

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAUROA**

Decision [2024] NZEnvC 090

IN THE MATTER OF

appeals against an abatement notice
under s 325 of the Resource
Management Act 1991

BETWEEN

GD BOWKETT

(ENV-2023-AKL-150)

(ENV-2023-AKL-153)

Appellant

AND

WHANGĀREI DISTRICT COUNCIL

NORTHLAND REGIONAL
COUNCIL

Respondents

IN THE MATTER OF

an application for enforcement orders
under ss 314 and 316 of the Resource
Management Act 1991

BETWEEN

WHANGĀREI DISTRICT COUNCIL

(ENV-2023-AKL-209)

Applicant

AND

GD BOWKETT

Respondent

Court: Judge JA Smith
Commissioner G Paine
Commissioner S Myers

Hearing: at Whangārei on 21 and 22 March 2024
Last case event: 27 March 2024

Bowkett v Whangarei District Council



Appearances: GJ Mathias for Whangārei District Council
KJL de Silva for Northland Regional Council
AW Braggins and AM Parkinson for GD Bowkett

Date of Decision: 24 April 2024

Date of Issue: 24 April 2024

DECISION OF THE ENVIRONMENT COURT

- A: The stay on the abatement notices ceases on the issue of this decision.
- B: In respect of the appeals against abatement notices, questions of costs can be applied for by the parties within 20 working days; any reply is to be filed within 10 working days after that; and any final reply, if any, five working days thereafter.
- C: The Court orders the removal of all the gabion baskets, the plinth, and the boat ramp (including the mattress gabion baskets underneath it), and the appropriate restoration of an access way over the esplanade reserve. The Court allows the parties 15 working days from the date of this decision to discuss the final wording of such an order. In the event the parties cannot agree the wording, the Council may apply for orders to allow the Court to determine the wording. The Council is to file any such application within a further 10 working days.
- D: If the matter is not resolved by that date, the Court will move to consider a further convened hearing for the final orders to be made. Such a hearing is likely to be convened by way of Microsoft Teams™.
- E: Costs are reserved in respect of the enforcement order proceedings.

REASONS

Introduction

[1] This hearing related to two appeals against abatement notices, and an application for enforcement orders by Whangārei District Council (**the District Council**). The abatement notices have been stayed pending the determination of this matter, and this was extended on 22 March until delivery of this decision.¹

[2] The facts appear largely to be agreed in that Mr Bowkett conducted or caused to be conducted, works in the Council esplanade reserve (the **Reserve**) adjacent to his property, including:

- (a) the construction of a concrete plinth of some 52m in length and the placement on it of a series of stone box gabion baskets;
- (b) the pouring of a concrete boat ramp from the adjacent reserve into or adjacent to the waterline of the coastal marine area (**CMA**); and
- (c) the construction of a metalled accessway from his own property boundary across some 15m of reserve.

[3] The parties are agreed the works were constructed after Cyclone Gabrielle, and probably in July 2022, when Mr Bowkett returned from overseas. The works are still in place, and the Court has issued several stays of the abatement notice until this matter could be heard.

The background facts

[4] It appears to be common ground that, along with most of the eastern coast, the property in the vicinity of Mr Bowkett's property received storm damage, including from Cyclone Gabrielle in February 2023, both on and around the foreshore and also through slippage on his own property.

[5] Mr Bowkett instructed an engineering company, Pattle Delamore Partners,

¹ *Bowkett v Northland Regional Council* [2024] NZEnvC 55.

shortly after the events of February, probably in early March. In April Mr Bowkett received an email from Mr Cam Watson that appears to constitute an interim update report from Pattle Delamore as to their initial findings and attaches a map showing these in diagrammatic form.

[6] Mr Bowkett may have then started examining the possibilities of protecting the foreshore. He tells us that he was overseas during at least June and possibly May.

[7] When he returned in July we are satisfied on the facts that he commenced works to construct the boat ramp and the concrete plinth necessary for the stone box gabion baskets. Photographic evidence taken around 13 July, shows that the track at this stage was not covered in fresh metal, and shows mud and grasses tracked down the now poured concrete ramp to the beach by machinery. Mr Bowkett told us he drove a telehandler for the movement of the stone boxes.

[8] Given the time necessary for the curing of the concrete boat ramp, we would anticipate that the concrete was laid for both the boat ramp and the stone box plinth in early July. Furthermore, Mr Bowkett told the Court in cross-examination that he had used a concrete truck to pump the concrete down the hill for both the boat ramp and the plinth.

[9] It then appears that he hired a telehandler and personally moved the gabion stone boxes. These gabion baskets were delivered to the top of the property near the house. Mr Bowkett then used the telehandler to take one basket at a time down his access track, across the reserve and boat ramp to the foreshore area. He then placed them on the plinth in a wall of some 52 metres in length, from adjacent to the boat ramp in an easterly direction.

[10] Given the gabion baskets were placed to the end of the concrete plinth foundation, it does not appear that Mr Bowkett considered extending the wall further to the east.

[11] It then appears that he worked backwards from the boat ramp uphill to his property by placing metal on the reserve and the drive to stabilise it after the works,

and then up through his property back to the house platform. To do so there was some reforming of the access track both on his own, and his neighbour's, property as well as the Reserve.

[12] Excess material from the access way reworking was placed partly on his property and partly on the Reserve. We understand some excess material may have been used to address ground "cracks" Mr Bowkett described to the Court. We are unable to identify if these were on Mr Bowkett's property, that of his neighbour, or the Reserve.

Council involvement

[13] On 12 July 2023, members of the public saw the works and reported these to the Northland Regional Council (**Regional Council**). The Regional Council despatched officers to inspect, and subsequently advised the District Council. The inspection photographs from 13 July 2023 demonstrate the steps we have outlined, including the muddy but formed boat ramp, the placed stone box gabion baskets, the mattressing with gabion baskets under the concrete ramp, and the creation of the access way to the boat ramp.

Stone box gabion baskets

[14] The stone box gabion baskets are approximately 1m³ and have been placed together along the concrete plinth we have described to form a wall. They have, behind them, sheets of geotextile cloth that are clearly intended to form a barrier between the gabion baskets and the earth behind. We are in no doubt that this is intended to provide a "hard protection structure" against the forces of the sea waves in the vicinity of the structure.

[15] We attach a plan showing the structure in relation to the properties, and annex this as "A". As demonstrated clearly in **A**, the effect of this wall is to protect the boat ramp and the adjacent accessway across the esplanade reserve to Mr Bowkett's property. The larger blowout area to the east is not affected by the structure, and there appears to be some evidence that the end effects on the gabion wall from wave action are likely to exacerbate the effects of erosion at the eastern end of the wall.

[16] On the face of the diagrams provided by Pattle Delamore, and in the cross examination of both Mr Pattle and the coastal expert called for Mr Bowkett, their opinion was that the gabion baskets were to address foreshore erosion. We conclude as a fact that that is their purpose.

The slip

[17] Having heard the evidence from Mr Pattle, examined the diagram, and from the cross-examination, we are satisfied as a fact that the stone box gabion baskets and the plinth on which they were placed were designed as a unified structure to reduce erosional impacts near the boat ramp and access way from Mr Bowkett's property. We can see no evidence that they served any purpose in avoiding or reducing slip erosion. We are satisfied that was not their intent.

[18] From all the evidence we have seen, we are satisfied that Mr Bowkett concluded that he needed to protect this portion of the esplanade reserve to continue access from his property to the area of the former boat ramp. He also considered he needed to reconstruct the boat ramp and the accesses to it to enable him to continue to use the boat ramp when required.

[19] Issues as to the slip were separately addressed by Pattle Delamore and have been the subject of various reports by them, including the more recent report in the last few weeks. In our view, that confirms the position that the protection wall and boat ramp, and access way, are unrelated to the slip and serve no purpose in protecting the house from further slipping.

The District Plan definitions

[20] We should first note that the words *hard protection structure* are derived from the Northland Regional Plan but have no specific meaning or a framework within the District Plan.

[21] A *structure* is defined under the operative Whangārei District Plan 2022 as:

any building, equipment, device or other facility, made by people and which is

fixed to land; and includes any raft.

The definition of raft does not apply here.

[22] The District Plan definition of *building* provides that:

Building means a temporary or permanent moveable or immovable physical construction that is:

- a. partially or fully roofed, and
- b. is fixed or located on or in land, but
- c. excludes any motorised vehicle or other mode of transport that could be moved under its own power.

[23] Under the District Plan definition of *structure* all *buildings* are structures.

[24] There is also a definition of *minor buildings*, which are exempt from certain rules.

[25] The issue is whether a *minor building* must meet the Plan definition of *building* as well. And, even if the *minor building* definition stands alone from the *building* definition is it also a *major structure* under the District Plan? The definitions are in our view somewhat clumsy, and particularly difficult because a minor building can be less than 300mm high **or** less than 2.2metres high **and** less than 9m². This compares with a major structure which is more than 2.2 m high **or** more than 9m².

[26] Structures themselves are defined as already noted, but the definitions include those for a *major structure*. Parts (a) and (b) of the definition of *major structure* are not directly relevant but the following may apply:

- (c) fence or wall, or a combination of either, greater than 2m in height above ground level. Where there is less than 1m separation distance between any separate fence or wall, or combination of either then the height shall be measured from the lowest ground level of either to the highest point of either;
- (d) [not relevant];
- (e) structure greater than 2.2m in height above ground level or greater than 9m² ground coverage, including outdoor stockpiles or areas of storage, but excluding amateur radio configurations.

[27] The other definition of direct interest in this case is the definition of a *minor building*. Parts (a), (b) and (c) are not directly relevant to this case, but the following may be:

- (d) any structure 300mm or less in height above ground level;
- (e) any structure which is 2.2m or less in height above ground level and which has 9m² or less ground coverage.

[28] As we have already noted, all buildings – including minor buildings – are structures. The question is, in this case, whether a major structure is also a minor building.

[29] On the wording of the provisions a major structure can also be a minor building. Such potential is nothing new but creates the need for a multi-level examination of the plan in order to ascertain whether a particular activity requires consent or is permitted.

The District Plan provisions

[30] This issue arises by virtue of the relevant rules for the coastal Natural Open Space zone (**the NOSZ**). The NOSZ applies to the Reserve land which is between the CMA and Mr Bowkett's and his neighbour's property.

[31] The objectives are set out in Objective NOSZ-O1, -O2 and -O3. Objective NOSZ-O1 itself is headed Natural Environment and provides:

Protect and enhance the natural, ecological, landscape, cultural and heritage values of the Natural Open Space Zone.

[32] Objective NOSZ-O2 Activities and Buildings, provides:

Buildings associated with recreational, educational, cultural and conservation activities, complement and do not compromise the values and qualities of the Natural Open Space Zone.

[33] The following policies, designated NOSZ-Ps, are set out as NOSZ P1 – P8. NOSZ-P1 reflects NOSZ-O1, namely, to identify and protect open spaces that are

managed primarily for conservation and have high natural, ecological, landscape, cultural and heritage values. The following NOSZ P2 – P5 are directly relevant, and we will cite them in full:

NOSZ-P2 Adverse Effects

To manage adverse effects on the values or qualities of the Natural Open Space Zone by limiting the use, location, scale and design of buildings.

NOSZ-P3 Enable Appropriate Structures

To enable structures and platforms in appropriate locations to enhance visitors understanding and experience of the natural, cultural and heritage values.

NOSZ-P4 Limiting Inappropriate Activities

To avoid, remedy and mitigate adverse effects on the values and qualities of the Natural Open Space Zone by managing the scale and nature of activities.

NOSZ-P5 Managing Activities

To avoid adverse effects on amenity and character of the Natural Open Space Zone by managing activities to ensure that they support ongoing conservation.

[34] NOSZ P6 – P8 are not directly relevant to this matter.

[35] We then move to the Rules under NOSZ-R1. The provisions are set out in annexure “**B**”. The default position there is that the activity status is permitted where resource consent is not required under any Rule of the District Plan and the activity is not prohibited under any Rule of the District Plan.

[36] NOSZ-R2 relates to any activity that is permitted where the activity is in accordance with s 4(3) of the Resource Management Act. The parties agree that s 4(3) does not apply here.

[37] Under NOSZ-R3 for minor buildings the activity status is permitted. NOSZ-R3 provides:

1. Minor buildings are exempt from Rules NOSZ-R4 – R7.

[38] NOSZ-R4 Building and Major Structure Height, permits a maximum building height and major structure height of 5.5m above ground level. The activity status when compliance is not achieved is discretionary.

[39] NOSZ-R5 Building and Major Structure Setbacks, has permitted activity status

where:

1. All buildings and major structures comply with the minimum building and major structure setback rule of the adjoining zone closest to the building or major structure.
2. All buildings and major structures are set back at least 27m from Mean High Water Springs or the top of the bank of any river that has a width exceeding 3m (excluding bridges, culverts and fences).

Rule Exemption:

1. NOSZ-R5.1 does not apply where the adjoining zone is an Open Space and Recreation Zone.

[40] Activity status when compliance is not achieved is discretionary. The exemption to NOSZ R5 does not apply as the adjoining zone is private land in the Rural Production Zone.

[41] NOSZ-R6 does not apply where the adjoining zone is Open Space and Recreation zone.

[42] NOSZ-R6, R8 and R9 onwards are not directly relevant.

The issue

[43] The argument raised on behalf of Mr Bowkett is that if the ramp and gabion wall are minor buildings (particularly the ramp) then they are permitted under the plan provision NOSZ-R3, and the setback control in NOSZ-R5 does not apply. For this hearing the undisputed evidence was that the ramp is less than 300mm high but some 25m² in area (greater than 9m²).

[44] To reach this outcome the Respondent must not only establish that the ramp is a minor building but that NOSZ-R3 also exempts it from NOSZ-R5 if it is also a major structure (more than 9m² in area).

[45] The Council's argument is that if a minor building is also a major structure, then the NOSZ-R3 rule exemption does not override the provisions of NOSZ-R5 which also captures major structures.

Application of the definitions

[46] We conclude that under the District Plan definition, the boat ramp and the gabion wall and plinth do not constitute a building because they are not partially or fully roofed.

Boat ramp

[47] The boat ramp constitutes a structure. It is a facility, equipment or device created by man. It is fixed to land.

[48] The next question is whether the 'boat ramp' constitutes a minor building or a major structure, or both. As we have stated above, a major structure can also be a minor building.

[49] Regarding the interplay of (d) and (e) in the definition of minor building, counsel for Mr Bowkett suggested that reading (e) to impose the 9m² limit on low level structures would render (d) redundant because structures less than 300mm are also less than 2.2m.

[50] There is some clumsiness in the drafting of the definition between subsection (d) and (e). We consider the use of the word 'and' in subsection (e) is the key here. If a structure has 9m² or less coverage, it has to be under 2.2m in order to be a minor building. If the structure is more than 9m² then it must be 300mm or less in height above the ground, fitting in with subsection (d).

[51] That boat ramp is more than 9m² (around 25m²) and therefore to fit within the definition of a minor building it must be 300mm or less in height above ground level. That the boat ramp is less than 300mm high does not appear to be disputed by any party. Given that it is less than 300mm in height it fits within the definition of minor building in subsection (d). We accept that the boat ramp is a minor building.

[52] We now go on to consider whether the boat ramp is also a major structure, as argued by the District Council. In the definition of major structure there is not the same relationship between height and ground coverage. To be a major structure a

structure must be greater than 2.2m in height **or** greater than 9m² ground coverage. The boat ramp is a major structure as it is greater than 9m² ground coverage.

[53] We conclude the boat ramp is both a minor building and a major structure.

[54] One issue not discussed at the hearing was whether the boat ramp, the plinth and the gabion baskets are a single structure. The gabion wall commences immediately adjacent to the ramp and appears to be in contact with the ramp.

The plinth and gabion baskets

[55] An initial argument that the gabion baskets should **not** be treated as a structure (a unit for a purpose or facility) were abandoned by Mr Bowkett's counsel. We conclude that the gabion baskets and the plinth wall constitute a structure. They are intended to work together to resist wave action on the coastal landward edge.

[56] The plinth which forms the foundation for the gabion baskets is clearly attached to the land and is also less than 300mm in height. An argument that the plinth is less than 300mm and therefore might be a minor building was not pressed by Mr Bowkett's counsel given it was intended to support the gabion baskets. The plinth forms the foundation for the gabion baskets.

[57] We conclude that the plinth and the gabion baskets act as a single structure (hard protection structure) for the purpose of protecting the foreshore from wave action. In fact, as it became clear, the gabion baskets were also interconnected, at least in part. There is photographic evidence that this occurred after the Court's stay order was made preventing further works.

[58] If the plinth is combined with the height of the gabion baskets it would still be less than 1.3m in height overall; therefore, it is less than 2.2m in height. The plinth wall area is something in the order of 52m²; an area greater than 9m².

[59] The gabion wall does not meet the definition of minor building because while it is less than 2.2m, it exceeds over 300mm in height and over 25m². The height is not

of consequence in meeting the definition of major structure in this case. The gabion wall meets the definition of major structure as it is greater than 9m² ground coverage.

[60] We conclude the gabion wall is a major structure and is not a minor building.

[61] Although not the focus of this hearing or evidence we are satisfied that the gabion wall is a hard protection structure designed to protect the landward edge and the boat ramp. As such we are tentatively of the view that all the elements comprise a single structure. If they are, then the minor building issue does not arise.

[62] In any event we now go on to consider the matter on the basis that the gabion baskets and the boat ramp are not a single structure.

Application of the rules

[63] NOSZ-R3 constitutes an exception to NOSZ-R5, at least as it relates to *minor buildings*.

[64] The use of the words “all buildings and major structures” in both 1 and 2 of NOSZ-R5 is interesting wording, given the earlier rule in NOSZ-R3. We agree with Mr Braggins that where it says “all buildings” in NOSZ-R5.1 and NOSZ-R5.2, that cannot apply to minor buildings given they are explicitly exempt under NOSZ-R3.

[65] The next question is whether or not, the exemption in NOSZ-R3 applies, even if a structure constitutes a major structure? In other words, if a structure falls within the definition of a minor building, while also being a major structure, does it get the benefit of the exemption in NOSZ-R3 or does it have to comply with NOSZ-R4 – R7?

[66] While we understand the argument being made by Mr Braggins and its basis in the unclear wording of NOSZ-R3 and NOSZ-R5 we have concluded that the exemption in NOSZ-R3 does not apply to major structures. We do not consider there is absolutism in the exemption in NOSZ-R3, i.e., because something meets the definition of minor building it does not mean only NOSZ-R3 applies.

[67] While counsel is correct that NOSZ-R3 provides an express exemption NOSZ-R5 clearly states that it applies to all buildings **and major structures**. Both provisions are direct. As we have said above, structures can be both a minor building and a major structure. The two are not mutually exclusive. We have concluded that although the boat ramp is a minor building and falls under NOSZ-R3, because the boat ramp is also a major structure, it must comply with NOSZ-R5.

[68] The end result is that the boat ramp and the gabion wall both meet the definition of major structure and must comply with NOSZ-R5.

Application of the setback requirement in NOSZ-R5

[69] The structures in this case are placed upon the Natural Open Space zone land, leading to the application of the NOSZ rules.

[70] These structures are caught under NOSZ-R5.2 because the structures are within 27m of the Mean High Water Springs.

[71] The exemption to NOSZ-R3 does not apply. In this case the adjoining zones are within the control of the Regional Council, being the CMA, or are privately owned residences in the Rural Production Zone. The only proper interpretation, in our view, of the exemption in NOSZ-R5 is that it is intended to apply to the lands surrounding the Reserve and not the Reserve itself, because that is not adjacent to itself.

[72] *Open Space and Recreation Zones* are defined in the Plan as the Open Space, Natural Open Space and Sport and Active Recreation Zones. In this case, as the zone on which the works have been done is the Natural Open Space zone, there is no other zone within the Whangārei District Plan which fits within those definitions.

[73] The end result is that these constitute major structures under the Plan and are therefore caught by NOSZ-R5 in that they are constructed within 27m of the Mean High Water Springs.

The consequence of structures within 27m of mean highwater springs

[74] Clearly, if these major structures are built within 27m of the Mean High Water Springs, they require a discretionary consent under the Plan, and otherwise are not authorised and are in breach of the Plan.

[75] On the face of it, this would enable the Council to issue an abatement notice, seek an enforcement order, or prosecute. All three options can be adopted by a Council and in this case the Whangārei District Council applied for an enforcement order and issued abatement notices.

The position of the Northland Regional Council

[76] The Northland Regional Plan defines hard protection structure as:

A seawall, rock revetment, groyne, breakwater, stopbank, retaining wall or comparable structure that has the primary purpose of protecting an activity from a coastal hazard, including erosion.

[77] The Northland Regional Council controls the area immediately adjacent to the CMA. Under different regional provisions this requires a hard protection structure to obtain a regional consent. Rule C.1.1.24 of the proposed Regional Plan for Northland states:

C.1.1.24 Hard protection structures – discretionary activity

The erection, reconstruction, placement, alteration, extension, maintenance, repair, removal or, demolition of a hard protection structure and the occupation of the common marine and coastal area by the hard protection structure that is not a permitted activity under C.1.1.1 Existing structures – permitted activity or C.1.1.8 Maintenance, repair or removal of hard protection structures – permitted activity, and the use of the hard protection structure, are discretionary activities, provided it is not in a mapped ... [not applicable]

[78] The Regional Council abatement notice only relates to the gabion basket wall and plinth. Given that we have already concluded that this constitutes a hard protection structure we are satisfied that the Regional Council was correct in issuing its abatement notices.

Should the abatement notice stay continue?

[79] The issuing of abatement notices are a discretionary matter for the Council. Given our earlier conclusions we accept they were properly issued by both Councils in terms of that discretion. They were stayed to give Mr Bowkett an opportunity to argue their appropriateness.

[80] Evidence now produced by Mr Bowkett suggests they should remain. In relation to the hard protection structure this is until a permanent solution is designed and installed (it is suggested this will take up to a year). In relation to the boat ramp the removal would prevent ready walking and small boat access by Mr Bowkett's family and several neighbours.

[81] Mr Mathias submits that Mr Bowkett was well aware of his obligation to seek a consent. Further, he notes there has been nearly a year to enable compliance; and the removal of the boat ramp and hard protection structure does not prevent a proper application for consent. In addition, permission from the landowner (the District Council) is also required, and allowing the abatement notice to remain stayed would defeat the exercise of council authority.

[82] We agree that both Councils have established that the abatement notices were valid and appropriate. We see little damage to the environment arising from the removal of the boat ramp and hard protection structure. Erosion of the Reserve, and shoreline generally, are natural processes.

[83] To prevent abatement notices being effective would encourage self-help and breach of Plan provisions. It follows, as a consequence of this, that there is **no** proper basis for this Court to further stay the abatement notices and the stay on the abatement notice ceases on the issue of this decision.

The enforcement orders

[84] Mr Mathias made it clear that the main focus of the Council for the purpose of this hearing was the enforcement orders. Given our conclusions as to the breach of the Plan in the works that were undertaken, there is an assumption that the Court will

make enforcement orders.

[85] However, these may be modified or delayed depending on the particular circumstances of the parties. All parties accepted the applicable law stems from cases such as *Russell v Manukau District Council*² and a long line of authority in this Court.

[86] We conclude that the major thesis of Mr Bowkett's evidence before the Court, beyond defence on the fundamental issues, was that he should be given the opportunity to apply for any necessary consents and undertake the work.

[87] In short, he agrees that the gabion baskets should be removed but wants to leave them in place until the application for consent for a more permanent structure has been addressed by both Councils. Furthermore, he says that the works on his own property are permitted (this is accepted and not the focus of this Court) and that the short length of access way over the Reserve (some 15-16 metres) creates no difficulties for the parties and should be allowed to remain until at least the completion of the application for consent and any works associated with that.

[88] As for the boat ramp, Mr Bowkett's argument is that this simply replaces earlier access by virtue of a natural access onto the beach, and after damage in 2018 the repaired access way has been further modified by these repairs. Again, we understand that Mr Bowkett's position may be that this could be regularised through an application for resource consent, and would be considered as a discretionary activity.

Undertaking the works now

[89] Both counsel accept, and submit to this Court, that the works required to rectify the position are all permitted under the District and Regional Plans. They say that the gabion baskets could be removed quite simply, in a similar way to the way in which they were put there; the plinth broken up and removed in a similar way as well as the boat ramp broken up and removed. They say the metal could be removed and the area resowed, and it appears there is still some fill adjacent which may be able to

² *Russell v Manukau District Council* [1996] NZRMA 35.

simply cover the area and grass allowed to re-take.

[90] The details of this have not been examined in full, but we accept the submission from both Councils that the work does not require a resource consent. In fact, the stay applications have made it clear that they do not prevent Mr Bowkett from removing the gabion baskets; and we think it follows that the plinth wall could be easily removed with little consequential damage to the beach, as could the concrete ramp that is situated on gabion mattresses. We accept that the gabion mattresses themselves could constitute something of a hazard and would also need to be removed.

[91] The Council's position is that if this occurred, and Mr Bowkett was subsequently successful in his application, that would include the works necessary to access the beach front, install the permanent works and any boat ramp that may be permitted by the Council in due course, and that this could be done with little or no effect on the access way on the esplanade reserve, the beach, the ramp or the area of the wall.

[92] Mr Bowkett's concern is that the removal of the wall and the boat ramp may lead to further erosion at that face, permanently removing the esplanade reserve in that area – and his access to the beach. Neither Council was perturbed by this outcome, and seemed to accept it as a natural process. We note that the coastal witness called by Mr Bowkett was clear that there had been substantial erosion in this area over the last ten years and that this was likely to continue with sea level rise.

[93] If Mr Bowkett is intending to make an application for works within the esplanade reserve that would protect his house from further slippage, it seems clear to us that this is likely to be further to the east and include little or any of the area currently covered by the wall. However, this is purely speculative at this stage because no final remedial plans have been established and there are always possibilities of works on Mr Bowkett's site itself to prevent further scarp slips.

[94] We note, finally, that Mr Bowkett's counsel has filed applications with the Regional Council and District Council for permission to do work on Council land. We have not focussed on this issue through this hearing, but do note that this land is

owned by the Council, and any works to be done upon it would require their consent.

[95] However, the failure to provide Council landowner consent is acknowledged by all parties to be a matter that is not remediable directly in this Court. Without the permission of the landowner, neither the current works or any future works could be undertaken.

[96] It is not clear to this Court whether the applications also include applications for resource consent for these works.

Outcome on application for enforcement orders

[97] We are satisfied that the grounds for making an enforcement order are made out and the question for this Court is whether we should exercise our residual discretion to delay or modify the requirements, at least in the short to medium term. Mr Bowkett seeks, it seems to us, something in the order of a year before this matter is finalised.

[98] In assessing this we note that the effects on the environment from the construction of the wall and the ramp have been relatively localised. There is no wide audience that views this area; it is only accessible at low tide and is not frequented by the public. Nevertheless, it is clear that the works were noted by members of the public and reported to the Council. In our view there is no suggestion that this area is totally inaccessible, but the storm effects on the esplanade reserve have made it less accessible than it may have been in the past.

[99] Against this we must assess the importance of retaining the integrity of the Plan. As Mr Mathias said, the Plan is the antithesis of the self-help approach to remedying residents' concerns. The Act itself has deemed it to be appropriate that there should be District Plans that set out the controls under which parties can undertake work either on their own property or on others.

[100] Although ownership of the property is not essential for a resource consent, it is clear that without it the works would be unable to be performed legally. Moreover,

this Court would normally require evidence that the applicant had permission of the landowner before it could do the works on another property.

[101] In the exercise of our discretion we have concluded that it is not appropriate that we should delay or stay the enforcement order to allow Mr Bowkett to undertake the consent process. There is nothing to prevent that consent process taking place, and as we understand it the works now envisaged would not involve the long-term retention of the hard protection structure by way of gabion baskets.

[102] We are not even clear at this stage if it would be intended that an application would be made for a boat ramp in this area. If so, it would need to be considered on its merits. It would also require the permission of the District Council as landowner.

[103] To allow parties to undertake this type of work on others' land without permission, in our view sets a dangerous precedent. We appreciate that there are many thousands of properties through the North Island of New Zealand in particular that have suffered serious damage as a result of recent weather events. However, in this case there is nothing to suggest that these works were emergency works, and they were conducted some months after the events leading to the shoreline erosion and the slip.

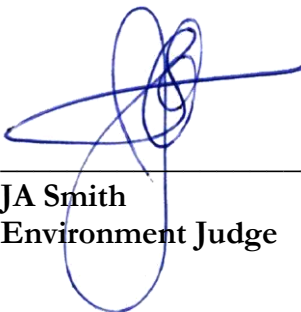
[104] Mr Bowkett is clearly a person well experienced in resource management issues. He stated himself that he had spent his life in this type of work, and he has been and is a director of major companies that are well aware of their resource management responsibilities. Accordingly, we see the decision to undertake the work without permission as a deliberate one and in the knowledge that works on another's land and adjacent to the CMA would require both the permission of the landowner and a resource consent. In such circumstances these features outweigh any inconvenience to Mr Bowkett of having to redo the work if he obtains a consent.

Outcome

[105] The Court concludes:

- (a) The stay on the abatement notices ceases on the issue of this decision;
- (b) In respect of the appeals against abatement notices, questions of costs can be applied for by the parties within 20 working days; any reply is to be filed within 10 working days after that; and any final reply, if any, five working days thereafter;
- (c) The Court orders the removal of all the gabion baskets, the plinth, and the boat ramp (including the mattress gabion baskets underneath it), and the appropriate restoration of an access way over the esplanade reserve. The Court allows the parties 15 working days from the date of this decision to discuss the final wording of such an order. In the event the parties cannot agree the wording, the Council may apply for orders to allow the Court to determine the wording. The Council is to file any such application within a further 10 working days;
- (d) If the matter is not resolved by that date, the Court will move to consider a further convened hearing for the final orders to be made. Such a hearing is likely to be convened by way of Microsoft Teams™ to reduce both time and cost to the parties and the Court; and
- (e) Costs are reserved in respect of the enforcement order proceedings. Any directions for costs will be made as part of any final orders sought.

For the Court



JA Smith
Environment Judge





KEY		
STAGE 1 GEOTECHNICAL INVESTIGATION	INSTABILITY FEATURES	OTHER FEATURES
Hand Auger Hole	Sharp Scarp (>1.0m)	Swampy Ground
Hand Auger Hole (with Piezometer)	Sharp Scarp (0.3-1.0m)	Seepages
CPT	Sharp Scarp (<0.3m)	Existing Retaining Wall
Scale Test	Tension Crack	Bedding Measurements
STAGE 2 GEOTECHNICAL INVESTIGATION	Possible Landslide Boundary	Strike and Dip Measurement (Degrees)
Hand Auger Hole	Top of Bank	
Hand Auger Hole (with Piezometer)	Bottom of Bank	
Borehole (with Piezometer)		
Cross Section		



SCALE: 1:400 (A3)
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NO.	REVISION	DATE	BY
A	REVISED	FEB 24	CBW

SOURCE:
 1. TANAI TRAIL SHADER - FORMED BY PDP FEB 2023 AND MAY NOT BE ENTIRELY ACCURATE.
 2. GEOTECHNICAL INVESTIGATION REPORTS FOR THE AREA.
 3. INVESTIGATION LOCATIONS WERE NOT SURVEYED AND ARE THEREFORE APPROXIMATE.

CLIENT:
 GRAEME BOWKETT

FIGURE 1: SITE INVESTIGATION AND ENGINEERING GEOLOGY SKETCH PLAN
 PROJECT:
 STAGE 2 GEOTECHNICAL INVESTIGATION - TARANUI - 1439 COVE ROAD, LANGS BEACH

Natural Open Space Zone (NOSZ)

Issues

The Natural Open Space Zone (NOSZ) identifies areas of open space **land** primarily managed for the conservation and protection of natural resources. The **land** is generally in Council or Department of Conservation ownership. Examples of such **land** include: bush reserves, headlands, natural **wetlands** and parts of the coastline. The Natural Open Space Zone provides for the natural, ecological, landscape, cultural and heritage values of these open spaces.

Identifying these areas helps to preserve and define Whangārei's natural character and provides a connection to our natural heritage. These open spaces play a special role in educating residents and visitors and providing recreational opportunities. Often the natural elements and unmodified nature of these areas gives them a sense of wilderness and isolation.

The Natural Open Space Zone consists of the following New Zealand Reserve Association Park Categories:

- Unmanaged natural park areas.
- Unmanaged recreation and ecological linkages.
- Unmanaged green space.

The Natural Open Space Zone often has high ecological/biodiversity values and it is therefore appropriate to limit the scale and intensity of activities and development to ensure there are minimal adverse **effects** and as little modification to the **environment** as possible.

The Natural Open Space Zone is characterised by minimal **buildings** and **structures**, largely undeveloped areas and open expanses of **land**. **Land** may have limited public **access** and **infrastructure** such as car parks, walking tracks and camp grounds.

Where **buildings** and improvements are proposed, they should generally relate to conservation and **land** management, recreation, education, and visitor information. The Natural Open Space Zone seeks to achieve a high quality **built form** and signage that responds to the surrounding natural **environment** resulting in an attractive and vibrant area for residents and visitors. **Commercial activities** are restricted in the Natural Open Space Zone to protect the high-quality **amenity values** of the natural **environment**.

Objectives

NOSZ-01 Natural Environment

Protect and enhance the natural, ecological, landscape, cultural and heritage values of the Natural Open Space Zone.

NOSZ-02 Activities and Buildings

Buildings associated with recreational, educational, cultural and conservation activities, complement and do not compromise the values and qualities of the Natural Open Space Zone.

NOSZ-03 Kauri Dieback Disease

Avoid the spread of plant pathogens including *Phytophthora Agathidicida* (Kauri Dieback Disease).

Policies

NOSZ-P1 Open Spaces

To identify and protect open spaces that are managed primarily for conservation and have high natural, ecological, landscape, cultural and heritage values.

NOSZ-P2 Adverse Effects

To manage adverse effects on the values and qualities of the Natural Open Space Zone by limiting the use, location, scale, and design of buildings.

NOSZ-P3 Enable Appropriate Structures

To enable structures and platforms in appropriate locations to enhance visitors understanding and experience of natural, cultural and heritage values.

NOSZ-P4 Limiting Inappropriate Activities

To avoid, remedy and mitigate adverse effects on the values and qualities of the Natural Open Space Zone by managing the scale and nature of activities.

NOSZ-P5 Manage Activities

To avoid adverse effects on amenity and character of the Natural Open Space Zone by managing activities to ensure that they support ongoing conservation.

NOSZ-P6 Subdivision

To avoid the fragmentation of Natural Open Space Zone land where subdivision would not protect high natural, ecological, landscape, cultural and heritage values.

NOSZ-P7 Subdivision Design and Layout

To protect the natural, cultural and heritage values of the Natural Open Space Zone by managing the design and layout of subdivision.

NOSZ-P8 Kauri Dieback Disease

To discourage vegetation clearance within the vicinity of New Zealand Kauri tree (*Agathis Australis*) and to ensure that vegetation clearance is undertaken in a way to avoid the spread of plant pathogens including *Phytophthora Agathidicida* (Kauri Dieback Disease).

Rules

NOSZ-R1 Any Activity Not Otherwise Listed in This Chapter

Activity Status: Permitted

Where:

1. Resource consent is not required under any rule of the District Plan.
2. The activity is not prohibited under any rule of the District Plan.

NOSZ-R2 Any Activity

Activity Status: Permitted

Where:

1. The activity is in accordance with Section 4(3) of the Resource Management Act 1991.

NOSZ-R3 Minor Buildings

Activity Status: Permitted

Note:

1. *Minor buildings* are exempt from rules NOSZ-R4 – R7.

NOSZ-R4 Building and Major Structure Height

Activity Status: Permitted

Where:

1. The maximum building height and major structure height is 5.5m above ground level.

Activity Status when compliance not achieved: Discretionary

NOSZ-R5 Building and Major Structure Setbacks

Activity Status: Permitted

Where:

1. All buildings and major structures comply with the minimum building and major structure setback rule of the adjoining zone closest to the building or major structure.
2. All buildings and major structures are set back at least 27m from Mean High Water Springs or the top of the bank of any river that has a width exceeding 3m (excluding bridges, culverts and fences).

Rule Exemption:

1. NOSZ-R5.1 does not apply where the adjoining zone is an Open Space and Recreation Zone.

Activity Status when compliance not achieved: Discretionary

NOSZ-R6 Building and Major Structure Height in Relation to Boundary

Activity Status: Permitted

Where:

1. All buildings and major structures comply with the minimum height in relation to boundary rule of the adjoining zone closest to the building or major structure.

Rule Exemption:

1. NOSZ-R6 does not apply where the adjoining zone is an Open Space and Recreation Zone.

Activity Status when compliance not achieved: Discretionary

NOSZ-R7 Building Gross Floor Area

Activity Status: Permitted

Where:

1. The maximum gross floor area of any building is 50m².
2. The total cumulative gross floor area of all buildings is no more than 15% of the site area.

Activity Status when compliance not achieved: Discretionary

NOSZ-R8 Outdoor Areas of Storage or Stockpiles

Activity Status: Permitted

Where:

1. The outdoor area of **storage** or stockpile:
 - a. Complies with rules NOSZ -R4 – R7.
 - b. Is screened from view from adjacent **public places** and surrounding Local Centre Zone, Mixed Use Zone, **Residential Zone** or **Open Space and Recreation Zones**, except for construction materials to be used on-**site** for a maximum period of 12 months within each 10-year period from 15 July 2020.

Activity Status when compliance not achieved: Discretionary

NOSZ-R9 Indigenous Vegetation Clearance

Activity Status: Permitted

Where:

1. The clearance of **indigenous vegetation**:
 - a. Does not exceed 250m² per **site** within each 10-year period from 15 July 2020.
 - b. Is not undertaken within 20m of a **water body**.
 - c. Do not occur within three times the maximum radius of the **canopy dripline** of a New Zealand Kauri tree (*Agathis Australis*).

OR

2. The clearance of **indigenous vegetation** is associated with:
 - a. Routine maintenance within 7.5m of the **eaves** of existing **buildings**:
 - i. Including the removal of any tree where any part of the trunk is within the 7.5m distance.
 - ii. Excluding damage to the roots or removal of any tree where the trunk is outside the 7.5m distance.
 - b. Operation, maintenance and repair of existing tracks, lawns, gardens, fences, drains, drainage **infrastructure**, new walking tracks and other lawfully established activities. Except that no **indigenous vegetation clearance** shall occur within three times the maximum radius of the **canopy dripline** of a New Zealand Kauri tree (*Agathis Australis*).
 - c. Pest plant removal and biosecurity works.
 - d. Vegetation removal for customary rights.
 - e. Conservation planting, including planting for ecological restoration purposes.

Note:

1. See the *TREE Chapter* for rules relating to Notable Trees.

Activity Status when compliance not achieved: Discretionary

NOSZ-R10 Farming

Activity Status: Permitted

Where:

1. The activity is a primary activity or **ancillary activity**.

NOSZ-R11 Residential Unit

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R12 General Retail

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R13 Commercial Services

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R14 Food and Beverage Activity

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R15 Visitor Accommodation

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R16 Place of Assembly

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R17 Recreational Facilities

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R18 Educational Facility

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R19 General Community

Activity Status: Discretionary

Where:

1. The activity is a primary activity or ancillary activity.
2. Any combination of activities listed in rules NOSZ-R11 to NOSZ-R19 have:
 - a. A cumulative gross floor area of less than 300m² per site.
 - b. A cumulative outdoor area less than 500m².

Activity Status when compliance not achieved: Non-Complying

NOSZ-R20 Plantation Forestry

Activity Status: Discretionary

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R21 Intensive Livestock Farming

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R22 Farm Quarrying

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R23 Industrial Activities

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R24 Supported Residential Care

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R25 Retirement Village

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R26 Trade Retail

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R27 Drive-Through-Facilities

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R28 Service Station

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R29 Funeral Home

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R30 Grocery Store

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R31 Entertainment Facilities

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R32 Care Centre

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R33 Emergency Services

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R34 Hospital

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).

NOSZ-R35 General Commercial

Activity Status: Non-Complying

Where:

1. The activity is a primary activity or [ancillary activity](#).