

**BEFORE INDEPENDENT HEARING COMMISSIONERS
APPOINTED BY THE WAIKATO DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991
(**RMA**)

AND

IN THE MATTER of the Proposed Waikato District Plan

BETWEEN **RANGITAHİ LIMITED**

Submitter [No. 343]

AND **WAIKATO DISTRICT COUNCIL**

Local Authority

LEGAL SUBMISSIONS FOR RANGITAHİ LIMITED

HEARING 27D – COASTAL HAZARDS

Dated: 12 May 2021

Solicitors on Record

BURTON PARTNERS
SOLICITOR – TONY NICHOLSON

PO Box 8889, Symonds Street, Auckland 1150, DX CP24147
P 09 300 3775 F 09 300 3770 E jeremy.carr@burtonpartners.nz

Counsel

Dr R A MAKGILL
BARRISTER

PO Box 77-037, Mt Albert, Auckland 1350
P 09 815 6750 E robert@robertmakgill.com

MAY IT PLEASE THE HEARINGS PANEL:

INTRODUCTION

1. These legal submissions are presented on behalf of Rangitahi Limited (**Rangitahi**) in relation to its submission (number 343) on the Proposed Waikato District Plan (**pWDP**).
2. Rangitahi has appeared before the Hearing Panel previously for Hearing 23 to present its submission on the Rangitahi Peninsula Zone. Rangitahi owns land within the Rangitahi Peninsula, and is the developer of the Rangitahi Peninsula Structure Plan introduced into the Operative Waikato District Plan (**oWDP**) by Plan Change 12. The plan change rezoned the land from Rural Zone to Rangitahi Living Zone.
3. The pWDP carries over the Rangitahi Peninsula Zone, with some key changes. Relevant to this hearing, the pWDP introduces overlays into the planning maps to manage coastal hazards.
4. Rangitahi's submission primarily concerns the Coastal Hazard (Erosion) overlays, and associated rules, that apply to Precincts A, B and D. Rangitahi seeks permitted activity status for those lots that were the subject of a geotechnical assessment for coastal erosion for Plan Change 12, and subsequently for resource consent applications.
5. Rangitahi generally supports the approach proposed by the Council with respect to Coastal Hazards which enables development provided risk can be avoided or mitigated. The evidence demonstrates that this is consistent with the approach taken to date in developing precincts in the Rangitahi Peninsula Zone. However, Rangitahi is concerned to avoid plan provisions that duplicate consenting requirements by requiring a further resource consent for lots within the Coastal Sensitivity Area (Erosion) overlay that have already been through a consenting process that assessed (and mitigated) coastal erosion hazards.
6. Rangitahi has filed evidence in support of its position from Ken Read (Geotechnical Engineer) and Ben Inger (Planner).

AGREED MATTERS

7. Mr Inger's highlights package confirms the matters which are supported by the recommendations in the s 42A Rebuttal Report, and one matter where disagreement remains. The agreed matters are as follows:
 - (a) Amendments to the mapping of the High Risk Erosion Area for the Rangitahi Peninsula;
 - (b) New Rules 15.7.2 RD2 and 15.8.2 RD2 to classify subdivision in the Coastal Sensitivity Areas as a Restricted Discretionary Activity (including the associated assessment criteria);
 - (c) Changes to Rules 15.9.2 D7 and 15.10.2 D6 so they do not apply to additional lots which are located entirely outside a High Risk Coastal Hazard Area.

8. Mr Inger had sought a new Restricted Discretionary Activity rules to address the subdivision of rural lots over 5 hectares which are partially within the High Risk Coastal Hazard Areas and which contain a complying building platform outside the of the High Risk Coastal Hazard overlays. The s. 42A Rebuttal Evidence concludes that balance lots would not constitute an "additional vacant lot" and are therefore exempt from the rules controlling subdivision of additional lots in the High Risk Coastal Hazard Areas.¹ Mr Inger agrees with this interpretation. Rangitahi requests that the Commissioner's decision makes express reference to this interpretation to aid in the future application of the subdivision rules.

BUILDINGS IN COASTAL SENSITIVITY AREA (EROSION)

9. The one outstanding matter is the appropriate activity status for construction of new buildings on existing lots in the Rangitahi Peninsula Zone that are affected by the notified Coastal Sensitivity Area (Erosion) overlay. The notified pWDP currently provides for such activities to be Restricted Discretionary.

¹ Section 42A Rebuttal Evidence Rebuttal Evidence prepared by Kelly Nicolson (3 May 2021), at [61].

10. Rangitahi seeks Permitted Activity Status for the construction of new buildings and additions to existing buildings in the Rangitahi Peninsula Zone where the lot subject to the Coastal Sensitivity Area (Erosion) overlay was created by a subdivision consent granted prior to the date of decisions on the pWDP. The proposed Rule 15.7.1 P5 would cover approximately 25 residential lots that are partially affected by the Coastal Sensitivity Area (Erosion) overlay in Precincts A, B and D.²
11. The s. 42A Rebuttal Evidence recommends rejecting this relief on the basis that a further consenting process would enable consideration of the potential need for development to be designed to be adaptive (i.e. relocatable) to address the effects of climate change over the next 100 years.³
12. This submission addresses the appropriate activity status having regard to:
 - (a) The regulatory duplication attendant on a rule requiring a second resource consent to address coastal hazards that have already been assessed, and appropriately addressed, in an earlier resource consent;
 - (b) The appropriate measures to manage coastal erosion hazards; and
 - (c) The risk of acting or not acting where there is insufficient evidence of a potential risk.

Regulatory duplication

13. As outline in the evidence of Mr Read:⁴
 - (a) Coastal hazards were considered as part of Plan Change 12, and 'specific design zones' identified for Precincts A, B and D.
 - (b) The land use and subdivision consents granted 2017 and 2018 for Precincts A, B and D are subject to conditions requiring an Earthworks Management Plan, and the provision of a Geotechnical Completion Report.

² EIC, Ben Inger (Planner) dated 16 April 2021, at [35]-[36].

³ Section 42A Rebuttal Evidence, at [44].

⁴ Evidence in Reply, Kenneth Read (Geotechnical Engineering) dated 16 April 2021, at [4] and [13]-[14]

- (c) Where the Geotechnical Completion Report recommended specific design or requirements for the construction of residential buildings those are recorded in a consent notice registered on the title.
 - (d) The geotechnical design requirements for 'specific design zones' applied through resource consents will ensure that the residential development in Precincts A, B and D is resilient to geotechnical risks that may result from climate change.
14. The Council's coastal scientists' have accepted that those site-specific investigations of potential slope instability are more detailed than their district-wide coastal hazard assessment, and on that basis Ms Gibberd has confirmed that she is comfortable that the potential coastal hazards have been provided for.⁵
15. The recommended restricted discretionary consent will duplicate the processes already followed, and in Mr Read's opinion the 'avoidance' and 'mitigation' strategies currently undertaken (through existing resource consents) appropriately addresses the risks of coastal erosion and geotechnical effects of climate change as modelled by the coastal scientists.
16. The requirement to undertake a further (and similar) consenting process is a significant burden:
- (a) Title to the lots in Precincts A and B was issued in June 2020, and all lots have now sold. If Rangitahi's submission is not accepted the *bona fide* purchasers of those lots will be required to go through a further consent process to develop their properties, while also complying with the mitigation requirements of the Geotechnical Compliance Report.
 - (b) Construction of civil works for Precinct D are underway, and a Geotechnical Compliance Report will be submitted with the s224C. Rangitahi faces the uncertainty of a rule requiring an additional consent that will not come into legal effect until after the decision on the pWDP is notified. Due to the burden (and uncertainty) of a rule requiring an

⁵ Statement of Rebuttal Evidence, Bronwen Gibberd for the Waikato District Council (3 May 2021), at [3.6].

additional resource consent Rangitahi is likely to delay applying for titles until after the decision is notified.

Management of Coastal Risks

17. Mr Read identifies four general “strategies” taken to manage coastal erosion risks – “Avoidance”, “Mitigation”, “Acceptance” and “Transference”. He considers that the adaptive design criteria in Rule 15.7.2.2 is an “Acceptance” strategy – i.e. accept the risk (erosion) and the costs consequent on the hazard being realised (relocating buildings). Mr Read’s evidence is consistent with Objective 5 of the NZ Coastal Policy Statement (**NZCPS**) which provides:

Objective 5: To ensure that coastal hazard risks taking account of climate change, are managed by:

- locating new development away from areas prone to such risks;
- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

18. Managed retreat is a strategy recognised in cases decided pursuant to s. 106 of the RMA. For example, in *Mahanga E Tu Inc v Hawkes Bay Regional Council* the Court concluded it was appropriate to grant consent for a coastal subdivision where properties would likely be at risk from coastal erosion subject to conditions, including one for a “managed retreat” requiring the owner to remove any buildings from the site at risk when a defined trigger point was reached.⁶
19. However, managed retreat carries a significant (future) cost for the development of properties. In Mr Read’s opinion the “avoidance” and “mitigation” strategies currently in place for Precincts A, B and D appropriately address the risks of coastal erosion and geotechnical effects of climate change, and adaptive management is not a necessary strategy to adopt.⁷
20. It is submitted that a further consenting process is unnecessary in these circumstances where the risk has been addressed. Retaining the notified rule

⁶ *Mahanga E Tu Inc v Hawkes Bay Regional Council* (2014) 18 ELRNZ 419.

⁷ Summary of Statement of Evidence, Kenneth Read (Geotechnical Engineering) dated 7 May 2021, at [3(s)].

would have a disproportionate effect and burden on the owners of the approximately 25 lots subject to the Coastal Sensitivity Area (Erosion) overlay.

Risk of acting or not acting

21. The section 32 evaluation includes assessing the risk of acting or not acting if there is uncertain or insufficient information: s 32(2)(c). This retains the recognition of the precautionary approach, which is also recognised in Policy 3 of the NZCPS:

Policy 3: Precautionary approach

1. Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.
 2. In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
 - a. avoidable social and economic loss and harm to communities does not occur;
 - b. natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur ...
22. Where there is uncertainty or insufficient information about a matter, the question of risk or acting or not acting will arise where there is evidence of a *credible* risk to the environment or to persons and communities.⁸
23. When assessing the risk of an effect, the High Court has stated that it must be able to satisfy itself (on the balance of probabilities) that the *risk* of the future event occurring is likely, albeit that it may be a low probability event.⁹ The case law is clear that a mere suspicion of an effect is not enough, as there must be at least a scintilla of evidence (not just a theory) sufficient to support a prognosis of an adverse effect on the environment.¹⁰

⁸ For example, *Francks v Canterbury Regional Council* [2005] NZRMA 97, at page 110 – 113, upholding a building line restriction to address risk of coastal erosion.

⁹ *R J Davidson Family Trust v Marlborough District Council* (2017) 19 ELRNZ 628 (HC), at [133].

¹⁰ *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC).

24. It is submitted the Council has not provided the evidence to support the rejection of Mr Inger's proposed Rule 15.7.1 P5 and the retention of the proposed rule requiring a restricted discretionary consent for new buildings within the Coastal Sensitivity Area (Erosion) overlay. Mr Read has demonstrated that Rangitahi has already satisfied Policy 3 of the NZCPS by assessing the risk of coastal hazards, and taking steps to mitigate the risk to the point of acceptability.¹¹
25. There is no technical evidence (i.e. from Ms Gribben) of additional coastal erosion risk beyond the risk that has already been addressed by the site-specific geotechnical investigations undertaken for resource consents. The planner's conclusion that adaptive management is a necessary risk management strategy¹² is opinion evidence without a technical foundation, and outside the planner's area of expertise.

RELIEF SOUGHT

26. Rangitahi requests that the Panel grant the relief sought by Rangitahi and confirm the new Rule 15.7.1 P5 as set out in Mr Inger's evidence.

Dated 12 May 2021



Brianna Parkinson
Counsel for Rangitahi Limited

¹¹ *Mahanga E Tu Inc v Hawkes Bay Regional Council* (2014) 18 ELRNZ 419, at [51].
¹² Section 42A Rebuttal Evidence, at [44].