BEFORE THE INDEPENDENT HEARINGS PANEL APPOINTED BY THE WESTERN BAY OF PLENTY DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (**RMA**)
AND	
IN THE MATTER	of **RC14513L** an application by Glen Isla Protection Society Inc. for a land use consent for the construction of a coastal protection structure and associated activities at 95 Seaforth Road and 12 Glen Isla Place, Waihī Beach

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LEGAL SUBMISSIONS ON BEHALF OF WESTERN BAY OF PLENTY DISTRICT COUNCIL

Dated: 12 August 2024

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MAY IT PLEASE THE PANEL

Introduction

1. The purpose of these submissions is to assist the Panel with legal issues arising from the applicant's proposal to build a seawall on Council reserve to protect private properties at Glen Isla Place at Waihi Beach.

2. I have reviewed the applicant's legal submissions and largely agree with the legal conclusions, as well as the summary of the evidence relating to the effects of the proposal. These submissions deal only with the matters where I take a different view.

Planning assessment

3. Mr Slyfield submits that Mr Faithfull's evidence should be preferred over Mr Hudson's because Mr Hudson places too much weight on the NZCPS provisions, having found that the proposal is generally consistent with the objectives and policies of the District Plan.

4. He submits that it is unnecessary to go back up the planning hierarchy unless the District Plan has failed to give effect to the higher order provisions. He cites an Environment Court case in support of that approach.[1]

5. Mr Hudson will be provided with an opportunity to revise his assessment and recommendations when he addresses the Panel, having regard to the alternative option put forward by the applicant of moving the Type 2 structure further landward, between 1.5m to 5m from the property boundaries.

6. I will briefly address the legal issue about whether the Panel is entitled to place weight on the NZCPS policies directly even where it finds that the District Plan gives full effect to them.

7. The High Court has considered this issue.[2] Justice Wylie expressed reservations about "*the truncated approach*" of referring only to the lower order planning instruments, noting that "*the story can be lost in the re-*

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[1] *Auckland Council v Auckland Council* [2020] NZEnvC 070. Opening Submissions for the Applicant, paras 41-43.

[2] *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZHC 3080, at [88]-[93].

telling". Even in the *Auckland Council* case relied on by Mr Slyfield, the Court undertook a belts and braces assessment of the NZCPS polices.

8. In this case, while the District Plan sought to implement the NZCPS through its Coastal Hazards Plan Change 2017, that focus of that Plan Change (PC74) was on managing coastal hazard risk. PC74 only sought to give effect to those objectives and policies of the NZCPS relating to coastal hazards, principally through the inclusion of 100-year mapping and rules for activities within the hazard risk area. It did not seek to address Policy 27 of the NZCPS relating to strategies for protecting "significant existing development" from coastal hazard risk, or management of hard protection structures or managed retreat.

9. It follows in my submission that it would be appropriate for the Panel to consider the consistency of the proposal against the relevant NZCPS provisions directly.

NZCPS

10. There are several aspects of the applicant's interpretation of Policy 27 (*Strategies for protecting significant existing development from coastal hazard risk*) which in my submission require a closer look:

    10.1 **"Significant Development":** The suggestion that the limited number of properties at Glen Isla Place seeking protection from the proposed structure might be an "*area of significant existing development*" for the purposes of Policy 27 and therefore hard protection structures might be considered necessary[3]:

        (a) If eight properties are to be interpreted as significant existing development, then it is difficult to conceive of what degree of coastal development might not reach the significance threshold;

    10.2 **"Strategic asset":** The suggestion that because the public reserve is a "strategic asset", it must therefore be of sufficient importance to justify a hard protection structure.[4]

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[3] Applicant's opening legal submissions, para 46.

[4] Applicant's opening legal submissions, para 48(f).

(a) Policy 27 refers to "*infrastructure of national or regional importance*" as potentially justifying hard protection structures. The concept of a "strategic asset" comes from the Local Government Act and relates to decisions to transfer the ownership of control of strategic assets, which must be explicitly provided for in the LTP. It does not follow that this particular esplanade reserve amounts to an asset of national or regional importance deserving the protection of a hard structure;

10.3 **"Significant benefit"**: The relevant assessment to the present circumstances is whether a hard structure is "*considered necessary to protect* ***private*** *assets*" (Policy 27(4)), in which case the issue becomes whether there is "*significant public or environmental benefit in doing so*."

(a) Based on the evidence of the reporting team, the applicant appears to have overstated both the public and environmental benefits of the proposed structure. This type of dune system within a public reserve is unlikely to ever be promoted as a public walkway, even if the foreshore area reduces over time. There are other existing, more appropriate, means of accessing the beach in this area.[5] In relation to environmental benefits, Mr Gumbley's evidence is that the benefits have been overstated. He assesses the benefits are more neutral, and heavily dependent on the successful restoration of native dune vegetation;

10.4 **"Immediate need"**: Policy 27 promotes an options analysis which provides for transition mechanisms and timeframes for moving to more sustainable approaches.

(a) The suggestion by the applicant that there is an "immediate need" to protect the properties and the reserve land, from the severe risks of storm cut,[6] appears overstated. This submission appears to assume removal of the groynes or

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[5] Memorandum from Reserves and Facilities Manager (Peter Watson) dated 4 July 2025.
[6] Applicant's opening legal submissions at para 57.

rely on alleged uncertainty as to whether the groynes will be replaced. The Council's evidence is that there is a very high likelihood of the groynes being replaced.[7] Removing them would give rise to an unacceptable risk of flooding, which would place the Council at risk of liability.

(b) Mr Davidson's evidence is that the storm cut risk which the applicant seeks to protect against **now**[8] could only occur at the southernmost properties (12,14 and 16) which would be protected by the Type 1 structure. Those properties gain no benefit from the existing groynes.

(c) The Policy 27 approach of moving towards more sustainable options is considered and addressed by Mr Davidson and Mr Hudson. They will propose some options which would reflect a more adaptive approach, having regard to when a clear need arises. These submissions consider how those options might be provided for in conditions further below.

Managed retreat

11. I agree with Mr Slyfield's essential submission relating to managed retreat; that the current proposal and managed retreat are not mutually exclusive. While proposals to locate substantial hard structures on private land are generally of concern, because they can foreclose future options for managed retreat, in this case the proposal is on a public reserve managed under the Reserves Act and Council (as administering authority) has the ability to remove the structure if considered appropriate to implement a future policy of managed retreat, and to remediate the reserve if required. It is acknowledged that this would likely require ratepayer funding and may not be supported by the community.

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[7] Personal comment by Peter Watson, to be confirmed through questioning by the Panel. See also summary statement of Adam Davidson dated 12 August, para 1.
[8] Mr Slyfield submits that "*In the absence of **the proposal** the GIPS owners already face the risks of a storm cut so severe that it would entirely destroy the reserve land and threaten extensive areas of the private properties, including parts occupied by their homes*." [emphasis added]. Opening submissions para 57. This appears to overlook the separate components of the proposal.

12. There is a separate issue as to whether there should be a finite term placed on the consent and / or remediation conditions, or whether this should be left to the side agreement between Council as landowner and the applicant, which would require Council to "surrender" the consent once transferred to it. This issue is addressed further in these submissions.

13. I agree with Mr Slyfield's submission that existing use rights create challenges for the implementation of managed retreat without reliance on regional rules, as occurred at Matatā. However, in this case the District Council has endeavoured to "grandparent" the concept of managed retreat in areas of natural hazard risk but requiring land use consent for new dwellings and renovations to existing dwellings, and imposing conditions of consent requiring new dwellings or renovations to be removable (or removed) once a hazard risk trigger event applies.

14. While only some of the Glen Isla properties are subject to this type of condition, it would be unreasonable to suggest that the District Plan creates an expectation that properties are entitled to protection from coastal erosion through hard protection structures simply because the activity status for a seawall is discretionary.

15. Mr Slyfield acknowledges that the proposal is an "interim measure" until such time as a more comprehensive policy of managed retreat is implemented. He appears to suggest that a timeframe of 30-50 years is appropriate.[9] This comment appears inconsistent with his submission that consent (if granted) should be in perpetuity.[10]

Term

16. Mr Slyfield submits that it is unusual for a land use consent in a district council jurisdiction to contain a term. That is not my experience for land use consents for structures within the coastal environment (although landward of the CMA) such as seawalls. For example, the Auckland Council case referred to by Mr Slyfield imposed a term of 35 years.[11] Consent for a seawall landward of the CMA at Wainui Beach in Gisborne

[9] Opening legal submissions for the applicant, para 58.
[10] Opening legal submissions for the applicant, para 66.
[11] *Auckland Council v Auckland Council* [2020] NZEnvC 070. That was for a substantial hard structure to support a new formed walkway/cycleway along the esplanade reserve.

was granted for 20 years to allow for development of a comprehensive coastal erosion management strategy and align with the terms of adjacent structures.[12]

17. There are sound reasons for imposing a term of consent on a structure of that nature, not limited to ensuring that the structure does not foreclose options for managed retreat as Mr Slyfield acknowledges. A term of consent is consistent with the NZCPS provisions which promote consideration of managed retreat (Objective 5, Policy 25(c)) and Policy 27(e), which promotes transition mechanisms and timeframes for moving to more sustainable approaches.

18. The suggestion that the consent (once transferred to Council) can simply be surrendered if Council wishes to implement a policy of managed retreat or be relieved of a maintenance burden overlooks the fact that surrender under the RMA is not unilateral. An application to the consent authority is required, which must be accepted by the consent authority (s138(4)). While it appears that a consent authority can only refuse to accept a *partial* surrender of a consent, for a full surrender it may direct completion of any works required to give effect to the consent.

19. This gives rise to a risk that a future Council (as consent holder) may seek to surrender the consent in full, and that Council (as consent authority) may be obliged to accept the surrender given all works to give effect to the consent are already complete. The risk of the consent being surrendered is that the structure could remain (potentially exposed) and there would be no obligation on the consent holder or on Council has administrator of the reserve to remove the wall and undertake any necessary remediation. While this risk may appear low given that a responsible local authority would be unlikely to leave an exposed wall in situ if that gave rise to adverse effects, this cannot be guaranteed.

20. Leaving this situation to be managed through a side agreement and / or surrender of the consent in the future, rather than imposing a term of consent and conditions to address the removal and remediation of the structure at the end of the term, would arguably amount to the consent authority abdicating its responsibility to manage the effects of the proposal

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[12] Consent for construction of a revetment wall at the toe of the dune below 4,6 and 8 Tuahine Crescent, Wainui Beach, dated 7 June 2023 (Commissioners Vanessa Hamm and Alan Watson).

though appropriate conditions of consent. Put another way, it is submitted that imposing conditions of this nature would be *vires* and appropriate, given they would be for a resource management purpose, directly connected to potential (future) effects of the proposal, and would be reasonable (depending on the length of the term imposed).

21. It is not uncommon for conditions on coastal permits to include bonds and / or provision for removal and remediation of coastal structures at the end of the consent term. If that is not considered appropriate in this case, another option would be a condition along the lines imposed in the Wainui Beach case, which required the consent holder to report to the consent authority at least 1 year prior to the end of the consent term in relation to whether a reconsenting process would be commenced to provide for retention of the wall, or the proposed work (and if necessary consenting process) to decommission the works, and advice and an assessment regarding what structures or final beach profile is proposed to respond to on-going coastal erosion processes. It is submitted that a condition of this nature would provide greater certainty for both Council as consent authority and for the community.

22. I agree that the Panel has no jurisdiction to inquire into the policy decision that Council has made as landowner to approve construction of the wall on the reserve or to inherit any consent granted. However, given that the Panel is not privy to the content of the side agreement, and should not speculate as to its contents, the Panel is entitled (and in my submission it would be appropriate) to take a belts and braces approach to managing future effects and ensuring good alignment with the NZCPS provisions, by imposing an appropriate term of consent and conditions addressing removal and remediation upon expiry.

Precedent

23. I agree that precedent is not generally a relevant consideration on a discretionary consent. However, principled decision-making requires that like cases are treated alike. I agree with Mr Slyfield that this only gives rise to an issue if the precedent is adverse (from an effects perspective) or undermines a clear policy position in the District Plan. In this case there is general agreement that (subject to appropriate conditions) effects can be appropriately managed. The District Plan does not discourage

applications for seawalls though a non-complying activity status (which requires further hurdles for assessment). Therefore, an applicant is entitled to establish that the proposal is appropriate in the particular location. Precedent concerns in the context of discretionary applications can generally be managed through clear reasoning in the decision in relation to why the grant of consent was considered appropriate on the particular evidence and circumstances.

Adaptive management approach

24. Mr Davidson and Mr Hudson have raised the option of implementing a more adaptive management approach by only providing for implementation of the Type 1 structure now, given the evidence does not establish a need for the Type 2 structure unless and until the groynes are removed and not replaced with a similar structure. Mr Watson has explained that those consents expire in 2032, and an options assessment as to their renewal is likely to be undertaken in around 2028/29.[13]

25. One option is therefore to only approve the Type 1 structure now and leave the option for the applicant to apply for the Type 2 structure if and when it is needed. An alternative may be to grant consent for the Type 2 structure now but only provide for its implementation upon a trigger event (permanent removal of the groynes) which could be clearly provided for in the conditions of consent, with provision for any updated designs to be submitted and certified at that time.

26. Submitters have raised alternative softer approaches such as sand push-ups and the Panel has sought further information about the Council's regional consent application for this work. An application was lodged with the Regional Council to facilitate dune repair and dune restoration along the entire length of Waihi beach to enable greater reliance on natural dune protection in an effort to avoid the need for additional sea walls.

27. The application was returned by the Regional Council to allow for further assessment of cultural effects and consultation with tangata whenua. That work has now occurred (by Jim Dahm) and the updated application is due to be sent to the Regional Council this week. A copy of the

[13] Memorandum from Reserves and Facilities Manager (Peter Watson) dated 4 July 2025.

application has been provided to the Panel and Mr Watson can address any questions arising.

Conditions

28. Ms Price will address the Panel in relation to the issue around ensuring there is no duplication of the conditions of regional consent. I support this approach in principle, to ensure efficiency and clarity of consent conditions, subject to the caveat that the regional consent is not for as structure and only has a 10-year term. Therefore, the district consent will need to ensure that any regional conditions which have expired, which are also relevant to the district consent, endure in the district consent.

29. Mr Slyfield's suggestion that certain conditions proposed by Mr Shaw and Mr Gumbley fall foul of s108AA and are "demonstrably invalid"[14] will of course depend on the Panel's findings on the evidence. Mr Shaw and Mr Gumbley consider that conditions requiring revegetation of the duneland south of the wall and maintaining vegetation that is established over the structure are justified based on a direct connection to the effects of the proposal.

30. It is acknowledged that, in a dynamic coastal environment, it will always be difficult to draw a clear line of causation between natural processes and manmade interventions. Nevertheless, it is submitted that, but for the proposal, the revegetation would not be required and therefore it is appropriate to impose conditions requiring comprehensive revegetation. If consent is granted, such conditions would go some way towards alleviating submitter concerns about impacts on natural processes and character of a manmade structure intended to provide a private benefit.

Reporting team

31. The reporting team consists of:

    31.1 Mr Adam Davidson (coastal engineering);

    31.2 Mr Willie Shaw (ecology);

    31.3 Mr Will Gumbley (landscape);

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[14] Applicant's opening legal submissions, paras 30-31.

31.4 Mr Jon Styles (acoustic and vibration) - evidence taken as read, but has prepared a summary statement;

31.5 Ms Pip Browne (traffic) – evidence taken as read, but has had further input into conditions;

31.6 Mr Peter Watson (Reserves Manager);

31.7 Mr Bevan Hudson (lead planner);

31.8 Ms Anna Price (consents planner who has assisted with conditions).

Dated: 12 August 2024

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Mary Hill
Counsel for Western Bay of Plenty District Council
Reporting Team