Before the Independent Hearings Panel appointed by The Otago Regional Council

Under	the Resource Management Act 1991 (**Act**)
And	
In the Matter	of an application under section 88 of the Act to alter and extend existing structures and to occupy the common marine and coastal area (RM22.550)
And	
In the Matter	of a submission by Te Rūnanga o Ōtakou on RM22.550

Legal Submissions on behalf of **Te Rūnanga o Ōtākou**

Dated: 5 September 2024

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INTRODUCTION

1. These legal submissions are filed on behalf of Te Rūnanga o Ōtakou (**Ōtakou**). Ōtakou made a submission on an application by Onumai Enterprises Limited (**Applicant**) to occupy the common marine and coastal area and alter and extend existing structures (**Proposal**) adjacent to 21 Marine Parade, Taiari Mouth (**Site**). The Proposal also includes a land use component for private accommodation and commercial use.

2. Ōtākou opposes the Proposal in its entirety and seeks that consent be declined.

3. Cultural evidence from Mr Edward Ellison in support of the Ōtākou submission has been filed in advance of the hearing. Mr Ellison's evidence highlights the impacts of the Proposal on the cultural values of Ōtākou and Kāi Tahu.

4. Ōtākou is not opposed to all activities taking place in the CMA and accepts that there are very justifiable and appropriate circumstances where it is appropriate for some activities to be established within the Coastal Marine Area (**CMA**). Ōtākou accepts that the Proposal will provide a range of positive benefits, particularly in relation to enhancing the disabled community's access to the CMA. However, ultimately it is the view of Ōtākou that it is not appropriate to establish a visitor accommodation facility in the CMA as there is no functional need for this type of activity to be located in the CMA. This position is supported by national and regional planning documents.

5. In these submissions, we will briefly outline the framework for your decision making as relevant to the concerns of Ōtākou and will address the key legal matters in relation to the Ōtākou submission. In terms of these key issues, our submissions are that:

   (a) The Proposal does not have a functional need to be located in the CMA and is therefore contrary to the objectives and policies of the New Zealand Coastal Policy Statement (**NZCPS**), ORPS, PORPS and the Otago Regional Plan: Coast (**Coastal Plan**);

   (b) As set out in the evidence of Mr Ellison, the Proposal will result in adverse effects on the values of Ōtākou and Kāi Tahu, particularly in relation to mahika kai and the mauri of the Taiari River and CMA;

   (c) The Proposal is contrary to the provisions of the Proposed Otago Regional Policy Statement (**PORPS**) that require the protection of customary use of natural resources;

(d) The Proposal is contrary to the requirement in section 6(e) of the Resource Management Act 1991 (**RMA**) to recognise and provide for the relationship of Māori and their cultural and traditions with their ancestral lands, water, sites wāhi tapu and other taonga; and

(e) As there are no consented residential activities in the Otago CMA, there is a genuine risk that granting consent for the Proposal will set a precedent for future applications for residential activity in the Otago CMA, as well as nationally.

TE RUNANGA O ŌTĀKOU

6. Ōtākou is one of the 18 papatipu Rūnaka who collectively form Te Rūnanga o Ngāi Tahu.

7. Te Rūnanga o Ngāi Tahu is an entity established under Te Rūnanga o Ngāi Tahu Act 1996. It is the collective of the 18 papatipu Rūnanka who are the modern assemblages that represent the whānau and hapū who hold mana whenua over Ngāi Tahu/Kāi Tahu takiwā. These submissions will refer to Te Rūnanga o Ngāi Tahu as Kāi Tahu, being the appropriate dialectal variation in the Otago region.

8. Te Rūnanga o Ōtākou is the mandated representative of those who are mana whenua in the area of the site. The role of Ōtākou and Kāi Tahu is to ensure its takiwā is protected and enhanced for future generations.

9. The association of Ōtākou with the Taiari River and the Otago CMA more broadly is outlined in the evidence of Mr Ellison.[1] In summary, Ōtākou have a close association with the Taiari River and the Taiari CMA. This association is confirmed in the Ngāi Tahu Claims Settlement Act 1998 (**Settlement Act**) where Te Tai o Āraiteuru (Otago CMA) is identified as a Statutory Acknowledgement Area. The relevance of Te Tai o Āraiteuru being identified as a Statutory Acknowledgement Area is further discussed in Mr Ellison's evidence.[2]

10. Further, the Settlement Act identifies three nohoaka entitlements over the Taiari River.[3] These nohoaka sites are seasonal settlements that were traditionally occupied by Ōtākou for several purposes, including the gathering of mahika kai and other resources.[4]

[1] Statement of Evidence of Edward Ellison dated 2 September 2025, at paras [16]-[46].
[2] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [14].
[3] Ngāi Tahu Claims Settlement Act 1998, Schedule 95.
[4] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [27]-[33].

THE APPLICATION

11. The Applicant has applied for resource consents for the following Discretionary activities:

    (a) To occupy the CMA for recreational and visitor accommodation purposes; and

    (b) To alter and extend the existing storage sheds on the jetty to construct a building to be used for visitor accommodation.

12. The Applicant has not applied for resource consents for the following activities:[5]

    (a) The placement of the floating pontoon as an attachment to the wharf, and the attachment of the ramp between the wharf and pontoon. These would both be discretionary activities under Rule 8.5.1.9 of the Coastal Plan;

    (b) Disturbance of the CMA for the installation of additional piles in the seabed. While additional piles are not currently considered necessary to support the wharf and proposed building, should this assessment in the detailed design stage, this would require a discretionary activity consent under Rule 8.5.2.5 and Rule 9.5.3.6 of the Coastal Plan;

    (c) Earthworks for residential development as a restricted discretionary activity under the Otago Regional Plan: Water, rule 14.5.2.1; and

    (d) Coastal permit to occupy the CMA for events extending beyond the wharf and residential building.

13. The Court of Appeal in *Bayley v Manukau City Council* (1998) 4 ELRNZ 461 held that where there is an overlap between resource consents such that consideration of one may affect the outcome of the other, it is appropriate to treat the application as a whole.[6] To do otherwise would be for the consent authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

14. In our submission, there is a degree of overlap between the consents that have not been applied for and the current consent application before the Panel. In particular, the effects of the earthworks required to 'pin' the residential building structure are connected to the use of the structure that is being consented under the current application. It is therefore appropriate to consider the effects of the proposed earthworks now rather than in a separate application at a later date.

[5] Section 42A Report, section 5.3, page 20.
[6] *Bayley v Manukau City Council* (1998) 4 ELRNZ 461 at 476.

15. We submit that the effects of the activities described above and which do not form part of the existing application are material to your consideration of the Proposal in the round.

STATUTORY FRAMEWORK

16. Relevantly, Section 104 of the RMA sets out the matters which a consent authority must have regard to when considering an application for resource consent. These include:

    (a) any actual and potential effects on the environment of allowing the activity;

    (b) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects;

    (c) the relevant provisions of the relevant planning documents including regional plans, national policy statements and the New Zealand Coastal Policy Statement; and

    (d) any other matters.

KEY ISSUES

Cultural Effects

17. As outlined above, Ōtākou have an established association with the Taiari River and the Otago CMA more broadly. This cultural association is recognised in the Settlement Act.

18. The cultural evidence of Mr Ellison demonstrates that the Proposal, in particular the use of the Site for private visitor accommodation purposes, will have adverse effects on the Ōtākou and Kāi Tahu relationship with the Taiari River. Mr Ellison notes that the presence of what would appear to an observer on the Site as private residential accommodation would disincentivise Ōtākou from engaging or reconnecting with traditional cultural practices such as the gathering of mahika kai in the river mouth and estuary.[7] In this regard, Mr Ellison considers that the Proposal does not safeguard wāhi tupuna (cultural landscape) and could further entrench the effects of displacement and disconnection of Ōtākou with the landscape.[8]

[7] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [59].
[8] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [60]-[61].

19. Mr Ellison describes why the Proposal will adversely affect the mauri of the Taiari River.[9] The mauri of a natural resource is degraded if it no longer supports traditional and contemporary uses and values.[10] Mr Ellison explains that if mauri is degraded, this affects the ability of mana whenua to carry out mahika kai practices as an environment that has been degraded by contamination or by intrusion of activities is less likely to be used for mahika kai.[11]

20. Overall, the evidence of Mr Ellison confirms that the Proposal would be incompatible with the values and associations of Ōtākou with their wāhi tupuna, including the awa, coast, Native Reserve Lands and aspirations to provide opportunities for mana whenua to engage with mātauraka Māori.[12]

21. We note that Mr Cubitt on behalf of the Applicant has filed evidence to the effect that the cultural values relevant to the Taiari Coast identified in the Kāi Tahu ki Otago Natural Resource Management Plan 2006 (**Iwi Management Plan**) will not be offended by the Proposal, and that the Proposal will have a positive effect on cultural values in that it would enable disabled members of the Kāi Tahu community to reconnect with this part of the coastal environment.[13]

22. In response, we submit that it is for Ōtākou as mana whenua to determine how a proposal impacts on their cultural values.[14] The High Court has previously held that where an iwi claims that a particular resource management outcome is required to meet section 6(e), 7(a) and 8 of the RMA, decision makers must meaningfully respond to that claim.[15] Accordingly, in our submission the evidence of Mr Ellison should be preferred over the evidence of Mr Cubitt when determining the extent of the cultural effects of the Proposal.

23. In light of the above, we submit that the Proposal is inconsistent with the policy directive in the PORPS requiring that the environment is managed to support Kāi Tahu hauora, including by protecting customary uses and Kāi Tahu values, and restoring these where these have been degraded by human activities.[16] Further, in light of Mr Ellison's evidence on the mauri of the Taiari River, we consider the Proposal is contrary to MW-P3(3) of the PORPS which requires that the mauri and life supporting capacity of natural resources are safeguarded to recognise the connections of Kāi Tahu with those resources and with practices such as mahika kai. We submit that the objectives and policies of the Mana Whenua chapter of the PORPS can be given greater weight than the equivalent chapter under the ORPS

[9] Statement of Evidence of Edward Ellison dated 2 September, at para [52]-[55]
[10] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [53].
[11] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [54].
[12] Statement of Evidence of Edward Ellison dated 2 September 2025, at para [60].
[13] Statement of Evidence of Peter Allan Cubitt dated 26 October 20205, at [60]-[62].
[14] *Ngāti Maru Trust v Ngāti Whātua Ōrakei Whaia Maia Limited* [2020] NZHC 2768 at [58].
[15] *Ngāti Maru Trust v Ngāti Whātua Ōrakei Whaia Maia Limited* [2020] NZHC 2768 at [102].
[16] Proposed Otago Regional Policy Statement, MW-P3.

in light of the appeals on the Mana whenua chapter of the PDP having been resolved by way of an Environment Court consent order.[17]

24. For this reason, we submit that the Proposal is contrary to objectives and policies of the Mana Whenua chapter of the PORPS, as well as the requirement in section 6(e) of the Resource Management Act 1991 (**RMA**) to recognise and provide for the relationship of Māori and their cultural and traditions with their ancestral lands, water, sites wāhi tapu and other taonga.

Functional Need

Directiveness of Functional Need Policies

25. The planning framework contains a clear policy directive (which is supported by Ōtākou) requiring functional need to be established for activities establishing in the CMA. In our submission, the visitor accommodation component of the Proposal is contrary to this policy directive.

26. The requirement for activities in the CMA to have a functional need to be located in the CMA is contained in the NZCPS, PORPS, ORPS and the Coastal Plan with varying levels of directiveness.

27. Under the NZCPS, the directive is to recognise that activities which do not have a functional need to be located in the CMA *generally* should not be located there.[18] Where there is functional need, the directive is to provide for these activities in "appropriate places":[19]

> **Policy 6: Activities in the Coastal Environment**
>
> 2) In relation to the coastal marine area
>
> …
> (c) recognise that there are activities that have a functional need to be located in the coastal marine area and provide for those activities in appropriate places.
> …
> (d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there.

28. The direction for functional need is stronger in the ORPS, which requires that activities that do not have a functional need to locate in the CMA be avoided:[20]

[17] *Dunedin City Council v Otago Regional Council* [2025] NZEnvC 107.
[18] New Zealand Coastal Policy Statement, Policy 6(2)(f).
[19] New Zealand Coastal Policy Statement, Policy 6(2)(c).
[20] Otago Regional Policy Statement, Policy 5.4.9(a).

Policy 5.4.9 – Activities in the Coastal Marine Area

In the coastal marine area minimise adverse effects from activities by all of the following:

a. Avoiding activities that do not have a functional need to locate in the coastal marine area.

29. The PORPS takes a more expansive approach by removing the 'avoid' requirement, and including "operational need" in the test for activities in the CMA (in addition to the functional need test.):[21]

CE-P10 – Activities within the coastal marine area
Use and development in the coastal marine area must:
…
a. have a functional need or operational need to be located in the CMA, or
b. have a public benefit or opportunity for public recreation that cannot be practicably located outside the CMA.

30. Operational need is a lower threshold than functional need and refers to the need for a proposal or activity to "*traverse, locate or operate in a particular environment because of technical, logistical or operational characteristics or constraints*."[22]

31. The direction in the Coastal Plan does not use the words "functional need". Rather, the direction is to consider whether or not a coastal location is *required*.[23] The Coastal Plan accepts that the following activities require occupation in the CMA:[24]

7.2.2 Some activities in the coastal marine area require occupation and can result in a reduction in public access to and along the coastal marine area

Explanation

Although section 6 of the Act requires public access to be maintained and enhanced, some activities in the coastal marine area will result in a restriction of access. Some activities, such as some types of aquaculture, marinas and port operations, may require occupation for safety, commercial security or other reasons…

32. We agree with the Reporting Officer's conclusion that the planning instruments discussed above are, as a whole, relatively consistent insofar as they relate to the requirement to establish functional need such that a weighting exercise is not required.[25]

[21] Proposed Otago Regional Policy Statement, CE-P10.
[22] National Planning Standards 2019.
[23] Otago Regional Plan: Coast, Policy 7.3.2 and 7.3.2.
[24] Otago Regional Plan: Coast, Policy 7.2.2
[25] Section 42A Report, page 41-42.

33. We agree with Mr Cubitt's assessment that the inclusion of the word "*generally"* in the NZCPS indicates that there will be exceptions where it would be appropriate for activities to be established in the CMA despite not having a functional need to be there. The Court in *Forest v Bird New Zealand Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 026 (**East West Link**) noted that the use of the word "generally" in Policy 6(2)(f) of the NZCPS contemplates that there will be deserving exceptions.[26]

34. However, we disagree with Mr Cubitt's assessment that the policy direction in Policy 19 of the NZCPS to maintain and enhance public access to the CMA "threads the needle".[27] While the Supreme Court in *East West Link* found that there may be exceptions to the requirement to establish functional need, it noted that these should only "*exceptionally justify the location of a development in the CMA".*[28] We therefore consider the requirement to establish functional need is more directive than suggested by Mr Cubitt and is not outweighed by the policy direction in Policy 19 regarding the enhancement of public access.

35. Further, we submit that the policy framework described above regarding functional need needs to be given heightened focus given the lack of a more specific objective, policy or rule in relation to the establishment of visitor accommodation the CMA.

Does the Proposal have a Functional Need to be in the Coastal Marine Area?

36. The meaning of 'functional need' is defined in the National Planning Standards 2019 as "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".*[29]

37. The Court in *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 held that the presence of alternative sites did not itself indicate a lack of functional need, and notes that matters such as the cost, distance, terrain and constructability issues of alternative solutions are relevant to the assessment of functional need.[30]

38. However, the Environment Court in *Doig* noted that the convenience of a structure or activity being located in the CMA does not meet the functional need test.[31]

39. Mr Cubitt considers there is a functional and operational need for "accessibility accommodation" to be located in the CMA as it enables the disabled community to

[26] *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency* [2024] NZSC 026 at [112].
[27] Statement of Evidence of Allan Cubitt dated 26 August 2025 at para [70].
[28] *Royal Forest and Bird Protection Society of New Zealand v New Zealand Transport Agency* [2024] NZSC 026 Footnote 279.
[29] National Planning Standards 2019 at 58.
[30] *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 629 at [57]-[58].
[31] *Doig v Marlborough District Council* [2-18] NZEnvC 055 at [38]-[39].

access the CMA, thereby giving effect to the policy direction in the NZCPS relating to public access and open space.[32] However, as there is no condition limiting the use of the proposed visitor accommodation unit for this purpose, and the intention of the Applicant is to enable the use of this accommodation by the general public,[33] we do not consider it would be appropriate to assess the functional need of the Proposal through this lens. A functional need for one single component of the application does not mean there is a functional need for the entire application.

40. Regardless, we submit that the presence of a visitor accommodation and the facilities that it provides to recreational users of the wharf are merely factors of convenience, and not of necessity. Accordingly, applying the case law on functional need above, we submit that there is no functional or operational need for visitor accommodation or "accessible accommodation" to be located in the CMA.

Purpose of Coastal Development Area 5: Taiari Mouth

41. The Site is identified in the Coastal Plan as Coastal Development Area 5: Taiari Mouth (**CDA 5**).[34] The values identified for CDA 5 are fishing facilities and recreational facilities.[35]

42. Unhelpfully, 'Recreational facilities' are not defined in the Coastal Plan. However, the Clutha District Plan defines 'recreational activity' as "*any indoor or outdoor passive or active sports or games or recreational pursuits and/or spectators whether or not they are undertaken for profit or for which no charge is made and shall include such activities on or in water, land or in the air."*[36]

43. Mr Cubitt in his evidence considers that the consenting of a fish and chip commercial takeaway on a neighbouring wharf[37] signals the changing nature of CDA 5 from what was a fishing and recreational activity focus to one that is more enabling commercial of activity.[38]

44. We submit that the consenting of a small-scale fish and chip takeaway in CDA 5 does not alter the underlying purpose of CDA 5 for fishing and recreational facilities, and is therefore not relevant to the assessment of an application to visitor accommodation activity.

45. Schedule 2 of the Coastal Plan requires the values of the relevant CDA to be recognised and be given regard when considering resource consent applications for

[32] Statement of Evidence of Allan Cubitt dated 26 August 2025, at para [41].
[33] Statement of Evidence of Greg Mirams dated 26 August 2025 at para [25].
[34] Otago Regional Plan: Coast, Schedule 2 Section 2.2.
[35] Otago Regional Plan: Coast, Schedule 2 Section 2.2.
[36] Clutha District Plan, section 5: Definitions.
[37] Coastal Permit 2005.728.
[38] Statement of Evidence of Allan Cubitt dated 26 August 2025, at para [19].

that CDA. In our submission, the visitor accommodation component of the Proposal would not be in keeping with the purpose of CDA 5.

Precedent Effects

46. The section 42A Reporting Officer considers that limited weight should be given to precedent effects in the determination of this application.[39] The Reporting Officer makes this conclusion on the basis that there are no permitted activity rules in the Coastal Plan that would enable any person to construct or operate any accommodation facility in the CMA without a resource consent, and therefore any future applications would be subject to its own consenting process. The Reporting Officer also notes that the Otago CMA is divided into several coastal development areas, and the acceptability of this application in this location does not necessarily translate into acceptability in a different coastal development area.

47. We disagree with the Reporting Officer's conclusion on precedent effects. In our submission, as the Proposal is the first of its kind in terms of authorising residential activity in the Otago CMA, there is a genuine risk that the granting of consent would create a precedent for future applications for residential activity in the CMA, both in Otago and on a national scale.

48. We disagree with the Reporting Officer that the classification of the Otago CMA into different coastal development areas means that a separate assessment must be made to determine whether residential visitor accommodation activities are appropriate in light of the purpose identified for each coastal development areas. Residential activity is not identified in any of the coastal development areas as an appropriate or anticipated activity. Accordingly, a finding that residential visitor accommodation activity is appropriate in Coastal Development Area 5: Taiari Mouth will likely set a precedent that this type of activity is also appropriate in the other coastal development areas.

49. The Environment Court in *Doig v Marlborough District Council* [2018] NZEnvC 55 (which related to occupation of an existing boatshed) noted that the issue of precedent effects is more significant when dealing with the CMA.[40] This is to protect the public realm against effective privatisation or undue compromise to public rights of access to the CMA.[41] Accordingly, we consider greater weight can be given to the adverse precedent effects that would arise from the granting of consent for the Proposal compared to that suggested by the Reporting Officer and Mr Cubitt.

[39] Section 42A Report at page 60.
[40] *Doig v Marlborough District Council* [2018] NZEnvC 55 at para [54].
[41] *Doig v Marlborough District Council* [2018] NZEnvC 55 at para [54].

50. The Environment Court in *Doig* found that granting consent for a toilet and shower as part of the boatshed structure in the Marlborough Sounds CMA would pose a precedent risk in terms of undermining the policy intention of the NZCPS regarding the need to establish functional need. Given the strong policy direction to establish functional need in the NZCPS, PORPS and ORPS, we consider that granting consent for the Proposal would undoubtedly create a precedent that residential activities have a functional need to be located in the CMA.

CONCLUSION

51. Ōtākou accepts that the Proposal will have some positive impacts, particularly in relation to the enhancement of access to the CMA for the disabled community of Otago. Ōtākou and Kāi Tahu are supportive of increasing public access to the CMA. However, in our submission the policy direction requiring an activity to have a functional need to be established in the CMA is a strong directive which has not been met in this case (in relation to the visitor accommodation component). The visitor accommodation unit and its facilities are a factor of convenience, rather than necessity.

52. In addition, as set out in the evidence of Mr Ellison, Ōtākou have deep concerns regarding the impacts of the Proposal on Kāi Tahu cultural values. We therefore submit that the Proposal is inconsistent with the policy direction in the PORPS requiring Kāi Tahu values and customary uses to be protected, and the mauri of natural resources to be safeguarded to recognise those values and uses.

53. The Proposal does not recognise the relationship of Māori and their culture and traditions with their ancestral lands and therefore does not achieve section 6(e) of the RMA.

54. Finally, we submit that granting consent for the Proposal will set a negative precedent for future applications for residential type activities in the CMA, both in the Otago region and on a national scale.

55. For the reasons set out above, we submit that consent for the Proposal should be declined.

DATED 5 September 2025

JMG Leckie and L Rolph
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