

Before Commissioners

Submitter

RAGLAN COLLECTIVE

Concerning

**WAIKATO DISTRICT COUNCIL
PROPOSED PLAN STAGE 1**

**VARIATION 2 NATURAL HAZARDS &
CLIMATE CHANGE**

CHAPTER 15 & PLANNING MAPS

Outline of legal submissions

Dated 12 May 2021

Counsel: Tom Bennion/Lisa Black
Bennion Law
PO Box 25433
Featherston Street 6140
Tel: 64-4-4735755
Fax: 64-4-3813276
tom@bennion.co.nz / lisa@bennion.co.nz

To the Commissioners

1. The Raglan Collective represents a number of landowners in the Wallis Street and Lorenzen Bay areas who have been meeting over some weeks in response to this Variation.
2. The Collective has adopted rules and is in the process of incorporation.
3. Submissions and further submissions have been made.
4. The Collective understands that it is the intention of the Council to engage in adaptive management with landowners and that the rules allow for repairs of existing walls as a permitted activity.
5. The Raglan Collective has asked for two basic amendments which go further than that:
 - a. Objectives and policies should explicitly recognise that historic seawalls will be retained on properties in longstanding Raglan harbour suburbs where no realistic alternatives to the walls exists.
 - b. Where such walls need to be replaced, discretion should be limited to determining whether the design maintains and improves public access and/or amenity and/or historic values and otherwise improves the urban coastal environment. Applicants should not have to step through the process of working out if alternatives to a hard structure, or even managed retreat, are options.
6. In response, the Department of Conservation and Council Officers have pointed to policies in the NZCPS 2010 discouraging the use of hard protection structures.
7. However, the particular focus of the NZCPS 2010 in those policies is not to create new risks. Also, the policies use words like 'discourage' and 'reduce' not stronger terms such as 'avoid'.
8. Further, Policy 27 explicitly recognises that hard structures in some situations may be 'necessary' and discusses how their benefits and costs should be assessed:
 3. *Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.*
 4. *Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.*

9. The RPS talks about avoiding new 'intolerable' risks and mitigating existing 'intolerable' risks to tolerable levels.¹
10. No one appears to be suggesting that the Wallis St and Lorenzen St properties currently face 'intolerable' risks. They are well inside the harbour, not facing the open ocean.
11. The existing seawalls easily meet the test of being 'necessary'. The section 32 report accepts that, given the proximity of dwellings to the coast, they are the only practical means of protecting these properties.²
12. Some of the walls support infrastructure, which the NZCPS recognises is an important exception to its general approach.³
13. The NZCSP and RPS also require the Council to give effect to directives in the NZCPS 2010 to provide for public access along the coast, coastal amenity and historic coastal heritage.⁴ Those things are present in varying degrees in the existing walls.
14. With respect, both the Department of Conservation and Council Officer responses to the amendments sought by the Collective miss the mark by suggesting that the Collective is proposing some kind of wide-ranging exception to the NZCPS 2010 policy of discouraging hard structures. It is not. It is asking that the Plan appropriately provide for a very particular circumstance in Raglan whose extent and nature are well understood right now.
15. There are also other practical considerations.
16. Removal by the Council of its walls as a deliberate act, might contravene the common law rule that landowners cannot undertake works that might undermine neighbouring land: *Brouwers v Street* [2010] NZCA 463.⁵
17. Nor can the Council allow its walls to simply degrade until they become unsafe.
18. Also, the removal of walls may create new parcels of private foreshore, confusing if not impeding public access.

¹ Policy 13.1 Natural Hazard Risk Management Approach and Policy 13.1.1 Risk Management Framework.

² Appendix (f) p76 Wallis St: "existing use is located very close to the coast with little space to adapt and would be severely impacted by removal of the current structures."

³ Policy 27.1.c: recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations.

⁴ NZCPS 2010 Policies 17, 18. RPS Policy 6.2 Planning For Development In The Coastal Environment and Policy 13.1.3 Assess Natural Hazard Risk To Communities.

⁵ [69] *there is no reason in principle to limit strict liability to the act of deliberate excavation. The focus is on the removal of support through non-natural means.*

19. Consequently, it is better that the Council to accept that its walls remain and also allow private landowners to replace their walls without putting them to the expense and time of justifying continued hard protection in every case.
20. A comment on the modelling.
21. The section 32 report where it explains the modelling leaves some matters unclear.
22. For example, the methodology for identifying the “High risk coastal erosion/flood areas” seems to leave out existing private (and possibly public) structures. Appendix (f) states (p2):

*"The high coastal erosion and flood risk areas are those areas which, **in the absence of existing or future intervention**, could be impacted by coastal erosion or flooding **within the lifetime of the District Plan (approximately 10-15 years)**. This does not represent a “worst-case” potential coastal erosion or flooding area over this timeframe but identifies the areas at greatest risk and therefore of highest priority for coastal hazard management." (emphasis added)*

23. But appendices to the report suggest some seawall impacts are considered, but possibly only negatively:

| Location | Shoreline Type | High Risk Hazard Area | Coastal Sensitivity Area | Notes |
|--------------------------------|------------------|-----------------------|--------------------------|--|
| Estuary Shorelines (Developed) | Beaches | 10 m | 25 m | Applies to Lorenzen Bay. Uses site specific baseline. Limited to landward by 5.0 m contour at Lorenzen. |
| Wallis Street | Low Estuary Bank | 7.0 m | 11.5 m | High risk provides for seawall effect and minor erosion + stable slope (1V:1.5H). Sensitivity: 10 m toe erosion + stable slope (1V:1.5H). High risk measured from 2.0 m RL contour (MVD '53). Sensitivity measured from 3.0 m contour (MVD '53). |

24. The methodology for identifying the “Coastal erosion/flood sensitivity areas” is also unclear. The intention is to identify “areas potentially vulnerable to coastal erosion/flooding over the period to 2120, assuming sea level rise of 1.0 m.” Appendix (f) page 2:

the defined coastal sensitivity areas represent the maximum area that we believe could potentially be affected by erosion with up to one metre of sea level rise. Further and more detailed investigation might reduce the sensitivity areas in some locations, and we recommend that Council provide for such adjustment on the basis of investigations undertaken by a suitably qualified and experienced coastal scientist or engineer. Notwithstanding this, a high level of uncertainty is likely to remain in most areas.

25. Once again, it is unclear if and how existing structures, both public and private, are considered if at all, and the methodology accepts that adjustments

might immediately be made. It is inefficient and not consistent with the requirements of s32 to put in place rules that might put residents to unnecessary expense of obtaining discretionary consents when the s32 report itself suggests that a little bit of further assessment right now would remove that need.

26. In terms of terms of inundation, the NZCPS 2010 asks councils to consider, over 100 years, the “cumulative effects of sea level rise, storm surge and wave height under storm conditions” and add SLR into the mix (Policy 24.1(e)).
27. The approach has been to take “a very high tide combined with a very large storm surge and a very high sea-level anomaly” all at the same time. The report notes that this has never been observed and its probability is less than once in every 200 years (“probability of occurrence is annual exceedance probability of less than 0.5% AEP”).⁶ The report then adds 1 metre sea level rise (MfE Guidance). This goes above and beyond the requirements of the NZCPS 2010, in a relatively protected harbour setting, with many existing seawalls.
28. Both methodologies take an approach that is arguably more ‘deterministic’ than ‘probablistic’ (High Court in *Weir v Kapiti District Council* [2013] NZHC 3522). In the *Weir* case, lines were drawn by Dr Shand showing sea level rise at 50 and 100 years which ignored accretion and erosion at particular locations, as well as all privately owned coastal protection structures.
29. That case concerned the inclusion of such lines in LIMs and the High Court commented:

[53] I am satisfied that Mr Shand’s science is sufficiently robust to satisfy that relatively low threshold requirement. Of course I say nothing at all about whether the Shand Report and the Shand lines should survive a more rigorous merit-based review through the District Plan Review process under the Resource Management Act 1991.

30. We also note that the inundation tool comes with significant caveats with the disclaimer stating:⁷

The Coastal Inundation Tool is intended to identify areas along the Waikato coast that are susceptible to coastal inundation. The water levels provided are indicative only and are regarded as estimates for most areas. The tool is to provide users with an appreciation of current and future coastal inundation.

⁶ Appendix (f) page 23.

⁷ <https://waikatoregion.govt.nz/Services/Regional-services/Regional-hazards-and-emergency-management/Coastal-hazards/Coastal-flooding/Coastal-inundation-tool/Disclaimer/>

The information contained in the Coastal Inundation Tool is not to be used for decisions that concern personal or public safety or the conduct of business that involves substantial monetary or operational consequences.

The tool does not identify coastal hazard areas suitable for assessing risk to specific property. Further investigation is required to quantify a coastal hazard area or define minimum ground/floor levels.

31. Both methodologies should be clarified and recalibrated to better meet the NZCPS 2010, RPS and RMA requirements.
32. Finally, we note a recent example in Eastbourne in Wellington (March 2021) where a 6 year programme of seawall renewal will be undertaken as part of a 4.4 km shared path development. The Decision Report noted:

3.1.4 To date, coastal protection structures along the seaward edge have been developed in an ad hoc manner over time. Those structures are vulnerable to failure and do not provide effective storm mitigation. In the face of ongoing sea level rise, the proposed seawalls will, for a time, reduce the frequency and extent of overtopping and the resultant debris on the road, and occasional road closures. The Project will also provide a consistent seawall design that can be added to in the future.

3.1.5 The Application documents and Mr Watson's s42A report both point out that the Project is not a permanent solution to the effects of sea level rise, and instead provides the first step in potentially incremental upgrades that would assist in providing protection to the road. The proposed seawalls do not preclude future options and have been designed to enable additional protection to be added in the future if considered appropriate.

Tom Bennion / Lisa Black

Counsel for the submitters