

**IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA**

**SC121/2023  
SC123/2023  
SC124/2023  
SC125/2023  
SC126/2023  
SC128/2023  
SC129/2023**

**UNDER THE**

Marine and Coastal Area (Takutai  
Moana) Act 2011 (the **Act**)

**IN THE MATTER OF**

an application by **CLAUDE AUGUSTIN  
EDWARDS, ADRIANA EDWARDS** and  
others for Customary Marine Title and  
Protected Customary Rights under the Act

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**SUBMISSIONS ON BEHALF OF WHAKATĀNE DISTRICT COUNCIL  
AS AN INTERESTED PARTY**

**DATED:** 4<sup>th</sup> day of October 2024

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COUNSEL FOR THE WHAKATĀNE DISTRICT COUNCIL CERTIFY  
THAT, TO THE BEST OF THEIR KNOWLEDGE, THESE  
SUBMISSIONS ARE SUITABLE FOR PUBLICATION

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## MAY IT PLEASE THE COURT

### 1. INTRODUCTION

- 1.1. The Whakatāne District Council (**WDC or the Council**) is an interested party to the applications pursuant to section 104 of the Act. As the territorial authority with jurisdiction in the area between Maraetōtara and the entrance to the Ōhiwa harbour, within CMT 1 and 2, the Council participated in the High Court and Court of Appeal proceedings in a limited capacity. The Council filed affidavit evidence which identified the various Council owned and controlled structures that are located between Maraetōtara and Tarakeha, out to 12 nautical miles (**Application Area**).<sup>1</sup>
- 1.2. Throughout these proceedings, the Council has participated only in respect to issues of direct relevance such as resource consents and assets which it owns or controls. It sought findings from the Court on the nature of WDC structures, both in terms of the accommodated activity provisions of the Act and as substantial interruptions. In other aspects, it has maintained a watching brief and abided by any decisions of the Courts.
- 1.3. Counsel files these submissions in accordance with the amended timetable granted by the Court's direction dated 12<sup>th</sup> September 2024.

### 2. COUNCIL-OWNED ASSETS AND STRUCTURES

#### The Council's role

- 2.1. The WDC is the territorial authority with functions and powers over the Whakatāne District, which extends from west of Otamarakau to the mouth of the Ōhiwa harbour. For the purposes of this hearing, the relevant area of the CMCA which sits within the Whakatāne District is from the CMT1 boundary at Maraetōtara eastwards to the mouth of the Ōhiwa harbour and including the harbour itself (which comprises CMT2).

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<sup>1</sup> During the *Stage 2* hearing, the WDC identified an estimated 59 structures within the Application Area, which included 34 stormwater assets, comprising 32 outfalls, as well as two erosion protection structures; 17 transportation assets, comprising one footbridge, seven bridges and nine drainage culverts; and eight port assets, comprising a wharf, two boat ramps, and a landing. Also see Affidavit of David Christopher Bewley dated 25 May 2020 CB Tab 274 [203.01398], Exhibit A (list of port assets) CB Tab 662 [325.11558], Exhibit B (Port Assets – Maps) CB Tab 663 [325.11560], Exhibit C (List of Resource Consents) CB Tab 664 [325.11563], Exhibit D (Transportation assets – maps) CB Tab 665 [325.11564], Exhibit E (stormwater assets – maps) CB Tab 666 [325.11566].

- 2.2. Like all territorial authorities, the functions and purpose of WDC is spelled out in the Local Government Act 2002 (**LGA02**) which charges the Council with meeting the current and future needs of communities for infrastructure, local public services and regulatory functions.<sup>2</sup> In decision-making, the LGA02 requires WDC to take into account the social, economic, and cultural well-being of people and communities, both now, and for future generations.<sup>3</sup>
- 2.3. It is essential that the Council maintains access to, and control over, its assets and structures in order to fulfil its functions and obligations under the Resource Management Act 1991 (**RMA**), LGA02 and Local Government Act 1974 (concerning roads).<sup>4</sup> These assets and structures perform vital functions in supporting the community. In cases such as stormwater, these assets play a key role in mitigating the harmful effects of erosion and severe weather events, to which Ōhope is particularly vulnerable. Therefore, the protection of these assets from the resource consent permission right exercised by CMT holders has been of significant importance to the Council in these proceedings.
- 2.4. As these assets are considered third-party structures for the purposes of the legal test at s 58(1)(b)(i), these submissions touch on matters raised by the Attorney-General relating to substantial interruption. While the Council is not an appellant in these proceedings, it endorses the Attorney-General's submissions with regard to substantial interruption, particularly as it relates to third-party structures / assets within the common marine and coastal area (**CMCA**). In doing so, the Council wishes to provide further context as to how these assets operate on the ground which may assist the Court when it considers the Attorney-General's submissions. WDC also makes submissions on the effectiveness of other provisions of the Act in protecting third-party assets and structures from the RMA permission right.
- 2.5. WDC endorses the High Court's findings and the Attorney-General's submissions regarding the issue of prior extinguishing events, particularly in relation to navigable rivers.

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<sup>2</sup> Local Government Act 2002, s 10(1)(b).

<sup>3</sup> Local Government Act 2002, ss 10(1)(b), 14(h).

<sup>4</sup> Local Government Act 1974, ss 316, 317 and 319; we note that the regulatory functions of WDC do not directly involve control of the CMCA, which is within the jurisdiction of the Bay of Plenty Regional Council under the RMA. WDC exercises some non-RMA functions over the CMCA, such as the Beaches Bylaw 2018, which applies over the Application Area.

- 2.6. The WDC also endorses the submissions on behalf of Ōpōtiki District Council / Crown Regional Holdings Limited (**ODC / CRHL**), including in their response to the submissions made by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (**Te Kāhui**).<sup>5</sup>

### **Assets owned and operated by WDC**

- 2.7. Council presented evidence in both stages<sup>6</sup> of the High Court hearings which listed Council-owned assets and described how they are managed and operated. We refer to this evidence in order to describe the functions and importance of the assets.

#### Transportation assets

- 2.8. WDC manages its transportation assets through an in-house team.<sup>7</sup> All of its bridge assets and local roads are captured by Designation 47 of the Operative Whakatāne District Plan which enables the “[o]peration of the roading network for the safe, convenient and efficient movement of road users” and includes “road repair, maintenance and upgrading of roads, control of access to roads, and traffic movements along roads...”<sup>8</sup>
- 2.9. Lists of WDC’s transportation assets, as well as details of relevant resource consents, were filed by David Bewley during *Stage 1*<sup>9</sup> and the affidavit of Martin John Taylor during *Stage 2*.<sup>10</sup> Overall, the transportation assets owned by the Council (including the roads themselves) provide important arterial links to the wider region for locals, commuters, and freight which contributes to the ongoing economic and social welfare of the region.<sup>11</sup> The

<sup>5</sup> Submissions on behalf of Crown Regional Holdings Limited and Ōpōtiki District Council dated 04 October 2024.

<sup>6</sup> *Re Edwards* (No.2) [2021] NZHC 1025 (**Stage 1 decision**) CB Tab 50 [05.00401]; *Re Edwards* (No. 7) [2022] NZHC 2644 (**Stage 2 decision**) CB Tab 56 [05.00660]; Affidavit of David Christopher Bewley dated 25 May 2020 CB Tab 274 [203.01398], Exhibit A (list of port assets) CB Tab 662 [325.11558], Exhibit B (Port Assets – Maps) CB Tab 663 [325.11560], Exhibit C (List of Resource Consents) CB Tab 664 [325.11563], Exhibit D (Transportation assets – maps) CB Tab 665 [325.11564], Exhibit E (stormwater assets – maps) CB Tab 666 [325.11566].

<sup>7</sup> Affidavit of Martin John Taylor on behalf of Whakatāne District Council dated 01 February 2022 at [4.4].

<sup>8</sup> Operative Whakatāne District Plan 2017, Part 3 – Area Specific Matters, Designations, WDC – Whakatāne District Council, D47.

<sup>9</sup> Exhibit D (Transportation assets – maps) CB Tab 665 [325.11564]; Exhibit C (List of Resource Consents) CB Tab 664 [325.11563].

<sup>10</sup> Affidavit of Martin John Taylor, Exhibits A, B, C and D.

<sup>11</sup> At [3.5] and [3.8].

assets connect the Ōhope and Whakatāne townships over the Maraetōtara Stream and are subject to frequent and extensive third-party use.

- 2.10. Wainui Road extends around the southern perimeter of the Ōhiwa Harbour and provides a key lifeline route for Ōpōtiki and other settlements along the East Cape to the Whakatāne Hospital. Wainui Road is heavily used by light traffic and also provides an alternative route when SH2 is closed.<sup>12</sup> Many of the 6000 vehicles per day that travel along this road are commuter or business-related journeys between Ōpōtiki and Whakatāne.<sup>13</sup>
- 2.11. The transportation assets owned and managed by WDC are essential to the ongoing operation of the district's transport network and provide important links to the wider region for commuters and freight. These assets have been under the control of WDC (and its predecessors) since they were first constructed, in most cases before 1991. WDC has an ongoing obligation to ensure that the structures are maintained to a safe and structurally sound standard, and that members of the community are able to benefit from the public services that these assets provide.

Stormwater assets

- 2.12. WDC manages eight stormwater networks across the district. Stormwater is disposed of through these networks.<sup>14</sup> Lists of WDC's stormwater assets, as well as details of relevant resource consents, were filed in the High Court by Mr Bewley during *Stage 1*<sup>15</sup> and by Glenn Gary Cooper during *Stage 2*.<sup>16</sup>
- 2.13. Originally, the stormwater system in the eastern part of Ōhope was developed in the early 1960s as the spit was developed and roads were constructed.<sup>17</sup> Development of stormwater structures along Ocean Road during subdivision was not co-ordinated, with separate outfalls to the beach eventually vesting in the then Whakatāne County Council once constructed and approved through subdivision consents.<sup>18</sup> It is common practice for

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<sup>12</sup> At [3.7].

<sup>13</sup> At [3.6]

<sup>14</sup> Affidavit of Glenn Gary Cooper on behalf of Whakatāne District Council dated 1 February 2022 at [3.1].

<sup>15</sup> Exhibit E (stormwater assets – maps) CB Tab 666 [325.11566]; Exhibit C (List of Resource Consents) CB Tab 664 [325.11563].

<sup>16</sup> Exhibits A, B, C, D and E.

<sup>17</sup> At [3.5].

<sup>18</sup> At [3.6], [3.7].

stormwater outfalls to vest in local authorities once constructed by developers undertaking subdivisions and residential development. This has resulted in the WDC holding multiple individual consents, all with different conditions, different monitoring regimes and different durations.<sup>19</sup> Since the passage of the RMA in 1991, stormwater discharges and structures are consented by the Bay of Plenty Regional Council (**BOPRC**).<sup>20</sup> The WDC sought a bulk consent to cover these discharges and structures on 30 March 2001 (application 61800).<sup>21</sup> The BOPRC placed this application on hold until a Catchment Management Plan had been developed. In the meantime, the discharges and associated structures listed in the bulk application are operating under s 124 of the RMA.<sup>22</sup>

- 2.14. Generally, stormwater from the roading network is collected by a piped gravity system and is then conveyed to a coastal, harbour or stream outlet. Outlets can include streams, beaches, harbour margins, and soakage systems (open or closed). Whilst the primary areas of stormwater runoff are public roads, private properties also discharge to the stormwater network, either directly or indirectly. Ground soakage rates are variable in Ōhope.<sup>23</sup>
- 2.15. The stormwater assets protect properties and other assets within the district being private and public investments, but also support wider economic activity throughout the region for those who live in Ōhope.
- 2.16. The stormwater networks play a vital role in safeguarding the community from the harmful effects of severe weather events. The cumulative effect that a dysfunctional stormwater network can have on economic and social welfare throughout the district in terms of flood risk and water quality cannot be downplayed. Therefore, WDC's stormwater assets and infrastructure are integral to flood management throughout the district and the wider region. Landowners rely on the stormwater system to manage nuisance ponding and surface flooding. It is essential that WDC's interests in the stormwater assets are protected to ensure private and public property is protected and that the transportation networks are passable during rain events.

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<sup>19</sup> At [3.4].

<sup>20</sup> At [3.4].

<sup>21</sup> Exhibit B.

<sup>22</sup> At [5.5].

<sup>23</sup> At [3.2].

Port assets

- 2.17. Lists of WDC-owned and managed port assets, as well as relevant resource consents, were included in Mr Bewley's affidavit during *Stage 1*<sup>24</sup> and also in an affidavit of Nikorima Broughton during *Stage 2*.<sup>25</sup> Resource consent 63710 applies to most of the assets and allows the WDC to 'occupy space in the coastal marine area' and to 'maintain both public and private access structures in, on, under or over the foreshore and seabed.' This is a consolidated consent which applies to 10 structures located throughout the district.<sup>26</sup> Goodwins Landing is subject to resource consent no. 62424 and 62945 which allows the WDC to occupy space in the coastal marine area and maintain a structure there.<sup>27</sup>
- 2.18. These port assets have historically played a significant role in the economic development of the region – and continue to do so to this day. While generally available for public access, the WDC has the authority to manage use and access to these structures through the Ports and Wharves Bylaw 2018.<sup>28</sup>
- 2.19. For example, the Port Ōhope Wharf was used as a working wharf primarily for outgoing cargo sourced from around the region which contributed to the economic growth of the district and wider region in the mid-1900's. Nowadays, the Port Ōhope Wharf attracts extensive third-party recreational use, commercial charter operators and tourists. The Port Ōhope Wharf is a popular swimming destination and was recently upgraded to support and enhance third party recreational use.<sup>29</sup> It is used by small charter operators, mooring holders who bring vessels alongside for loading, and a significant number of recreational fishers, swimmers and residents who promenade the structure.<sup>30</sup>

<sup>24</sup> Exhibit A (list of port assets) CB Tab 662 [325.11558]; Exhibit C (List of Resource Consents) CB Tab 664 [325.11563].

<sup>25</sup> Affidavit of Nikorima Callie Broughton on behalf of the Whakatāne District Council dated 01 February 2022, Exhibits A, B and C.

<sup>26</sup> At [30], [31].

<sup>27</sup> Supplementary Affidavit of Nikorima Callie Broughton dated 11 February 2022 at [8]; Exhibit A-1.

<sup>28</sup> The Council restricts recreational swimming and fishing on port structures under cl. 9(3)(f) and 10. The Council also sets fees for use of structures which, if not paid, will result in the removal of the vessel under cl. 21. Anyone convicted of a breach of the Bylaw is liable for fines under cl. 23 per s 242(2) of the Local Government Act 2002.

<sup>29</sup> At [16] – [21].

<sup>30</sup> Ibid.

- 2.20. Historically, the Port Ōhope Boat Ramp was used by the Whakatāne Harbour Board to access cargo sheds and to undertake onsite maintenance for cargo vessels. Today, the Port Ōhope Boat Ramp provides access to the Ōhiwa Harbour for recreational users and commercial fishing charters.<sup>31</sup> The Port Ōhope Yacht Club leases a building next to the ramp from WDC.<sup>32</sup>
- 2.21. The Ōhiwa Boat Ramp was constructed in 2007 and is used primarily for launching craft transported by trailers. As owner of the ramp, WDC undertakes maintenance inspections, and the arranges and pays contractors to repair works.<sup>33</sup>
- 2.22. Goodwins Landing provides access to the harbour for small craft and is available for general public use. It is also used by residents on Ohakana Island to go to and from the island. Residents and landowners usually anchor their small crafts in the tidal waters that surround the ramp and leave their motor vehicles in the carpark provided.<sup>34</sup>
- 2.23. WDC plays an important role in ensuring that the port assets are managed and maintained to a safe standard for the use and enjoyment of the public and its commercial users. WDC is responsible for ensuring that port assets in its district are maintained in a safe and structurally sound condition at all times.<sup>35</sup> In line with this, Council is required to, at times, restrict public access to and along the CMA near port assets for health and safety reasons so that repair or maintenance works can be undertaken.<sup>36</sup>

### 3. SUBSTANTIAL INTERRUPTION

- 3.1. In *Stage 1*, the High Court considered whether any of the applicants had a valid claim to either Customary Marine Title (**CMT**) or Protected Customary Rights (**PCR**). *Stage 2* addressed the boundaries and content of CMT and PCR orders, including whether any areas were required to be excluded from the CMT or PCR orders under the Act.

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<sup>31</sup> At [22] – [24].

<sup>32</sup> Ibid.

<sup>33</sup> At [25], [26].

<sup>34</sup> At [27] – [29].

<sup>35</sup> Exhibit C, Resource consent no. 63170, condition 7.1.

<sup>36</sup> Condition 7.4.

- 3.2. While largely addressed in the *Stage 2* decision, the majority in the Court of Appeal (which dealt with appeals emerging from the *Stage 1* decision) made several key findings in regard to the question of substantial interruption.<sup>37</sup> In this Court, both the Attorney-General and Te Kāhui have made extensive submissions on the topic of substantial interruption.<sup>38</sup>
- 3.3. The Council submitted in the *Stage 2* hearing in the High Court that whether a third-party activity amounts to a substantial interruption for the purposes of section 58(1)(b)(i) of the Act depends on the nature, scale and intensity of the activity itself.<sup>39</sup> This reflected the findings from the *Stage 1* decision, where Churchman J stated:<sup>40</sup>

[...] Activities relating to port infrastructure such as wharves, jetties or slip ways **may well amount to substantial interruption**. The same for sewerage or other outfall pipelines. **But whether they do is to be determined by an examination of the facts in each case**, not by applying a presumption.

[emphasis added]

- 3.4. However, Churchman J found in the *Stage 2* decision:<sup>41</sup>

[34] I do not include as substantial interruptions Council-owned assets that enhance the ability of people to use the takutai moana for recreational activities or those things that have a maritime safety function such as navigation buoys or safety signage or structures with the purpose of environmental protection or monitoring...

[...]

[36] If anything, the activities and structures associated with these consents **can be seen to enhance the use of the relevant area** by the applicants and others, rather than as substantially interrupting the exercise of customary rights.

[emphasis added]

- 3.5. These findings by Churchman J in *Re Edwards Stage 2* seem to contradict his earlier findings from *Stage 1* as well as prior caselaw where the Court followed a fact-dependent approach when determining substantial interruption. This approach was based on elements such as extensive

<sup>37</sup> *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board (Court of Appeal Decision)* [2023] NZCA 504 at [426] – [434].

<sup>38</sup> Submissions for Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea dated 23 September 2024 at [4.19] – [4.23], [4.28] – [4.31], [4.35] – [4.40]; Submissions on behalf of the Attorney-General on appeal dated 20 September 2024 at [44] – [46].

<sup>39</sup> Consistent with Miller J's view in the Court of Appeal Decision at [174] and [181].

<sup>40</sup> *Re Edwards* [2021] NZHC 1025, at [230] CB Tab 50 [05.00467].

<sup>41</sup> *Re Edwards* [2022] NZHC 2644 at [34] and [36] CB Tab 57 [05.00676], [05.00677].

development, the construction of port structures such as marine and boat ramps, and significant third-party recreational and / or boat use.<sup>42</sup>

- 3.6. In *Re Edwards Stage 2*, Churchman J also used the example of the Pan Pac outfall pipe from *Re Ngāti Pahauwera* to set a high bar when assessing the impact of the Ōhope Wastewater Treatment Plant within CMT 1:<sup>43</sup>

[43] The evidence of the interruption of the use and occupation of the area around the outfall pipe **is not as overwhelming as it was in the case involving the Pan Pac outfall pipeline**. There is some evidence that the outfall pipeline has caused some kaimoana at some times, to be unfit for human consumption, and that patterns of kaimoana gathering have changed. But it cannot be said that the presence of this structure has resulted in an impact of sufficient magnitude for there to have been a substantial interruption which would result in its exclusion from the CMT area.

**[emphasis added]**

- 3.7. In this finding, Churchman J effectively set a high threshold for the consideration of substantial interruption based on evidence from another case, rather than solely assessing the nature, extent, duration and/or cause of any potential interruption within the context of the case at hand.
- 3.8. At the Court of Appeal, the majority went further and adopted an even higher threshold for third-party substantial interruption that resembled the legal test for extinguishment.<sup>44</sup>
- 3.9. In contrast to these findings, the Council notes several submissions that have been made by the Attorney-General regarding substantial interruption and extinguishment:<sup>45</sup>

[34] The majority's misuse of the concept of extinguishment materialises in two principal ways: it informs the majority's conclusion that s 58's continuity requirement should be discounted to avoid "unjust" outcomes that would "defeat the promises made in the Treaty/te Tiriti"; and it leads the majority to adopt a threshold for (third-party) substantial interruption that effectively resembles the test for extinguishment. **The majority's interpretation significantly narrows the scope for third-party use to amount to a substantial interruption** by suggesting such use must be authorised by

<sup>42</sup> *Re Ngāti Pahauwera* [2021] NZHC 3599, at [272].

<sup>43</sup> *Re Edwards* [2022] NZHC 2644 at [43] CB Tab 57 [05.00679]; we note that the Court in *Re Ngāti Pahauwera* found that the impact of the Pan Pac pipe had been 'significant' at [232].

<sup>44</sup> Court of Appeal Decision at [427], [428] and [433] per Cooper P and Goddard J.

<sup>45</sup> Submissions on behalf of the Attorney-General on Appeal dated 20 September 2024 at [34], [44], [45].

legislation “capable of overriding” customary rights and physically exclude applicants from accessing an area

[...]

[44] Properly interpreted, the Attorney-General submits the question of whether a substantial interruption has occurred requires an overall consideration of the evidence. The assessment is highly fact-sensitive (requiring considering of the nature, extent, duration and cause of any interruption) ...

[45] The Attorney considers the following (non-exhaustive) matters may contribute to or constitute a substantial interruption:

[45.1] activities carried out in the area by third parties under a resource consent granted prior to 1 April 2011;

**[45.2] permanent structures in the area that are owned by third parties (such as port facilities, boat launch ramps, wharves, jetties and outfall pipes);**

[45.3] intensive and frequent use and occupation of the relevant area by third parties (for example, the use of commercial shipping lanes, commercial or recreational fishing, and other recreational activities).

**[emphasis added]**

3.10. The Council supports these submissions. In doing so, the WDC also supports the following key points which were submitted by the Attorney-General:

- (a) The assessment of substantial interruption in regard to third-party structures is highly fact-sensitive, requiring consideration of the nature, extent, duration and cause of any interruption for the case at hand;
- (b) This assessment requires an overall consideration of the evidence; and
- (c) Substantial interruption may arise from an activity authorised by legislation, but this is not the only situation which may give rise to substantial interruption. The Court of Appeal erred when it set a threshold for substantial interruption as being akin to extinguishment (despite being a completely different legal test).

#### **4. OTHER EXCLUSIONS IN THE ACT**

4.1. There are other provisions in the Act which have the effect of excluding third-party structures from a CMT order in lieu of being deemed a substantial

interruption. However, these provisions do not provide the same level of security that structures / assets will be protected from the resource consent permission right as a finding of substantial interruption would. The WDC is not asking the Court to make any findings in relation to these sections, but merely to consider them in light of the practical implications of your findings in relation to substantial interruption.

### **Existing structures**

- 4.2. Under section 18 of the Act, any structure that is (on or after 1 April 2011) “fixed to, or under or over, any part of the common marine and coastal area (CMCA)” is to be regarded as personal property and does not form part of the CMCA.<sup>46</sup> Churchman J declined to exclude these structures via draft orders as the effect of s 18 excluded these structures from the CMT area anyway.<sup>47</sup>
- 4.3. However, it remains unclear as to what extent an RMA permission right can be exercised over a resource consent sought in relation to a s 18 structure. For example, in the event that a buried pipe requires maintenance or repair, it is unclear whether the obligatory resource consent can be “vetoed” if it includes proposed activities in the surrounding CMCA (such as excavation to expose the pipe).
- 4.4. The RMA also prohibits occupation of the CMCA, or the carrying out of any activity in, on, under, or over the CMA unless authorised by a plan rule or a resource consent.<sup>48</sup> It is the role of Regional Councils to act as consent authorities for the purposes of coastal planning. Therefore, in cases where WDC structures are operating in the CMA via a consent from the BOPRC (such as port structures), while s 18 would prevent CMT holders from “vetoing” a resource consent relating solely to the structure itself, it is unlikely to prevent a “veto” over a use and occupation consent for that structure within the CMA. This would effectively render the structure unusable, as it could no longer exist or operate within the CMA.

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<sup>46</sup> Marine and Coastal Area (Takutai Moana) Act 2011, ss 18(1) - (2)(a) and (2)(b).

<sup>47</sup> Minute of Churchman J dated 8 March 2024 at [69].

<sup>48</sup> Resource Management Act, ss 12(2), 12(3), 20A.

- 4.5. As the exercise of an RMA permission right cannot be appealed,<sup>49</sup> the uncertainty of s 18 is of ongoing concern for the Council in its ability to retain and maintain vital community assets in the CMA. In the event that use and occupation consents are vetoed, the Council will be forced to remove the structure.

#### **Accommodated activities / infrastructure**

- 4.6. Accommodated activities, including accommodated infrastructure, can be carried out in parts of the CMCA that are subject to CMT and PCRs.<sup>50</sup> RMA permission rights do not apply to accommodated activities.<sup>51</sup>
- 4.7. The High Court provided some guidance as to the effect of the accommodated infrastructure provisions under the Act in that it is the exclusive jurisdiction of the Minister for Land Information to determine whether an activity is an accommodated activity. This determination is “final”, meaning that it cannot be subject to appeal.<sup>52</sup> Such a determination can only occur in the event of a “dispute” between the CMT holder and the third-party.
- 4.8. The Council is concerned about the uncertainty of these provisions due to the fact that the final, unappealable, determination about the future of vital community assets sits in the hands of the Minister.
- 4.9. As was submitted by the ODC/CRHL, some infrastructure may not meet the “regional” threshold for accommodated infrastructure or activities, if it is considered to benefit only the district rather than the wider Bay of Plenty region (for clarity, the WDC takes the position that all its assets are “regionally” significant for the purpose of these provisions). This uncertainty puts the long-term viability of vital community infrastructure in jeopardy.
- 4.10. In light of the uncertainties presented by s 18 and ss 63-66, the Council supports the submissions of the Attorney-General relating to substantial interruption, which (if accepted by this Court) would have the effect of

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<sup>49</sup> Marine and Coastal Area (Takutai Moana) Act 2011, s 68(2)(a).

<sup>50</sup> Marine and Coastal Area (Takutai Moana) Act 2011, ss 64(1)(a), (b).

<sup>51</sup> Marine and Coastal Area (Takutai Moana) Act 2011, ss 55(3)(c), (d).

<sup>52</sup> Marine and Coastal Area (Takutai Moana) Act 2011, s 64(4) and (5); *Re Edwards* [2022] NZHC 2644 at [81] CB Tab 57 [05.00688].

removing the unreasonably high bar that the Court of Appeal decision placed on the ability for Council-owned assets to overcome the s 58 test.

## **5. EFFECT OF PREVIOUS EXTINGUISHING EVENTS**

- 5.1. The Council supports and adopts the submissions of the Attorney-General and CRHL / ODC on the effect of previous extinguishing events, in particular the vesting of navigable riverbeds in the Crown under the Coal-Mines Amendment Act 1903 (**CMAA**).<sup>53</sup> The Council agrees that the Court of Appeal wrongly treated the divestment of Crown and local authority ownership under s 11(3) as “reviving” customary interests in navigable rivers.<sup>54</sup>

**DATED** at Auckland the 4<sup>th</sup> day of October 2024

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Andrew Green / Ted Greensmith-West  
**Counsel for the Whakatāne District Council**

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<sup>53</sup> Submissions of the Attorney-General at [47] – [56.2].

<sup>54</sup> At [51].