BEFORE THE COMMISSIONERS APPOINTED ON BEHALF OF OTAGO REGIONAL COUNCIL

Under	The Resource Management Act 1991 (the **Act**)
In the Matter	of an application to alter and extend existing structures and to occupy the common marine and coastal area (RM22.550)
Between	**JANEFIELD ENTERPRISES LIMITED (formerly known as Onumai Enterprises Limited)** **Applicant**
And	**OTAGO REGIONAL COUNCIL** **Respondent**

CLOSING SUBMISSIONS OF COUNSEL ON BEHALF OF JANEFIELD ENTERPRISES LIMITED

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CLOSING SUBMISSIONS

1. These closing submissions address the following:

   (a) Amendments to the proposal.

   (b) Bundling of activities

   (c) Existing environment

   (d) Functional need and differentiating *Doig v Marlborough District Council* [2018] NZEnvC 55 (***Doig***).

   (e) Landscape effects

   (f) Cultural effects

   (g) Section 42A matters

Amendments to the Proposal

2. To ensure clarity regarding the proposal to which these submissions relate we set out the key changes to the proposal, including the conditions now being offered by the Applicant. A copy of the proposed conditions offered by the Applicant are filed with these submissions.

3. The Applicant has formally changed its name on the Companies Register to Janefield Enterprises Limited in acknowledgement of the concerns raised by Mr Ellison and the significance of the name Onumai/Onumia to mana whenua.

4. The Applicant continues to recommend that ‘residential’ is removed from the description of the activity. That is because residential activity denotes a sense of permanence. It is not intended that the facility be

occupied on a permanent basis. Use of the facility by the applicant is still considered to be ‘visitor accommodation’, because it will be short term (no longer than 5 consecutive days). Clarifying text to ensure that payment is not determinative has been added. It is proposed that the description is as follows:

> “To occupy the common marine and coastal area with a wharf, floating pontoon, and multipurpose building for the purpose of visitor accommodation (whether for a tariff or not), recreational, sporting and educational use, and emergency, civil defence and regulatory services use.”

5. The maximum number of nights available for overnight use is proposed to be 180. This condition is offered in response to the concerns about ‘privatisation’ or residential character associated with the use of the facility. Imposing a maximum number of nights per year manages the potential effects of nighttime domestication. It ensures that the facility will be vacant over 50% of the time. This combined with the above condition imposing a maximum number of consecutive nights per stay will ensure that use is variable.

6. The Applicant proposes an additional condition that ensures that no more than 60 nights are utilised by a party that does not have a member with a disability. The purpose of this condition is to ensure there is a predominance of use associated with facilitating disabled access to the coast. And to ensure that the benefits associated with that are realised. Associated reporting conditions are also offered. The Applicant’s preference is to retain the ability to host some non-disabled groups to support the financial viability of the facility, particularly in the initial years while the facility establishes itself as a well-known option within the disability community.

7. The Applicant will no longer install a gate along the access ramp. Whilst the gate was not to be locked and signage confirming public

access to wharf would be installed it was clear that submitters considered this to be an issue. To address that the Applicant will establish an alternative method to address the safety risk associated with the ramp for wheelchair users. Signage communicating the public access to the wharf continues to be part of the proposal.

8. The proposed building will be relocatable to ensure that in the event the feasibility of the project is undermined, the building can be easily removed, reversing the effect of the occupation of the CMA by the structure.

9. The proposed condition associated with dark sky lighting has been amended so that only dark sky approved luminaries are utilised. This avoids the need to specify the standards, whilst ensuring that lighting that minimises effects is installed.

10. Additional paragraphs have been added to the conditions associated with reverse sensitivity, and communicating the potential effects of surrounding uses on guests.

11. The proposed donation of 3% of income remains. Some of the submitters raised concerns about this and whether it relied on the facilities being ‘profitable’. The condition was deliberately drafted to ensure that the donation was generated relative to income received, not profit taken. Therefore, it forms part of the cost of running the facility and does not rely on the Applicant generating a profit.

If the Panel is not minded to grant consent for the application as proposed

12. If the Panel is not minded to grant consent for overnight use of the facility by people without disabilities it is open to the Panel to impose conditions of consent which limit visitor accommodation use to people with disabilities. It is not the Applicant’s preference for the reasons set

out in evidence and discussed during the hearing, but it is a decision available to the panel.

13. Equally, if the Panel is not minded to grant consent for visitor accommodation, it would be within scope to grant consent for a recreational facility, including the multipurpose building.

14. This would be more akin to the Vauxhall Boat Club and would enable day use to occur. That would at least still provide some opportunity for disability access to be provided addressing the range of barriers and issues discussed by Mr Marrable, Ms Barkman and Ms Grant. Although it would not allow the wider range of passive recreation benefits to accrue, particularly for the disability community who have so very few options available to overnight in, or even near to the CMA.

15. Counsel further notes the evidence of Ms Grant regarding the likely preferences regarding day use compared to overnight use. A facility only available for day-use may not be as attractive for people and therefore may not accrue that same benefits in terms of enhanced access to the coast and associated economic benefits. Particularly given that there would remain no accessible overnight accommodation facilities within Taieri Mouth.

Bundling of activities

16. Counsel for Te Rūnanga briefly commented on a perceived overlap between the application and consents that have not been applied for.

17. Mr Leckie cited *Bayley v Manukau City Council* (1998) 4 ELRNZ 461 to support the notion 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.

18. Whilst we agree that case supports the position, we do not agree that it is relevant to the application in this case.

19. *Bayley* dealt with a notification decision in relation to three overlapping land use consents relating to residential activity, boundary setbacks and access requirements. The first was a controlled activity and the latter two were restricted discretionary. All related to the same residential development. In deciding not to notify in relation to non-compliance with a yard setback requirement, the Court considered that the Council had artificially separated the activities for which consent was provided for.

20. By contrast, in this case a coastal permit has been applied for in relation to all the relevant and necessary coastal activities.

21. Te Rūnanga states that further piling may be required. At the present time the Applicant does not consider that will be necessary (and that is certainly their preference) – hence no application is made.

22. Equally, Te Rūnanga argues that earthworks may be required on the landward side of the facility. Those earthworks are not required unless consent is obtained for the proposal and the effects are very discrete. If the coastal permit is obtained, then the Applicant will apply for consent for the relevant earthworks following detailed design and construction planning (if consent is required). The earthworks are also dealt with under the Regional Plan: Water, which is a different regulatory document.

23. These are not artificial separations of the relevant activities, they are processed based approaches to a construction project as is required for any similar facility.

24. The application can be differentiated from *Bayley* where three activities required a land use consent under one regulatory plan for what was all

materially the same activity. In that case there could not have been a development without providing access and meeting relevant setbacks. That is not the case here.

Existing Environment

25. It is important to recall what the existing consent provides for, particularly with respect to public access to the existing wharf. The existing consent does not require the wharf to be maintained as open to the public. The recommending report associated within the existing consent specifically recorded that the wharf would restrict access along the foreshore.

26. A number of the submitters argued that the proposed consent offered no benefit in this regard – with respect they (and Ms Annan) have misunderstood the existing consent.

27. To that extent the proposal offers an improvement to public access due to the proposed conditions for access to the wharf and use of the crane via a QR code link to the website where a crane user can register. Therefore, the extent of the CMA that the public can access will be increased and enhanced.

28. The multi-purpose facilities within the building will also be available to the public, albeit via a booking platform. At least 6 days will be made available free of charge for community organisations. It is clear from the letters of support included with the application that there are numerous organisations across multiple sectors (government agencies, education, disability) who consider the availability of the facility to be a significant benefit and who would want to use it.

29. The proposed conditions (maximum number of days and maximum length of stay) do not enable the facility to be ‘converted’ to residential

activity, which would allow the consent holder to occupy the building permanently and to the exclusion of others indefinitely.

30. 'Private' is defined as "belonging to or for the use of one particular person or group of people only". This facility, whilst belonging to one 'person', will be available for the use by all people through the booking system. In that sense it is analogous to a hut along a great walk. Those huts are 'public', but only those who have booked and paid to stay in them are entitled to utilise them on any particular night.

31. Nor is the presence of a 'charge' determinative of privatisation. For example, public facilities such as museums and art galleries often impose a charge. The purpose of which being to cover the cost of the provision of these services. That is the case here.

32. It is respectfully submitted that the concerns about 'privatisation' are being overstated. It is a perception, without genuine interrogation of the proposal and what it offers. Relative to the exclusive occupation afforded to commercial fishing uses, the proposed occupation is at pains to be inclusive – to open the wharf, and the facilities for use by a wide range of people. That is even more compelling now that the applicant has offered not to install a gate. Any visual 'impediment' to accessing the wharf is now gone.

Functional need and differentiating *Doig*

33. It is submitted that whilst the *Doig* decision grapples with similar issues it is distinguishable on its facts. In that case the Applicant did not ultimately argue that the toilet and shower at issue had a functional need. Equally, it was apparent on the facts of that case they did not. The boatshed in that instance was located in a remote location and entirely constructed to serve the private interests of the Applicant. There was no suggestion or offer that the facilities would be available for use by the public. The Applicant in that case had facilities available

within their landward residence nearby. The boatshed was unremarkable (in a regulatory sense) in that it was not located in an area identified for development and as such would be difficult to distinguish from the many other boatsheds in similar circumstances within the Marlborough Sounds.

34. Further the proposed plan in that case included specific avoid policy direction associated with sanitary facilities in boatsheds. The Court noted the following in relation to the policy regime in that case:

> …(a) Objective 9.2.1.1 provides for:
>
> the accommodation of appropriate activities in the coastal marine area whilst avoiding remedying or mitigating the adverse effects of those activities.
>
> (b) Policy 9.2.1.1.3 provides for:
>
> exclusive occupation of the coastal marine area or occupation which effectively excludes the public will only be allowed to the extent reasonably necessary to carry out the activity.
>
> [21] The pEMP is in the early stages of its statutory preparation processes and, as such, we accord it relatively less weight than the NZCPS and Sounds Plan. However, we have had regard to its relatively more prescriptive policies for, inter alia, boatsheds. That includes its proposed Policy 13.10.21 that "the installation of sanitary plumbing within or as part of the boatshed must be avoided''. While it can be anticipated that the pEMP could well be changed through the public hearings or appeal stages, that policy can be regarded as a coherent expression of the policy direction now sought to be taken by the Council as the body which has the RMA function of proposing and administering it. Having said that, we record that our decision does not depend or turn on the provisions of the pEMP. Rather, on the evidence and in light of the directions given by the NZCPS and Sounds Plan and our evidential findings, we are overwhelmingly of the view that there should be no

> toilet and shower facilities in the boatshed. We explain why in the balance of this decision. ...

35. It is submitted that the Court's analysis in *SKP Inc v Auckland Council* [2018] NZEnvC 81 is more relevant to the current circumstances, and in light of the evidence of Mr Marrable, Mrs Grant and Mrs Barkman.

36. *SKP* was an appeal against a decision of Auckland Council to grant consent for the construction, operation and maintenance of a 186-berth marina and associated facilities in Kennedy Point Bay on Waiheke Island. The proposal included a floating access and carparking pontoon, a marina office, viewing deck and storage and launching facilities for kayaks and SUPs. There were also public grey and black water pump out and temporary storage facilities. The Court granted consent subject to conditions.

37. The decision is notable for its contrasting approach to *Doig*, in particular relating to its analysis of functional and operational need, with the lack of the former not necessarily being fatal to the proposal.

38. In that case the Court found (in relation to functional and operational need) as follows:

> ***Functional and operational need to be in the CMA***
>
> [256] The planners in their joint witness conferencing had no difficulty in agreeing that there is a functional need for a boat marina to be located in the CMA, as held by this Court in the *Matiatia Marina* decision. A question however arises from the joint witness session, and in our minds, as to whether there is a functional need to locate the floating carparking deck, and multi-use utility building and deck, within the CMA. ...
>
> [269] We consider that Mr Wren sensibly acknowledges the practicality that "a certain number of people accessing their boats will come by car

especially if they are transporting luggage and supplies for longer boat trips". In the circumstances of this marina and the search for land-based areas which was not successful, we accept that there is at very least an operational need for the marina to have a carpark on a floating deck in the CMA, and arguably a functional need. The solution is also, incidentally, less obtrusive visually than a reclamation or a fixed carpark on piles over the CMA as were amongst the options explored at *Matiatia*.

[270] We also find it easy to accept Mr Wren's opinion that a floating office is "similar to the carpark in that it is required for the marina and can't be located elsewhere". Even more importantly than administration, the provision of security functions from a marina office actually drives the need in the direction of a functional one.

[271] As to the community building, we are prepared to find an operational need, perhaps verging on a functional need, in that offers public benefit providing additional opportunities for the public to interact with the water.

[272] We hold that the proposal for the carpark and the other described facilities, is consistent with Policy 6(2)(d) of the NZCPS and the subsidiary instruments discussed.

[273] We do not disagree with the findings of the hearing commissioners that it might also be impracticable and unnecessary to separate the components out from being part of the overall marina. ...

[276] We find favour with the approach taken by Mr Allan on behalf of the Council, in which he invites us to distinguish the *Matiatia* findings. He first submits that the newly "minted" AUP contains specific provisions which give effect to the NZCPS, representing a carefully considered approach to achieve the NZCPS objectives and policies, and articulating when activities that do not have a functional need to be in the CMA can locate their (noting again the word "generally" used in Policy 6 of the NZCPS). ...

> [289] We have found that the marina will offer a variety of positive effects for people and communities, in particular providing new access to the CMA for recreational purposes, and also on the physical environment.
>
> [290] We have found that the proposal adequately serves the higher order and regional policy frameworks and specific regional plan objectives and policies.

39. We draw the Panel's attention in particular to the operational need (verging on functional need) associated with offering public benefit by providing additional opportunities for the public to interact with the water. Further, this was considered consistent with Policy 6(2)(d) of the NZCPS.

40. It is submitted that the Applicant has offered uncontested evidence about the needs of disabled people accessing the Coastal Marine Area, the barriers that they currently face and how the proposed facility would allow many of those to be overcome. Many of the submitters recognise this and the public and personal benefits associated with enabling disabled people improved access, including Te Rūnanga.

41. It is submitted that the need for the facilities to enhance access to the coast (a matter of national importance) has a demonstrable functional need. This is both in terms of enabling disabled access, but also in providing additional opportunities for the public to interact with the CMA. However, if the Commission disagree it is submitted that the multipurpose facility has an operational need, provides a public benefit and support recreational activity which satisfies the Policy 6(2)(d) and PORPS Policy CE-P10 limbs.

42. In this regard it is important to emphasise Policy CE-P10. We differ from Mr Leckie in our opinion on the weight to the afforded to that policy in your decision, as set out in opening submissions. Whilst that policy is under appeal, the appeals only relate to clause CE-P10(3).

Those appeals are from Environmental Defence Society and Forest and Bird, and the relief only extend to deleting ‘operational need’ from the clause. Kai Tahu’s appeal does not specifically appeal any aspect of CE-P10.

43. Therefore, it is submitted that weight can be given to that provision, as it represents a policy change from the ORPS with respect to the strict ‘avoid’ direction for activities without a functional need. CE-P10 is directive in that the chapeau provides a ‘must’ direction, but the subsequent clauses (2), (3) and (4) are disjunctive (on that we do agree with Mr Leckie). That aspect of CE-P10 is not up for grabs on appeal. Nor is CE-P10(4) which does not require a functional need but requires use and development of the CMA to have a public benefit or opportunity for public recreation that cannot practicably be located outside the coastal marine area.

44. It is submitted that the activities supported by this proposal – the active recreation, passive recreation and access to the water cannot practicably locate outside the coastal marine area and there are clear public benefits associated with the provision of this. Those benefits accrue for disabled and non-disabled people.

45. It is submitted that having overcome those limbs, whether the facility can be utilised by non-disabled people is an effects matter.

46. It is further consistent with Policy 6(2)(e)(i) of the NZCPS to enable this multi-use. The facility would exist, the policy direction encourages efficient use through a requirement that structures be made available for public or multiple use wherever reasonable and practicable. It is submitted the proposal achieves both aspects of this through retention of public access to the wharf, provision of the online registration for use of the hoist and utilisation of the building facility for accommodation, events and emergency services.

East West Link

47. We note a question during the hearing from Commissioner Day-Cleavin to Mr Leckie regarding whether there was any guidance to be given relating to *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 (***East West Link***).

What is a 'deserving exception'?

48. In *East West Link* the Supreme Court accepted, in the context of Policy 11 of the NZCPS, that despite the policy being rule like and containing "something in the nature of a bottom line", there was still room for "deserving exceptions that do not subvert the policy's purpose. In short, wriggle room is built into the policy layers of the system".

49. The Supreme Court further noted that the policy was designed to avoid adverse effects, it was not intended to produce perverse outcomes in pursuit of that high level purpose.[1]

50. The Supreme Court said that exceptions like these are necessary for the broad language of these policies to work as intended in the innumerable places and circumstances to which they must be applied, and without producing outcomes plainly at odds with Part 2.[2]

51. We take this to mean that a deserving exception will arise in situations in which a rigid application of a directive policy results in an outcome that does not achieve sustainable management nor other aspects of Part 2.

[1] At [105].
[2] At [105].

52. This would be the case if consent were declined in this instance. Policy 6(2)(d) sits in a policy that relates to appropriate use of the coastal marine area, public access and efficient uses of the coast.

53. On the evidence the proposal clearly improves public access to the coast and improves the public's opportunities for recreation. The evidence demonstrates that the multipurpose facility needs to be in this location. If rigid adherence to a directive policy (e.g. Policy 5.4.9 of the operative RPS) meant that the proposal was declined, we submit that this would produce a perverse outcome and not achieve sustainable management, particularly with respect to matters at issue in section 6.

Is the policy regime directive here?

54. Policy 11 of the NZCPS is strongly worded and directs that relevant adverse effects on indigenous biodiversity "must be avoided".

55. We note that contrasts with Policy 6(2)(d), which is merely to recognise that activities without a functional need 'generally' should not locate in the CMA.

56. The policy regime in this case is not in the same league of directiveness as in *East West Link*. Policy 6 and the Regional Plan: Coast use terms including "recognise", "generally" and "have regard to".

57. CE-P10 uses "must" but provides a range of options by which to meet that criteria. Functional or operational need is only one of the ways by which that policy can be met. A proposal with public benefit and multiple purposes can discharge the policy, and we think those criteria are clearly met by the Janefield proposal.

58. The one directive policy in the regime is Policy 5.4.9. As noted in previous submissions, we think that policy should not be afforded

significant weight given the change in council policy, the progress of the proposed policy statement through the Schedule 1 process and the other policies in this framework.

59. As set out in opening submissions, Policy 5.4.9 is inconsistent with the NZCPS, in particular policy 6.

60. To the extent that policy is directive, we consider that the proposal in is a deserving exception to these policies and threads the needle to the less directive policy regime in this circumstance. Otherwise a perverse outcome will result in terms of Part 2.

Landscape issues

61. Whilst the analysis of the landscape experts differs somewhat, it is important to highlight what they do agree on. Ultimately that the effects on natural character, landscape and visual amenity of the proposal will be minor to less than minor.

Cultural effects

62. Mr Ellison's evidence discussed the effect of the proposed structure and activity on the experience of those utilising the CMA. He noted the possibility that it may create a further sense of detachment.

63. Conditions have been proposed to help address this potential effect. These include the limitation on usage and consecutive days of stay. It will mean that people are not present all of the time, and that overnight use is interspersed with times of no use.

64. It is submitted that ultimately the effects being discussed by Mr Ellison relate to perceptual effects – how people perceive the environment when they are in it. In that regard, the nature of the existing environment (particularly the presence of the existing structures that

exclude access) and the policy framework associated with the CDA are important considerations.

65. Mr Leckie, on behalf of Te Rūnanga did acknowledge the benefits associated with the proposal in enabling disability access. Ms Barkman also discussed the fact that rates of disability within Māori communities (~20%) is higher than the general population. Therefore, the facility is highly likely to provide direct benefits to members of the local Māori community who fall into this category. There is no reason to suggest that those people do not experience the same feelings of frustration and loss of opportunity as the wider disabled community. In that sense the facility provides an opportunity for these people to reconnect with a culturally important part of the environment. It may enhance cultural connections for those people, and their families (who are likely to be affected in a similar way as that articulated by Mr Barkman and Mr Marrable).

66. The proposal represents an opportunity to provide important, dignified access to the CMA for a sector of the community that is been demonstrably excluded, or whose only ability to connect with this environment requires them to suffer the personal (mana diminishing) indignity of being man handled over sand, or from their wheelchairs.

67. The very small encroachment into the CMA, seems a small price to pay to generate the significant and dignity enhancing opportunities described by Mr Marrable, Ms Grant and Mr and Ms Barkman.

Precedent effects

68. Much has been made of the potential precedent effect. Precedent is an ‘other matter’ to be considered under section 104(1)(c). The starting point is that each application needs to be assessed on its own merits. Decisions on an application for resource consent do not, in and of themselves establish a precedent. Particularly those for a discretionary

activity for which all matters are relevant, and for which consent may be granted or declined.

69. The issue of precedent was discussed in *Doig.* The Court noted at [54]:

> Starting with the legal position, as Ms Steven noted, potential precedent effects can be relevant for a discretionary activity. We find that the issue is more significant when dealing with the coastal marine area. That is in light of the position we have already noted concerning the priority accorded by both the RMA and the NZCPS and Sounds Plan to protection of the public realm against effective privatisation or undue compromise of public rights of access and enjoyment by, for example occupation and use of structure for a private benefit.

70. The Court concluded with respect to the Boatshed in *Doig* that:

> There are no distinguishing qualities or features of this application that make it markedly different from other boatshed in the vicinity. …
>
> We acknowledge there would be private benefit and convenience to the appellant in the boatshed retaining its toilet and shower facilities.

71. It is submitted that this proposal is fundamentally different. As set out in opening submissions there are numerous aspects of the proposal that are unique and that either can't be replicated or would not need to be replicated because this facility already exists.

72. As outlined by the witnesses Mr Marrable, Ms Grant and Ms Barkman there are a range of important public benefits that will accrue as a result of the proposal. That evidence was further reinforced by Mr Barkman’s submission and recounting of his experience in supporting Sally. Additional evidence regarding these public benefits comes from

the letters of support from the Ministry of Fisheries, Taieri College, Parafed Otago, and Otago Regional Council Harbourmaster.

73. Finally – the proposal actually supports public access to the CMA. It makes the wharf publicly accessible, provides an all-tide water access facility and facilitates access to the CMA.

74. The proposal in *Doig* offered none of these public benefits, and none of the unique features of this proposal.

Section 42A report

75. Ms McDonald noted some concern about whether it was critical whether the existing containers were incorporated into the building. It is submitted that it is not. The relevant rule does not distinguish between the wharf and the structures that may be on top of it. Rules 8.5.2.5 simply deals with any extension or alteration of an existing structure.

76. Whether the building incorporates the existing shed and container is not determinative – if they are removed and a new building established it is submitted that this is still an extension and alteration of the existing structure. The outcome will be the same, and in accordance with the effects of the activities proposed.

Policy 19 - "free of charge".

77. Ms McDonald highlighted this aspect of Policy 19. It is noted that access to the wharf itself, and utilisation of the hoist is proposed to be free of charge and as we have noted elsewhere enhances public access. It is only access to the building (excluding the 6 community days) where a charge is proposed. The reason for that is obvious and does not undermine the obvious benefit that comes from the wharf and hoist access, or the use of the all-tide access facilities.

78. Policy 19 is geared towards walking access, which is improved by the access to the wharf. We note previous submissions as to ‘walking access’ being inclusive of people with disabilities.

79. Once again, the letters of support confirm that there are a wide range of public uses that the proposal will support.

Dated 18 September 2025

Bridget Irving / Gus Griffin

Counsel for Janefield Enterprises Limited