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Adaptation to Sea-Level Rise: Local Government Liability Issues

**Research Report for the Deep South National
Science Challenge**

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Deep South National Science Challenge
Final Report, July 2019

Title	Adaptation to Sea-Level Rise: Local Government Liability Issues
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Acknowledgements

This research was funded by the Deep South National Science Challenge through a research contract with Victoria University of Wellington.

Thanks are due to the research assistants who were funded through this research contract to work on different aspects of this report. In alphabetical order they are: Matthew Dicken, Nicolaas Platje, and Jesse Watts. Jesse's extensive work on it is recognised with co-authorship.

Thanks are also due to those who helpfully provided feedback on the draft report: Blair Dickie (Waikato Regional Council), Mark Johnson, Dan Zwartz and Harriet Cruden (Ministry for the Environment), Karen Bell and Sasha Smith (Department of Conservation). Note that none of these individuals nor their organisations are responsible for the information in this paper. Every effort has been made to ensure the soundness and accuracy of the opinions and information expressed in this report. While we consider statements in the report are correct, no liability is accepted for any incorrect statement or information.

Recommended citation

Iorns Magallanes, CJ & J Watts, *Adaptation to Sea-Level Rise: Local Government Liability Issues* (Deep South National Science Challenge, Wellington, 2019). 234 pp.

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Executive Summary

This paper addresses the legal frameworks and rules about what local and regional councils in New Zealand can and cannot do to adapt to the coastal hazards associated with sea-level rise and climate change. The focus is on what councils might be liable for in respect of housing affected by coastal hazards. It is part of a Deep South National Science Challenge program on Impacts and Implications for residential housing that is now – and in the future will increasingly be – subject to such coastal hazards. Its focus is limited to adaptation measures for residential housing; it does not address infrastructure nor commercial building or activities.

It does not address the issue of what a council should be doing – such as whether it should be buying land for managed retreat from the coast, building sea walls or whether it should be letting residents bear such costs themselves. It does not address central government or other compensation mechanisms; they are the subject of other reports.¹ Neither does it address the particular interests of Māori that are protected under the RMA, nor Treaty obligations of the Crown that might be relevant to climate adaptation; these matters are the subject of a separate report.²

The first three chapters address background matters: an introduction and summary of the issues of residential development in coastal areas that will be subject to increased risks of flooding and likely storm damage from climate change; the types of legal instruments usually used in order to adopt climate adaptation measures and the difficulties with adopting those in New Zealand; an outline of the structure and provisions of the Resource Management Act relevant to decision-making on climate adaptation measures; and some general considerations of principle, including coastal hazards guidance from central government.

The second Part of the paper addresses specific tools that will be required to implement climate adaptation: prevention of new development or placing conditions on it, coastal protection works, and managed retreat of residences from future coastal hazard areas.

¹ Catherine Iorns, *Case Studies on Compensation after Natural Disasters* (Deep South National Science Challenge, Working Paper, September 2018); Vanessa James, Catherine Iorns and Jesse Watts, *The Extent of EQC's liability for damage associated with sea-level rise* (Deep South National Science Challenge, Research Report, June 2019).

² Catherine Iorns, *Treaty of Waitangi duties relating to adaptation to coastal hazards from sea-level rise* (Deep South National Science Challenge, Research Report, June 2019). RMA protections include the protection of their relationships with their lands, waters, wāhi tapu and other taonga under s 6(e) of the RMA, or requirements in relation to Māori participation in decision-making such as Schedule 1 participation in the making of Plans.

The final Part of the paper addresses the use of information instruments in order to provide relevant coastal hazard information to current and future homeowners, and then liability in negligence for council consenting decisions.

The paper is not designed to provide a legal opinion on the points discussed but to illustrate where liability may fall for loss and damage from coastal hazards, and for the decisions made in adapting to climate change hazard risks. It also identifies barriers and enablers to the adoption of adaptation measures. While this identification was not the initial aim of the report, it quickly became clear that councils do not have all the tools necessary to effectively adapt housing to coastal hazard risks, yet also that there are some potential tools that are not being used. We thus thought it worthwhile to identify these, including where central government could assist such as through legislative amendment or relevant guidance. The aim is not to recommend what should be done but to assist discussion on whether the law is adequate to enable councils to do what they will need to do in order to adapt to the coastal hazards associated with climate change to the extent necessary for residential housing. While only some of this material on barriers and enablers is concerned with liability, it is all an essential aspect of achieving the bigger goal of effective adaptation.

Summary of findings:

Overall, the current planning paradigm is unsuited to dealing with the problems posed by existing use rights in hazardous areas. As a result, any effective policy for addressing existing use rights is likely to require new legal measures to be established. One such example is the Australian recommendation for the use of flexible regulatory instruments for new and existing development (Ch 1, Box 1). Under the current system of devolved planning, paired with broad guidelines rather than prescriptive rules, councils find it difficult to adopt these. Reasons for this include the political pressures faced by local governments, the lack of resourcing, a system based on fixed instruments, and the actual and perceived fear of legal liability. For these reasons, greater direction is required from higher levels of government, even if this breaches the principle of subsidiarity. The system needs to be inverted: rather than flexible policy statements, we need firm directives from central government about the content of consents – that the content of consents needs to be flexible rather than fixed. Furthermore, we need flexible instruments to apply to existing developments, in addition to information instruments.

With respect to new development, the problem is not so much about finding new policy solutions, as it is about getting – likely assisting – local government to implement restrictions. It

is difficult to do this where responsibility for plan-making is fragmented between regional and territorial authorities, and where there are practical obstacles to adopting measures that impose costs on current ratepayers in favour of future ratepayers. In contrast, the problem with respect to existing development is more complicated, and will likely require new legal tools.

Another key finding is that central government ought to cover a greater share of the costs of information creation and dissemination because of the clear resource constraints upon local government.

Additional guidance is needed on precise mechanisms for adaptation such as the use of activity status (Ch 4), consent conditions (Ch 5), and on hazard information provision on LIMs (Ch 8).

Some amendments are suggested to better enable the adoption of adaptation policies:

- Amendment of s 32 RMA to provide an explicit direction to apply the precautionary principle, and to consider altering the "most appropriate" standard for evaluating activity status.
- Amendment of s 128 RMA to better enable review of consent conditions.
- Greater clarity on potential council liability and/or on their obligations, whether in relation to the use of consent conditions, or via a liability shield akin to that in the Building Act 2004.
- Clarify compensation for the extinguishment of existing use rights in the adaptation context.
- A more fundamental rethink could be undertaken of the protections given to existing use rights and of compensation for their impairment and extinguishment .

Other amendments are needed including in relation to Building Act 2004 provisions and standards relating to natural hazards.

Further research is recommended on mechanisms for managed retreat (such as the use of consent conditions, and of s 85 plan changes and challenges and compensation), on the meaning of "significant risks" in s 6, and on liability under the Building Act 2004.

A. In respect of new development:

1. There is a range of tools that councils can use to prevent new development in hazardous coastal areas. The New Zealand Coastal Policy Statement 2010 (NZCPS) requires councils to avoid increasing the risk from hazards and suggests a number of mechanisms to achieve

that. The Department of Conservation and Ministry for the Environment both provided more detailed guidelines in 2017;³ they, in conjunction with recent case law (such as *King Salmon* and *Davidson*), will likely render obsolete existing case law that is based on the older guidelines. (Ch 2 & Ch 3)

2. The NZCPS has not led to a consistent approach in the Court for all aspects of new development; it is unclear to what extent the 2017 guidance from MfE and DoC will fix this. Issues to be resolved include: (Ch 4)
 - whether Policy 25 and Objective 5 disallow new development from occurring which would create new hazards;
 - whether Policy 25 and Objective 5 disallow an approach founded upon the “voluntary assumption of risk”;
 - Whether managed retreat can be planned for when allowing new development (eg, subject to conditions for relocating buildings when coastal hazard trigger points are reached), or whether this can only apply to existing development.
3. Section 106 of the RMA can be used to prevent hazardous development otherwise allowed as a matter of right under a plan. (Ch 4.4)
 - It can be used to decline a consent on the basis of material damage or unsafe access, without having to undertake the broader evaluations under s104 and Part 2.
 - The use of esplanade reserves as a buffer can be declined as a mitigating condition when a “material” portion of the new lot will inevitably disappear due to coastal hazards. The inevitable loss of a proposed esplanade reserve amounts to “material damage” and can be declined under section 106.
4. Councils have a wide discretion to decline new development for safety of access reasons. While a proposed building can be protected from flooding, public access to the property cannot so readily be protected, and persons may be at risk moving during a flood. (Ch 4.4)
5. Beyond the core Part 2 requirements pertaining to climate change and natural hazards, the Environment Court has been particularly concerned with the inefficiency (ie costs vs benefits) caused by new development being allowed in hazardous areas, especially when

³ Ministry for the Environment, *Coastal hazards and climate change: Guidance for local government* (ME 1341, December 2017); Department of Conservation, *NZCPS 2010 guidance note: Coastal Hazards* (December 2017).

the new development is likely to require expensive maintenance of public access ways for the benefit of a few property owners. (Ch 4.4)

6. In the past, the Environment Court appears to have applied a proportionality calculus when applying the precautionary principle, wherein large/expensive developments are disallowed on the basis that uncertain but plausible threats ought to be taken more seriously (eg, using upper estimates for sea-level rise). The logical corollary of this is that small-scale development is more likely to be allowed with mitigation conditions, but a large development with the same conditions would not. The MfE *Guidance* may entail that a slightly different and stricter approach to development be taken in future cases.
7. The precautionary principle applied in *Sustain Our Sounds* to biodiversity can be similarly applied to residential development (*Gallagher*).
8. Prohibited activity status may be used by councils to prevent new development in coastal hazard areas but it must be assessed as the most appropriate option and cannot be achieved by other means. (This may benefit from legislative amendment.) (Ch 4.2)
9. Where noncomplying activity status has been used for residential uses in a coastal area subject to future inundation, some residential uses have been approved on the basis of voluntary assumption of risk (with appropriate conditions). This depended on there being a policy under the regional and district plan which stressed that risk could be assumed. This may not be possible once all plans have been updated to reflect the NZCPS 2010. (Ch 4.3)
10. Subdivision applications may be prevented by RMA s.106 considerations: a significant risk from natural hazards, applying not just to the buildings but also to roads and other subdivision infrastructure, where such hazards might prevent access to residences. (Ch 4.4)
11. Consent conditions can be used to mitigate future harms. Any relocation conditions must be very carefully thought out, including all practical matters of conducting any eventual relocation, and councils should consider the use of bonds to enforce them. (Ch 5)
12. Liability shields and non-complaint covenants have not been used post the 2010 NZCPS. This may be an area for reform in order to provide councils with greater clarity on their potential liability and/or obligations, eg in relation to coastal protection works. (Ch 5.4)
13. NZ courts have held that there is no liability in negligence under the RMA for failing to decline a resource consent, even if a decision-maker knows or ought to have known about a natural hazard affecting the property. (Ch 9)

14. Liability for negligence under the Building Act is possible for the granting of consents which are exposed to natural hazards, if a plaintiff can show that these hazards were negligently inspected, leading to the issuance of a consent (*Smaill*). Such hazards under the Building Act include coastal erosion and inundation. (Ch 9)

B. In respect of coastal protection works (CPW):

15. There is no existing obligation under the common law or prerogative to erect coastal protection works, because these have been superseded by statute. Even if they hadn't been superseded, erection of CPW would still need to be in the public interest. (Ch 6.3)
16. There is no obligation in statute – specifically, the Soil Conservation & Rivers Control Act – which can be used to force a council into erecting CPW. (Ch 6.3)
17. The Environment Court cannot order a council to erect CPW, or undertake an alternative type of CPW, as this would amount to dictating expenditure. (Ch 6.4)
18. A council cannot be liable in negligence for failing to erect CPW. (Ch 6.4)
19. An action in negligence against a council is possible in respect of a duty to maintain flood and coastal hazard protection works. That duty of care may be owed to ratepayers who are protected by such works. However, the issue is likely to turn on proof of causation of the damage: whether the flood was due to a breach of duty or it would have happened anyway, perhaps because of the size of the natural hazard event (e.g. amount of rain or strength of storm). (Ch 6.5)
20. There is (currently) no duty to disclose via a LIM any policy proposals, including for the disestablishment of CPW. (Ch. 8.2)
21. Private CPW can be disestablished under a regional plan. (Ch 6.3)
22. Hard protection structures are not entirely foreclosed by Policy 27 of the NZCPS.
23. CPW have been allowed to protect existing assets, especially when these were lawfully established in a prior era, and/or when existing CPW has already changed the coastal environment. (Ch 6.4)
24. However, the Environment Court will not allow new development to include CPW, even if privately funded, for fear that this will create an expectation that local government ought to 'do something', such as to maintain it in the future. (Ch 6.4)

C. In respect of existing uses:

25. LIMs could provide a useful function as information instruments about coastal hazards faced by existing properties. (Chapter 8)
 - Coastal hazard information does not need to be site specific;
 - Councils have a broad discretion over how to present coastal hazard information, as long as it is accurate;
 - Liability in negligence for the content of information in a LIM is possible but may not be upheld due to difficulties in proof of causation of loss.
26. The Resource Management Act tends to grant land use consents in perpetuity and in this respect allocates rights resembling private property rights. It contains strong protections for existing use rights and therefore is ill-suited to pursuing a policy of managed retreat. (Ch 7)
27. Two possible means of altering or even extinguishing existing residential use rights (section 20A and section 128) have not been directly tested by the courts. An argument based on section 20A is being attempted in the Matatā case, which is expected to go before a panel of independent commissioners. It may determine that residential use rights can be removed via a regional plan. It is possible that the removal of residential use rights will be deemed as rendering the land “incapable of reasonable use” under section 85 and thus attract compensation. (Ch 7.1)
28. Section 85 applications for compensation have been rare (and have rarely succeeded in the past) but are more likely to occur in the future if actions are taken to remove existing residential use rights. The expanded range of remedies now available under section 85 – as a result of the 2017 amendment – is likely to increase the number of claims. (Ch 2.6)
29. In the case of any government acquisition of individual property, the Court will carefully scrutinise any voluntary offers made; any distinction between recipients will need to have a firm empirical basis (*Quake Outcasts*). (Ch 7.4)
30. While the likelihood of local authorities facing successful claims in negligence is very low, even a fear of legal liability can exert a chilling effect upon local authorities. Some sort of liability shield could be investigated in order to achieve better coastal climate adaptation.

Introduction

This report addresses the legal framework surrounding responsibilities on local government in New Zealand to adapt to the coastal hazards associated with the sea-level rise from climate change. It arose from a dialogue between researchers, the insurance sector and local and central government that was conducted as part of the Deep South National Science Challenge program on Impacts and Implications of climate change.⁴ Of particular concern was the range of possible options available to local, regional and national government to adapt to climate change, and who might be responsible for costs, particularly for residential housing that was now – and in the future would increasingly be – subject to such coastal hazards. This was seen as of particular importance in light of the likely uninsurability of some coastal properties due to the increasing coastal hazards faced from sea-level rise and climate change.

The focus of this report is on liabilities of local government. This report has not limited its focus to what local government might do only about uninsurable housing, but has addressed adaptation liabilities in relation to all housing. As the researchers have a legal background, the focus is on the legal frameworks and rules about what the councils can and cannot do, including climate adaptation measures to be taken before it gets to the stage of damage from climate hazards. Adaptation options are fully explained before identifying where liabilities may fall.

As the research progressed it quickly became clear that councils do not have all the tools necessary to effectively adapt housing to coastal hazard risks, yet also that there are some potential tools that are not being used. We thus thought it worthwhile to identify these, including where central government could assist such as through legislative amendment or relevant guidance. The aim is *not* to recommend what *should* be done but to assist discussion on whether the law is adequate to enable councils to do what they will need to do in order to adapt to the coastal hazards associated with climate change to the extent necessary for residential housing. While only some of this material on barriers and enablers is concerned with liability, it is all an essential aspect of achieving the bigger goal of effective adaptation.

There is a lot of leeway in choice of approaches to deal with hazard risks, including from sea-level rise, and a range of approaches have already been taken by local and regional councils in New Zealand. For example, the Northland Regional Council is reportedly letting the sea gradually

⁴ Belinda Storey and others, *Insurance, Housing And Climate Adaptation: Current Knowledge And Future Research*, (Motu Economic and Public Policy Research, Note 27, Wellington, 2017).

erode properties in Ahipara without interfering; residents are thus expected to bear the loss.⁵ In Hector, coastal protection works have been deemed too expensive for the local or regional councils, but they have allowed individual homeowners to erect protective barriers at the front of their properties, while suggesting that they will have to eventually move.⁶ In Napier, the council has agreed to replace and improve an expensive sea wall for Westshore, even though it is recognised that it is not a permanent solution and will only protect a relatively small number of properties.⁷ In Matatā, the local and regional councils have worked together to effectively rezone the area by proposing changes to the district and regional plans so as to prohibit even the existing residential use, and offering to purchase the properties at full market value without any discounts for the hazard risks that they suffer.⁸ In respect of Haumoana, a community consultative decision-making procedure resulted in a decision to adopt a staged approach, with groynes and beach nourishment first, then eventual staged retreat from the coast.⁹ In respect of Waihi Beach, decisions in the 1990s and early 2000s to not erect any hard coastal protection structures (by the council, reinforced by the Environment Court) was reversed by Ministerial decision to erect a groyne, even though only temporary.¹⁰ However, while leeway exists to make this range of choices, some of these options can incur future liability costs for councils more than others. Further, from our discussions, some councils – or at least some of those involved in making adaptation decisions – appear to be unaware of the extent of possible liability.

There is much work that has been done already on the laws in in this area, such as through the legal opinions from Simpson Grierson for Local Government New Zealand,¹¹ and other academic work on individual elements of the legal framework. This paper tries to pull these together and summarise the aspects that are relevant for the action that might be needed in this area. It is

⁵ See, Te Hiku TV, “Ahipara Left to Tangaroa” (28 September 2018) <www.tehiku.nz>. Northland Regional Council “chairman Bill Shepherd says it is the council’s job to inform the community about the potential impact of sea-level rise, not to take on the risk of protecting properties from it.”

⁶ See, Joanne Carroll, “West Coast communities warned they must move from flood and erosion zones” Stuff (13 September 2018) <www.stuff.co.nz>.

⁷ See, Napier City Council “Westshore Erosion and Seawall extension” <www.napier.govt.nz>.

⁸ Whakātane District Council, “Awatariki 'manged retreat' process advances” (12 December 2018) <www.whakatane.govt.nz>.

⁹ See, for example, The Clifton to Tangoio Coastal Hazards Strategy Joint Committee, (Clifton to Tangoio Coastal Hazards Strategy 2120, 2016) <www.hbcoast.co.nz>.

¹⁰ See Bronwyn Hayward, “Nowhere Far From the Sea’: Political Challenges of Coastal Adaptation To Climate Change in New Zealand” (2008) 60 Political Science 47, at 53-55; discussed below in relation to Coastal Protection Works, see footnote 687 and accompanying text.

¹¹ Simpson Grierson, *Councils’ Ability to Limit Development in Natural Hazard Areas* (Legal Opinion for Local Government New Zealand, February 2018). See also Simpson Grierson *Councils’ Ability to Limit Development in Natural Hazard Areas* (Legal Opinion for Local Government New Zealand, April 2010), and Simpson Grierson *Liability Risks for Councils Re Coastal Hazard Information* (Legal Opinion for Local Government New Zealand, February 2010).

not comprehensive, primarily because it was originally intended to merely build on this existing work and provide a short update of the area. However, it very quickly became clear that, in order to address some of the particular issues, the background had to also be provided first, as well as occasional comparisons with similar issues faced elsewhere with some of the tools that are needed (such as in Australia). Further, in order to be useful for a wider audience, we added illustrations by way of case studies to many of the sections. The resulting report is thus the product of these tensions: trying to not write a textbook on the topic yet still needing to explain the law in the area, and to justify the comments we have made in relation to gaps, barriers and enablers of appropriate climate adaptation policies. Importantly, it can be taken as a work in progress and will need updating as the law and practice changes (which is likely to be rapid).

The paper does not address the special position of the relationships between Māori and their lands, waters, wāhi tapu and other taonga, nor the need to recognise and protect such relationships under the RMA.¹² Nor does it address requirements that local government may have in relation to Māori participation that it does not share with the wider community (such as Schedule 1 participation in the making of plans), or Treaty obligations of the Crown to actively protect taonga under Article 2 or uphold the Treaty partnership in good faith. These matters are the subject of a separate report (due to the large size of both reports more than anything else).¹³ This omission illustrates that this current report may not discuss all of the relevant obligations or liabilities of local government for climate adaptation measures.

The focus for this report is on the RMA regime and the adaptation measures that can be adopted under it; it thus does not address every statute relevant to local government liability in respect of climate adaptation for coastal hazards. While several references to Building Act provisions have been made, there is no comprehensive analysis of liability under the Building Act.¹⁴

It also does not address other important topics such as the protection of biodiversity or the use of ecosystem services as a means of providing adaptation. It is focused on the narrow topic of adaptation measures for housing.

¹² Resource Management Act 1991 (RMA), s 6(e).

¹³ Catherine Iorns, *Treaty of Waitangi*, above n 2

¹⁴ Notably, the Building Act blocks liability of building consent authorities or their employees for: "any civil proceedings brought...on the grounds that the building consent authority issued a building consent for the building in the knowledge that the building for which the consent was issued, or the land on which the building was situated, was, or was likely to be, subject to damage arising, directly or indirectly, from a natural hazard" (s 392(3)).

The paper starts with an introduction and summary of the issues of residential development in coastal areas that will be subject to increased risks of flooding and likely storm damage from climate change, both sea-level rise and changing weather patterns. It summarises the legal instruments usually used in order to adopt climate adaptation measures, and then summarises the difficulties with adopting such measures in New Zealand.

The paper is then divided into three parts. The first part, containing chapters 2 and 3, addresses zoning and relevant provisions under the current system. Chapter 2 outlines the structure and provisions of the Resource Management Act that are relevant to decision-making on climate adaptation measures. It discusses the powers and responsibilities of local government in this area, particular aspects of relevant decisions such as zoning and plan changes, and provides examples of the application of the relevant rules. It is designed as an introductory overview of the relevant provisions. Chapter 3 addresses some general considerations in relation to adopting climate adaptation measures, including relevant Part 2 values, the precautionary principle, and considerations relevant to direction and guidance on coastal hazards from central government.

Part 2 addresses specific tools that will be required to implement climate adaptation, with one chapter on each: prevention of new development or placing conditions on it, coastal protection works, and managed retreat. Chapter 4 addresses the range of measures open to councils in order to prevent new development in hazardous coastal areas; it outlines the legal requirements for these measures. Chapter 5 addresses the range of consent conditions that might be imposed on new development in hazardous coastal areas. It outlines the legal requirements for these measures, including bonds, liability shields, and the relocation or removal of buildings.

Chapter 6 addresses the use of Coastal Protection Works in hazardous coastal areas. It outlines the legal requirements for such Works, legal aspects of establishment and maintenance, and civil liability for their maintenance.

Chapter 7 addresses managed retreat, particularly the difficulties of using it within the current legal rules and ways that it may be able to be undertaken. It discusses how existing residential use rights could be modified under a Regional Plan and how consent conditions could be reviewed under section 128; it then discusses the use of acquisition Instruments and the applicability of the Canterbury Earthquake Recovery Act 2011 and the *Quake Outcasts* decision¹⁵ to residential development in the hazardous coastal areas.

¹⁵ *Quake Outcasts & Fowler Development Ltd v Canterbury Earthquake Authority* [2015] NZSC 27.

Part Three of the paper addresses two other matters relevant to climate adaptation measures and council liability in relation to them. Chapter 8 discusses the use of information instruments in order to provide relevant coastal hazard information to current and future homeowners. It focuses on the New Zealand Land Information Memoranda (LIM) and discusses three potential legal actions that could be taken against a council for the contents of a LIM report. Finally, chapter 9 discusses liability in negligence for council consenting decisions.

There is no one conclusion from this report on climate adaptation measures and liability of councils or their responsibility to undertake particular measures. Who is liable, and for what, typically depends on the measure being employed and other factors particular to that case. Importantly, there are a range of enablers and barriers, some of which can be altered by a change in policy; others will need law changes.

The paper is not designed to provide a legal opinion on the points discussed but more to provoke discussion on whether the law is adequate to enable councils to do what they will need to do in order to adapt to the coastal hazards associated with climate change. Some possible solutions to barriers are discussed but this was not the aim of this report; thus, solutions are not addressed throughout or comprehensively.

Other work within the Deep South National Science Challenge arising from the same insurance dialogue paper¹⁶ addresses other aspects of climate adaptation, including in relation to insurance¹⁷ as well as to ethical guidance for the choice of solutions.¹⁸ Other National Science Challenge researchers are also undertaking research relevant to this discussion; most notable is that under the Resilience to Nature's Challenges, looking in more depth at one or two of the RMA aspects addressed in this report.¹⁹ Results from these other areas of work should be combined with this discussion of current laws in order to fashion appropriate responses.

Some findings from this report are summarised in the Executive Summary (above, pp 8-13).

¹⁶ Storey and others, above n 4.

¹⁷ See, David A Fleming, Ilan Noy, Jacob Pastor-Paz & Sally Owen, *Public insurance and climate change (Part one): Past trends in weather-related insurance in New Zealand* (Motu Economic and Public Policy Research, Working Paper 18-09, July 2018).

¹⁸ See, Elisabeth Ellis, *How Should the Risks of Sea-Level Rise be Shared?* (Deep South National Science Challenge, Research Report, August 2018).

¹⁹ See, Emily Grace, Ben France-Hudson, Margaret Kilvington, *Managing existing uses in areas at high risk from natural hazards: an issues paper* (GNS Science, miscellaneous series 119, 2018).

Chapter 1: Climate Adaptation and Coastal Development: the problem, potential solutions, and problems with the potential solutions

This chapter provides an introduction and summary of the issues of residential development in coastal areas that will be subject to increased risk of coastal inundation, associated erosion and likely storm damage from climate change, both sea-level rise and changing weather patterns. It summarises the legal instruments usually used in order to adopt climate adaptation measures, and then summarises some difficulties with adopting such measures in New Zealand.

The following topics are addressed in this chapter:

- (1) The problem: the existence of residential development in hazardous coastal areas and the increasing risks associated with sea-level rise and changing weather patterns
- (2) Potential Solutions: climate adaptation strategies and legal instruments for preventing further intensification, and/or retreating from hazardous areas

Box 1: Macintosh et al's Taxonomy of legal instruments for pursuing climate adaptation

- (3) Problems with the Solutions: practical obstacles and institutional barriers to implementing an effective climate adaptation policy under New Zealand's devolved planning system

Box 2: Fear of Liability amongst Australian Councils

Box 3: Climate Change in the Environment Court before 2011

- (4) Conclusion

1. The problem: residential development in hazardous coastal areas

The threat posed by the combination of climate change and the build-up of residential property in low lying coastal areas is a problem affecting countries worldwide. These coastal hazards will consist of both acute effects – such as intermittent but increasing frequent and violent storms – and chronic effects – such as sea-level rise and the increasing loss of biodiversity. The acute and chronic aspects of the problem raise distinctive challenges for policy makers. Both aspects are affected by uncertainty around the specific impacts and timeframes, not least because it is not yet known what emissions scenario(s) will unfold.

In New Zealand, there are already more than 44,000 homes and 1500 commercial properties within 1.5 meters of the mean high-water spring tide mark.²⁰ There are other dimensions to this problem, such as the vulnerability of certain demographic groups. By 2050 it is estimated that around 1 million older New Zealanders will be living in areas susceptible to atmospheric events such as storm surges, windstorms and severe flooding.²¹ Māori society has been recognised as “climate sensitive due to the strong links that exist between Māori economic, social and cultural systems and the natural environment” and the disproportionate amounts of low-lying coastal land.²²

The harms caused by maladaptive development can be divided into monetary and non-monetary impacts. The financial impacts include the losses to individuals who purchase hazard-prone property, as well as the potential compensation claims, both legal and informal, which are made against the government. There is immense political pressure for governments to provide some form of compensation to the victims of natural disasters, creating an enormous fiscal burden for future generations.

An additional financial impact is the future cost to local government in maintaining infrastructure in hazardous areas, committing to expensive protection measures, and/or removing development from hazardous sites. All of these issues raise matters of equity: whether it is fair for the costs of maladaptive development to be imposed on the wider community, or should they be borne by those directly affected. Beyond monetary impacts, the harms of maladaptive development include the stress suffered by directly affected households, and the potential deterioration of coastal communities if property is gradually abandoned.²³

²⁰ RG Bell, R Paulik and S Wadwha, *National and regional risk exposure in low-lying coastal areas: Areal extent, population, buildings and infrastructure* (NIWA, Report for the Parliamentary Commissioner for the Environment Prepared for the Parliamentary Commissioner for the Environment, October 2015), at 13. Jonathan Boston and Judy Lawrence, *The Case for Climate Change Adaptation Funding Instruments* (Institute for Governance and Policy Studies, IGPS Working Paper 17-05; New Zealand Climate Change Research Institute, NZCCRI 17-01 Wellington, August 2017), at 2.

²¹ Insurance Council of New Zealand, *Protecting New Zealand from Natural Hazards: An Insurance Council of New Zealand Perspective on ensuring New Zealand is better protected from natural hazards* (Position Paper, October 2014), at 5.

²² DN King and others, *Coastal adaptation to climate variability and change: Examining community risk, vulnerability and endurance at Mitimiti, Hokianga, Aotearoa-New Zealand* (NIWA Report AKL2013-22, September 2013), at 21.

²³ Paul Govind, “Managing the relationship between adaptation and coastal land use development through the use of s 149 certificates” (2011) 7 *MqJICEL* 94, at 104.

2. Potential Solutions: climate adaptation strategies and legal instruments for preventing further intensification, and/or retreating from hazardous areas

While the existence of a problem is clear, issues such as the appropriate timeframe, the types of measures required, and the level of government best suited to implementing any solutions are hotly disputed. In addition to these simply raising hard issues, without many good precedents, different people take different political and philosophical approaches to the resolution of such issues. For example, Foerster, Macintosh and Macdonald identify four key issues in relation to climate adaptation that connect to deep questions about political philosophy concerning the proper role of the state:²⁴

- Should governments second-guess individual choices and intervene to stop people from putting themselves in harm's way?
- Should governments compensate or assist individuals who are adversely affected if climate risks materialise (ie to share risks and losses)?
- To what extent should governments respect the "property rights" of landholders in designing and implementing land-use policies?
- Should governments intervene to stop landholders from implementing hazard mitigation measures that impose costs on the public or third parties (ie negative externalities)?

While politics cannot be entirely discounted, it is also true that the range of *strategies* and *planning options* for addressing the problem are readily identifiable, at least on an abstract level. There are four very broad strategies for addressing climatic hazards. They are:

1. *avoid* the hazard altogether by locating buildings away from hazardous areas;
2. *accommodate* the hazard, usually by adapting buildings to be more resilient (such as by raising ground level) or making buildings relocatable;
3. *protect* the asset against the hazard by, for instance, constructing hard defences (eg, sea walls) or soft defences (eg, planting trees to slow down erosion, or to build up natural barriers); and

²⁴ Anita Foerster, Andrew Macintosh and Jan McDonald, "Transferable lessons for climate change adaptation planning? Managing bushfire and coastal climate hazards in Australia" (2013) 30 EPLJ 469, at 474.

4. *Retreat* from the hazard, by abandoning or removing residential buildings from the hazardous site.

Climate adaptation strategies can also be divided into those that target *prospective/proposed* developments by, for instance, prohibiting new development in a hazardous area, or imposing significant restrictions such as time limits for occupation; and those that affect *existing* developments. In the case of the *prospective* development, the loss is about future possibilities: a developer loses an economic opportunity; a community loses the additional housing; and local government loses the additional rates. These losses are, in a sense, hypothetical, and therefore do not carry as much emotional resonance. By contrast, in the case of the *existing* development, the loss is far more tangible. On the one hand, regulations affecting people's existing residential rights may be partly prospective, such as the loss of an opportunity to intensify residential development on their land (eg, by subdividing, or expanding the size of the building). On the other hand, any curtailments of people's 'rights'/options with respect to their 'home' are especially fraught. To state the obvious, people's homes are often their main economic asset as well as a source of intense emotional attachment. Curtailments that can spark intense opposition include a range of perceived rights: the 'right' to decide what level of risk to accept (rather than have that dictated by government), the 'right' to protect one's home through hard defences, the 'right' to protect the value of one's home by not having climate hazards identified on the title, and the 'right' to rebuild one's home after a disaster. As will be seen in this report, measures which affect existing use rights are the most difficult, both legally and politically. However, because so much development has occurred in an era before climate change risks were properly factored into planning decisions, maladaptive development has already occurred. For this reason, measures affecting existing use rights are perhaps the most pressing part of any discussion about adaptation. However, as subsequent discussion will make clear, the current planning paradigm is unsuited to dealing with the problems posed by existing use rights in hazardous areas. As a result, any effective policy for addressing existing use rights is likely to require new legal measures to be established.

A broad taxonomy of planning instruments and legal devices for pursuing climate adaptation can also be identified. Foerster et al usefully identify nine types of spatial planning instruments for implementing climate adaptation.²⁵ This taxonomy usefully identifies those approaches that

²⁵ Foerster and others, above n 24, at 476-477.

are most commonly used in Australia, and identifies some emerging tools. There are enough similarities to New Zealand to take note of, and their findings are documented in Box 1.

BOX 1: Macintosh et al's taxonomy of legal instruments for climate adaptation.²⁶

(1) Framing instruments

Framing instruments are not intended to control development but to guide the creation of detailed rules that do. These can vary in their level of specificity, with broad purpose statements at one end, and bottom lines at the other. An example of the former might be a directive for planning rules to promote climate adaptation, to give due consideration to the avoidance of climate hazards, or to establish systems for identifying and avoiding climate hazards. An example of the latter could include the recognition of projected sea-level rise, or setting a timescale upon which to assess any hazards (eg, to assess any hazards likely to impact upon a development over the next 100 years).²⁷ In New Zealand, the Coastal Policy Statement (NZCPS) is such a framing instrument. The Ministry for the Environment *Guidance* would also be one, although without the legal weight of the NZCPS.²⁸

(b) Information Instruments

Information instruments are solely intended to alter behaviour through the provision of hazard information to the public. These can be either legally required, or informally promulgated, and vary in their level of specificity – eg, they may list the hazards associated with a geographical area, or they may list the hazards affecting a particular property.²⁹ In New Zealand, Land Information Memoranda (LIMs) could be used as such information instruments.

(c) Fixed regulatory instruments

The category of fixed regulatory instruments refers to both the instruments that control the granting of consents, and the conditions that are placed upon consents. These can include zones and overlays, hazard mapping, set-back requirements, codes and guidelines,

²⁶ Andrew Macintosh, Anita Foerster and Jan McDonald, *Limp, Leap or Learn? Developing Legal Frameworks for Climate Change Adaptation Planning in Australia* (National Climate Change Adaptation Research Facility, Publication 41/13, 2013).

²⁷ Macintosh and others, at 4.1.

²⁸ MfE, *Guidance*, above n 3.

²⁹ Macintosh and others, at 4.2.

agreements on title, reserves and buffers, requirements for compulsory insurance, and the non-spatial regulation of hazard mitigation activities.³⁰ However, for our purposes, the important feature of fixed regulatory instruments is that they are inflexible by definition. Once a consent is granted, then the expectation is that the land can be used in the way described for an indefinite period of time. In other words, once a consent is conferred, the government has little ability to regulate the subject matter contained within the consent. In this regard, fixed regulatory instruments confer rights that are closely analogous to private property, with the accompanying expectation that any existing use right can only be discontinued if compensation is offered to the owner.³¹

(d) Flexible regulatory instruments

In contrast to fixed regulatory instruments, flexible regulatory instruments allow a planning authority to control land use and development after the use has commenced under the consent. These are therefore particularly useful for climate adaptation because they allow existing use rights to subsequently be restricted or withdrawn upon the actual or likely happening of specified events. For this reason, flexible instruments can allow planning authorities to respond to the inevitable uncertainties posed by climate change and sea-level rise. By contrast, fixed regulatory instruments can amount to an underreaction or an overreaction to climate hazards.³² An example of a flexible instrument is a consent that contains an “event trigger” as one of the conditions. This condition would require that, upon the occurrence of certain events (eg, sea-level rise reaching a certain height), the development allowed by the consent must either be modified to reduce hazard exposure or be removed. Another option is to have time limited approvals. Foerster et al identify two broad types of flexible regulatory instruments: those that apply to new development (eg, as precondition to development), and those that affect existing development. The imposition of flexible instruments upon existing development is thus a promising alternative for outright acquisition with all of its attendant costs. However, it is not currently possible under most planning regimes, and may require a law change if it was to be pursued in New Zealand.

³⁰ Macintosh and others, above n 26, at 46-56.

³¹ At 4.3.1.

³² At 4.3.2.

(e) Compulsory acquisition instruments

Compulsory purchases will usually require fair compensation for the land acquired by the state; for this reason, conventional compulsory acquisition is a very expensive response to the problem of maladaptive coastal development. (In Aotearoa New Zealand, Treaty of Waitangi principles will also be relevant.) Compulsory acquisition instruments can take a number of forms, other than just compulsory purchase of the entire property. The costs, both administrative and financial, can be kept down by the use of voluntary instruments for purchasing the property which are backed up by the tacit threat of compulsory acquisition.³³ There are also other forms of acquisition, such as leaseback schemes (whether voluntary or compulsory). In an adaptive leaseback scheme, the land would be purchased but leased back to the former owner with adaptive conditions attached. A resale scheme may be adopted, where the land is sold back to the former owner with covenants on the title that mirror those flexible consent conditions that are potentially included on a newer consent for residential development in a hazardous area (eg, containing trigger points that compel relocation).³⁴ Another method is the legal designation of land for future acquisition, which prevents owners from selling their land to any party other than the specified government agency, thereby allowing the owners to remain in possession for the foreseeable future.³⁵

(f) Voluntary instruments

Voluntary instruments, broadly defined, are those instruments that do not legally compel participation and/or compliance but are entered into voluntarily. These include financial inducements, voluntary buy-back schemes, land swaps (wherein a land-owner is able to swap their hazardous land for land elsewhere), and transferable development rights (which transfer the consent conditions to another parcel of land).³⁶

(g) Taxes and Charges

Taxes and charges can be used to either provide incentives to land-owners to cease or adapt an activity in a hazardous area, and/or to raise funds for climate adaptation. Examples

³³ Macintosh and others, above n 26, at 4.4.

³⁴ At 4.4.1.

³⁵ At 4.4.2.

³⁶ At 4.5.

could include rates reductions for property owners who invest in climate adaptation on their own land, or additional rates on owners who live in hazardous areas.³⁷ Charges are simply more targeted revenue-gathering mechanisms, such as requiring upkeep fees from homeowners who benefit from coastal protection works (such as those protecting beach front properties, or a public road that allows access to a small coastal settlement in a hazardous area).

(h) Liability shield instruments

Legal liability is a major concern to planners; as a result, it can exert a chilling effect on the adoption of adaptive policies and measures. Options to lessen this chilling effect include the use of consent conditions that remove the ability to sue consent authorities in negligence, and the use of statutory provisions that clearly delineate or even expressly limit the liability of consent authorities in defined circumstances.³⁸

Foerster et al note that current planning attempts to deal with climate adaptation in Australia rely heavily on a combination of framing instruments (in the form of higher level policy statements), fixed regulatory instruments to prescribe the content of consents, and the limited use of information instruments.³⁹ They note that the reliance on these instruments is understandable given that adaptation efforts to date have occurred within the existing statutory regimes.⁴⁰ It is also notable that these practices broadly mirror what occurs in New Zealand under the Resource Management Act 1991 with its hierarchy of planning documents.

However, Foerster et al also note that **framing instruments** and **fixed regulatory instruments** have particular features that make them unsuited to the execution of a climate adaptation policy. *Firstly*, while framing instruments make sense within a devolved system of environmental management, they can also cause significant problems for planners at the coalface. Foerster et al observe that planners are sceptical about the extent to which clear guidance is actually provided by such instruments. In practice, broad principles confer upon local authorities a great deal of discretion with very little guidance. This has potentially created a number of problems. These include: delays in implementation as local authorities await more specific guidelines;

³⁷ Macintosh and others, above n 26, at 4.6.

³⁸ At 4.7.

³⁹ Foerster and others, above n 24, at 489.

⁴⁰ At 477.

resources being wasted on conducting research that could be better conducted at the state government level; inconsistencies in the actions and objectives of different agencies and local authorities; and a lot of reliance upon the appeals process to resolve inconsistencies or interpret ambiguous directives.⁴¹ Because of these problems with overbroad or conflicting framing instruments, Foerster et al observe that clearer guidance is required from higher levels of government.⁴² They note that the absence of leadership may be in part due to the enduring influence of the subsidiarity principle, which holds that decisions ought to be made at a local level in order to better reflect and respond to the needs of the local community, and to empower those who know the environment best.⁴³

Secondly, fixed regulatory instruments are especially unsuited to climate adaptation policy, precisely because they are not adaptive. Rather, fixed instruments typically confer fixed entitlements in perpetuity subject to compensation. Foerster et al note that a hallmark of current planning regimes is the provision of strong protections for existing land uses by guaranteeing these fixed entitlements in perpetuity. Furthermore, they attest that directives to “consider” the effects of future climate change are essentially grafted on to these regimes, therein limiting any impact to the consenting of new development.⁴⁴ They therefore insist that some kind of “anticipatory planning for existing development” is required, but that, at present (in Australia at least), such actions have been rare, and restricted to government action in the aftermath of natural disasters.⁴⁵ More broadly, Foerster et al identify flexible instruments as being an underutilised tool and one that is likely to see increasing usage due to their ability to allow some development in the present whilst addressing the future equities that would be caused by granting a fixed consent.⁴⁶ As the next section will show, all of the problems that they observe in Australia are also observable in New Zealand.

What seems clear from Foerster et al’s analysis is that an inversion of planning practice needs to occur. Current practices involving fixed regulatory instruments in combination with strong protections for existing use rights are unable to account for the uncertainties inherent in climate change impacts. The solution is the widespread adoption of more flexible instruments, for both new development and existing development. However, under the current system of devolved

⁴¹ Foerster and others, above n 24, at 477.

⁴² At 489.

⁴³ At 486.

⁴⁴ At 489.

⁴⁵ At 488.

⁴⁶ At 483.

planning, paired with broad national guidelines rather than prescriptive rules, councils are unlikely to take the necessary initiative for reasons that will be explored in the next section. Broadly stated, these include the political pressures faced by local governments, the lack of resourcing, a system based on fixed instruments, and the actual and perceived fear of legal liability. For these reasons, greater direction is required from higher levels of government, even if this breaches the principle of subsidiarity. In other words, the system needs to be inverted. Rather than flexible policy statements, we need firm directives from central government about the content of consents – namely, that the content of consents needs to be flexible rather than fixed. Furthermore, we need flexible instruments to apply to existing developments, in addition to information instruments.

With respect to new development, the problem is not so much about finding new policy solutions, as it is about getting local government to implement aspects of the agenda just described. There are, however, a number of obstacles to implementing such policies. In contrast, the problem with respect to existing development is more complicated and it will likely require new legal tools.

3. Problems with the Solutions: practical obstacles and institutional barriers to implementing an effective climate adaptation policy under New Zealand's devolved planning system.

This section suggests that the current paradigm of devolved local body governance has largely failed to implement climate adaptation policy in the absence of leadership from central government. The reasons for this failure are multiple, cumulative and interconnected.

Firstly, local democracy has failed to prioritise climate adaptation. It is hard for councils to adopt difficult decisions which impose short-term costs on residents now, for long-term gains for future residents. Residents commonly exert political pressure on councils to protect their perceived existing rights and to allow additional development.

Secondly, local government lacks many of the financial and expert capacities necessary to pursue an agenda of climate adaptation under the current regime. In part this is because of the resources necessary to enact plans under the RMA. In addition to undertaking extensive consultation, scientific evidence must be mustered in order to underpin and justify any controls proposed (eg under a s 32 RMA analysis) and to withstand challenges in the Environment Court; but this research can be beyond the capacity of some local authorities to undertake. These issues

are further compounded by financial strains caused by a limited rates base and the costs of essential infrastructure.⁴⁷

Thirdly, local government decision-making on natural hazards is reported to be dominated by the engineering profession. Research suggests that council engineers are reluctant to employ a precautionary approach to planning and consenting.⁴⁸ This has led to scientific uncertainty about future risk being viewed as an insufficiency of evidence necessary to regulate, rather than being seen as a cue to exert caution. In turn, this has raised the level of evidence deemed necessary to deal with climate hazards. This problem is compounded by an historic lack of locally-specific climate science either available to or purchased by local government, plus a lack of integration between planners and civil defence, with planners often leaving any residual risk to civil defence, who in turn reportedly enact largely reactive plans. There is a move toward risk reduction through risk-based land use planning, but it is still new and not yet widely adopted.⁴⁹

Fourthly, the devolved system adopted under the RMA has resulted in a fragmented system of governance wherein responsibility is not clearly assigned, resulting in either inaction or insufficient responses to coastal hazards.

Fifthly, the use of broad statutory directives, also known as “framing instruments”, has not yet adequately compelled a majority of local councils to enact proactive climate adaptation or hazard management measures. This is partly due to timing, with a 10-year planning cycle meaning that the 2010 NZ Coastal Policy Statement, for example, might not yet be implemented in some plans. Also a matter of timing, the clarification about the (strong) legal status of the NZCPS did not occur until 2014 in *King Salmon*.⁵⁰ Whatever the reason, the current system of rules is fragmented, with inconsistencies between key hazard management statutes, and has been unable to protect local councils or allay liability concerns amongst decision makers.

⁴⁷ It is noted that local government funding and financing is the subject of a Productivity Commission inquiry. A draft report was released in July 2019: New Zealand Productivity Commission, *Local government funding and Financing: Draft report* (July 2019) <www.productivity.govt.nz>. The final report is expected on 30 November 2019.

⁴⁸ See footnotes 68-69, below, and accompanying text.

⁴⁹ See, WSA Saunders, JG Beban and M Kilvington, *Risk-based land use planning for natural hazard risk reduction* (GNS Science Miscellaneous Series 67, September 2013). *Local Government New Zealand, Managing natural hazard risk in New Zealand – towards more resilient communities: A think piece for local and central government and others with a role in managing natural hazards* (October 2014) <www.lgnz.co.nz>.

⁵⁰ *Environmental Defence Society v King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; discussed below, 141-144.

Finally, in absence of the promulgation of standards and rules from central government, final decisions on adaptation measures have been left to the courts. While this has resulted in some proactivity and helpful decisions in individual cases, the Environment Court is unsuited to the task of setting long-term policy on climate adaptation. It has neither the institutional legitimacy nor the technical capacity to do this in comparison with the executive and legislative branches of central and/or local government.

Political pressures on local government

There are a range of political pressures on local government relevant to the adoption (or not) of adaptation measures for sea-level rise. First, despite widespread public approval of the provision of generous disaster relief, there is a very limited appetite for long-term investment in preventative measures.⁵¹ For example, climate adaptation measures that interfered with – or were perceived as interfering with – existing use rights or the interests of developers, caused widespread backlash across the east coast of Australia leading to a political backtracking on implementation of such measures.⁵² While the New Zealand laws may not be the same, the political pressure and threats of legal action from those whose existing use rights, development, and/or monetary interests has been similar to that seen in Australia.

The notable exception to this tendency of the public to resist preventative measures arises in the immediate aftermath of a disaster. But this support is often short lived, and may even result in maladaptive reconstruction measures that simply recreate the hazard, albeit with some mitigation.⁵³ This suggests that voters are inclined to prioritise immediate concerns over long-term preventative measures, and only react to dangers posed by natural hazards when a recent event has made the hazard seem salient.⁵⁴ A good example of this phenomenon is the fact that Christchurch City Council makes extensive provision for avoidance of liquefaction, whilst other parts of the country do not, despite the known risk of liquefaction in other areas.⁵⁵

The second political pressure arises as a result of the current three-year political cycle, whereby politicians are disinclined to enact long-term adaptation measures. For this reason, enacting

⁵¹ Boston and Lawrence, above n 20, at 2.

⁵² Jacqueline Peel and Hari Osofsky, “Sue To Adapt?” (2015) 99 Minn L Rev 2177, at 2222.

⁵³ Jan McDonald, “A Short History of Climate Adaptation Law in Australia” (2014) 4 Climate L 150, at 156.

⁵⁴ BC Glavovic, WSA Saunders, and JS Becker, “Land-use planning for natural hazards in New Zealand: the setting, barriers, ‘burning issues’ and priority actions” (2010) 54 Nat Hazards 679, at 694.

⁵⁵ Kate Scanlen, “Liquefaction and the Law: Understanding Challenges and Failure to Strengthen Hazard Management Regulations” (2016) 20 NZJEL 279, at 289.

climate adaptation policies is often accorded little to no priority. One reason for this may be climate scepticism on the part of politicians, or at least scepticism about the necessity of acting within the current term in office.⁵⁶ A further reason for the perennial deferral of climate adaptation is that the many cost-efficiency requirements written into local government rules have the effect of prioritising projects with immediate benefit to ratepayers rather than to future generations.⁵⁷ Additionally, there is also a notable incongruence between the current electoral cycles (3 years) and RMA plan-making cycles (10 years):⁵⁸

Paradoxically, the timeframe of planning cycles is too long for flexible responses, while the short-term political cycle is too short for consideration of risks emerging over longer timeframes.

A third type of political pressure is that, because of its size, local government is reportedly particularly vulnerable to being captured, or at least heavily influenced, by well-organised property lobbies.⁵⁹ These lobby groups are of two general types: residents' groups which represent local property owners, and lobby groups that represent land developers. Coastal lobby groups have an outsized influence in coastal areas due to their considerable economic power, not least because of the high value of their coastal property.⁶⁰ This passionate constituency mobilises to resist adaptive measures such as hazard notifications or managed retreat policies, and to pursue maladaptive adaptation measures such as hard defences to resist erosion. Private actors may seek resource consents for privately funded structures, or they may even insist upon local government footing the bill for protecting their property.⁶¹ Despite the fact that both law and policy weigh strongly against the erection of hard defences, coastal lobbies are surprisingly successful:⁶²

National policy prioritises natural character and processes, legal decisions dismiss the absolute rights of property owners; technical reports confirm the inevitability of sea-level rise and erosion; resource consent conditions and encumbrances on titles may warn of land loss; *but actual practice illustrates the power base that coastal property owners can exert on local authorities.*

Mick Strack provides a poignant example of a district council giving into the demands of a coastal lobby. In 1995 the Gisborne District Council successfully defended a policy of managed retreat in the Environment Court, therein allowing the Council to cease maintenance of hard defences

⁵⁶ Judy Lawrence and others, "Adapting to Changing Climate Risk by Local Government in New Zealand: Institutional Practice Barriers and Enablers" (2015) 20 Local Environment 298, at 313.

⁵⁷ At 307.

⁵⁸ At 306.

⁵⁹ McDonald, above n 53.

⁶⁰ Mick Strack, "Property loss due to coastal erosion: judicial, legislative and policy interventions" (September 2010), at 1100.

⁶¹ At 1098.

⁶² At 1102 (emphasis added).

and banning the erection of private defences.⁶³ However, in 2003 the Council agreed to erect new coastal defences, therein reversing the prior policy of managed retreat. In 2009 further consents were passed to maintain these defences that had become hazardous in the intervening years.⁶⁴

Developers and established development lobbies represent the other major property lobby with an outsized influence over local government. In part, this is because developers can readily tap into the dominant ideological preference amongst both policy makers and the public to prioritise development over competing objectives, such as climate adaptation or hazard management.⁶⁵ This pressure is particularly acute in fast developing regions, where hazardous locations are opened up for development due to the demand for housing.⁶⁶

Expert capacities and limitations

Local government requires professionals from multiple backgrounds to lend their expertise to decisions about how to manage natural hazards. However, different professions/experts may be more inclined to favour certain outcomes due to their profession's established methodologies, or otherwise discount input from other experts. Different professions may also fail to collaborate with practitioners from other backgrounds, or spheres of government. In other instances, certain experts may be in short supply (such as experts on climate change). All of these factors can and do create the capacity for maladaptive decision making in local government.

First, the three dominant disciplines in coastal management – namely, engineering, law, and planning – currently privilege fixed and certain solutions to planning problems.⁶⁷ For example, zones are deemed to be safe or unsafe, and residential development consents almost always confer fixed entitlements to use the land in perpetuity.

Second, the engineering profession, which historically has dominated coastal management, has an observable preference for, firstly, only giving weight to quantifiable risks (rather than considering uncertainty) and, secondly, pursuing “static structural responses” to mitigate

⁶³ *Faulkner v Gisborne District Council* [1995] 3 NZLR 622 (HC).

⁶⁴ Strack, above n 60, at 1102.

⁶⁵ Glavovic and others, above n 54, at 693.

⁶⁶ Scanlen, above n 55, at 289-290.

⁶⁷ Lawrence and others, above n 56, at 298.

hazards.⁶⁸ These attitudes are likely to have rubbed off on even non-engineer planners, who have been observed to insist on a higher level of evidence than is actually needed to regulate climate hazards under the RMA.⁶⁹

Uncertainties are perceived by the decision-makers as lack of evidence and thus practitioners use single numbers, or the middle or low end of the range to express climate risk, despite the precautionary approach advocated in the national guidance and the NZCPS.

When this is added to the requirements to justify planning decisions such as under s 32 RMA, those in charge of planning decisions may be likely to (wrongly) believe that the evidential requirements under the RMA are not met, and perhaps cannot be met, given the lack of resources available for conducting further scientific study.

Third, there is an observable disconnect between planners and emergency managers.⁷⁰ Planners have seen residual risk as a matter for emergency management to address,⁷¹ while emergency planners assume that risk reduction and avoidance measures will be pursued under the RMA.⁷² As a result, no responsibility is taken for residual risk. An additional reason for this failure to enact hazard avoidance measures is the popularity of “resilience” discourse amongst hazard management professionals. Kate Scanlen argues that resilience theory does not promote hazard avoidance; instead it stresses the ability of communities to “bounce back”.⁷³ She also asserts that the same criticism can be made of hazard management through “mitigation”, which often fails to account for the costs imposed upon a population in a hazard prone area.⁷⁴ By this logic, both terms fail to challenge the dominant discourse that is in favour of continued development and they fail to encourage a rethink in light of a proper appraisal of the potential hazards.

Financial constraints

An additional consequence of devolved governance (the subsidiarity principle) is that, in practice, it leaves local authorities with a more limited pool of financial resources. Local government is already subject to significant financial constraints, spending around 10.5% of public revenue, while only raising around 8.3%, and receiving less financial support from central

⁶⁸ Lawrence and others, above n 56, at 306.

⁶⁹ At 305: “Uncertainties are perceived by the decision-makers as lack of evidence and thus practitioners use single numbers, or the middle or low end of the range to express climate risk, despite the precautionary approach advocated in the national guidance and the NZCPS.”

⁷⁰ Glavovic and others, above n 54, at 696.

⁷¹ Lawrence and others, above n 56, at 306.

⁷² Glavovic and others, at 696.

⁷³ Scanlen, above n 55, at 294.

⁷⁴ At 293.

government than they did 30 years ago.⁷⁵ Furthermore, local government's main responsibility for maintaining public infrastructure is set to become increasingly expensive, with the costs of repairing land transport networks having quadrupled in the last decade due to weather related events.⁷⁶ These pressures on infrastructure are likely to increase in the coming decades as climate change further threatens essential infrastructure.⁷⁷

This will inevitably affect the capacity of local government to implement climate adaptation measures because the costs of mapping, hazard identification and adaptation planning are not cheap.⁷⁸ In the case of mapping, it makes far more sense for central government to use its economy of scale and its greater institutional resources to develop mapping methods that are both effective, consistent, and based on verifiably reliable data. Research from Australia has shown that, when local governments have been tasked with undertaking mapping, the results have been poorly designed, founded upon poor data inputs, and have produced poor outputs.⁷⁹ The clear conclusion is that central government ought to cover a greater share of the costs of information creation and dissemination because of the clear resource constraints upon local government. It is noted that the proposed Zero Carbon Act for New Zealand will likely mandate that a centrally-funded national risk assessment be performed and updated on a regular basis.⁸⁰ This would be a helpful development.

Inconsistency between regulatory regimes

There is inconsistency across the various statutes that constitute New Zealand's hazard management regime.⁸¹ One problem is that these older statutes are becoming outdated. For example, liquefaction is potentially excluded from the definition of natural hazard under the Building Act 2004.⁸² More broadly, Boston and Lawrence note that all of this legislation was written before sea-level rise was considered a serious issue, meaning that much of the legislative

⁷⁵ Boston and Lawrence, above n 20, at 17. See also the Productivity Commission study above n 47.

⁷⁶ Boston and Lawrence, at ii.

⁷⁷ At 17.

⁷⁸ McDonald, above n 53, at 154.

⁷⁹ Foerster and others, above n 24, at 480.

⁸⁰ See Part 1C of the Climate Change Response (Zero Carbon) Amendment Bill, introduced 8 May 2019. For background about the national risk assessment, see, eg: Parliamentary Commissioner for the Environment, *A Zero Carbon Act for New Zealand: Revisiting, Stepping stones to Paris and beyond* (March 2018), at p 42; Ministry for the Environment, *Our Climate Your Say: Summary Document on the Zero Carbon Bill* (ME 1371, June 2018), at p 17.

⁸¹ Boston and Lawrence, above n 20, at 10.

⁸² Scanlen, above n 55, at 285. See also Insurance Council of New Zealand, above n 21, at 8: that geological activity is not adequately guarded against under the present definition of 'natural hazards'.

architecture is so misaligned that the problems cannot be mended through the passing of amendments.⁸³

Currently there is a misalignment between the timeframes considered in the Building Act 2004, which is 50 years and only takes account of risks to human safety,⁸⁴ and the 2010 NZCPS, which looks at a broader range of hazards over a timeframe of at least 100 years.⁸⁵ The 50-year timeframe applied under the Building Act 2004 is likely inadequate given that buildings are likely to last more than 50 years, at which stage they may become subject to flooding on account of climate change. Furthermore, the Building Act states that consents must be issued where the hazard will not be exacerbated within a 50-year timeframe and it is reasonable to grant a waiver of the building code in respect of that natural hazard.⁸⁶ Again, this overlooks hazards that may materialise over a longer stretch of time.⁸⁷ The result is that present measures of safety are prioritised over longer term uncertainties; this approach is not adaptive.

An additional complication is that the interaction between hazard regulation under the Building Act and that under the RMA has been misunderstood. For example, in relation to planning timeframes, GNS Science has commented that:⁸⁸

Often there is reliance on timeframes under the Building Act for land-use planning, in particular the 50 year timeframe. Under the Building Act, buildings have a minimum intended lifetime of 50 years, and are constructed to withstand a 475 year return period earthquake (i.e. a 10% probability of occurrence in 50 years). Critical facilities are constructed to withstand a 2,500 year (2% chance of occurring in 50 years) earthquake event. Based on this approach, the timeframe of 50 years has become, in some districts, the default planning timeframe for flooding. However, if correctly used for flooding, the 475 year return period, with a 10% chance of occurring in 50 years, not a flat 50 year return period, should be used.

GNS Science has also commented that past case-law has misunderstood the health and safety protection addressed in the Building Code. For example:⁸⁹

⁸³ Boston and Lawrence, above n 20, at 10.

⁸⁴ See, eg, the Building Regulations 1992, Schedule 1 [‘The Building Code’], B2.3.1. This clause, known as the ‘Durability Requirement’ states that the ‘elements’ of the building must be able to survive for a minimum of 50 years with ‘normal’ levels of maintenance. The 50-year requirement applies to ‘elements’ of the building that are hard to access, are vital to the structural integrity of the building, or are a part of the building that would not ordinarily be checked and therefore could result in an undetected defect. Other parts of the building, which are more readily accessible, and/or commonly upgraded with maintenance, can have shorter lifespans (5 and 15 years respectively).

⁸⁵ Boston and Lawrence, above n 20, at 5.

⁸⁶ See Building Act 2004, s 72. See also s 113: buildings with a specified intended life of less than 50 years require a special application and must provide for their removal.

⁸⁷ Insurance Council of New Zealand, above n 21.

⁸⁸ GNS Science, “General Natural Hazard Guidance” <www.gns.cri.nz> at 4.1.

⁸⁹ GNS Science, at 4.1.

Within RMA case law from the Environment Court (*Petone Planning Action Group Incorporated v Hutt City Council*, W020/2008), it is stated that:

“... the performance of the structure and the safety of people in earthquake events, is to be left to compliance with the Building Code and Standard ... risks to safety from earthquake shaking, liquefaction and tsunami would be appropriately addressed and mitigated in the Building Code process and assessment in accordance with NZS1170.5:2004” (New Zealand Standard *Structural Design Actions Part 5: Earthquake Actions*).

The decision was summarised as follows:

“... we conclude that the consenting to the proposal on condition of compliance with the Building Code and NZS1170.5:2004 would enable people to provide for their safety against risks from earthquakes and other natural hazards.”

However, NZS1170.5:2004 only considers earthquake, not other natural hazards such as tsunami, landslide, or flood, leading to the conclusion that the Environment Court was questionable in its judgement that other natural hazards are provided for in this standard, and consequently peoples’ health and safety is not provided for. Under the Building Act, only the consideration of other hazards is required. The implication of this is that planners should adhere to the purpose of s5 of the RMA and provide for people’s health and safety. It is recommended that this includes planning beyond the default 50 year planning horizon of the Building Act.

Fragmentation in environmental governance

The Resource Management Act’s hierarchy of documents is intended to produce coordination between the different levels of government. However, in keeping with the experience of both Australia⁹⁰ and the United States,⁹¹ getting multiple agencies or levels of government to coordinate with each other has proven exceedingly difficult. This lack of inter-governmental cooperation can create confusion over which agency or level of government is responsible for what, allowing for “buck passing” and thus maladaptation.⁹² Glavovic, Saunders, and Becker single out the lack of inter-governmental cooperation as the main failure under New Zealand’s devolved hazard management system, and thus is a key obstacle.⁹³

⁹⁰ McDonald, above n 53, at 166: “This complexity in adaptation governance has resulted in a lack of clarity over who is responsible for what aspects of adaptation decision-making, creating scope for buck-passing and maladaptive decisions.”

⁹¹ Glavovic and others, above n 54, at 692: “[E]xperience in the USA demonstrates that it is difficult to develop the requisite coordination and collaboration across different spheres of government and between the many role-players involved in natural hazards planning.”

⁹² McDonald, at 166: “This complexity in adaptation governance has resulted in a lack of clarity over who is responsible for what aspects of adaptation decision-making, creating scope for buck-passing and maladaptive decisions.”

⁹³ Glavovic and others, at 702.

As aforementioned, there is also a disconnect between planning and emergency management in New Zealand. Even within the emergency management sector, there is fragmentation between the central, regional and local chapters of civil defence.⁹⁴ However, by far the most important failure of inter-governmental cooperation in this sector is the lack of integration between regional councils and territorial authorities. Both levels of government have the same designated function of controlling the use of land for “the avoidance or mitigation of natural hazards”.⁹⁵ The intention in having these overlapping functions is to allow for integrated management of hazards affecting land. However, at present, the conferral of statutory duties has been insufficient without additional efforts to integrate practice between the two levels of government.⁹⁶ Practitioners within local government have identified this lack of integration as a current obstacle to implementing adaptation.⁹⁷ This is also supported by evidence that unitary authorities have been able to more readily implement climate adaptation policy.⁹⁸

An additional cost of institutional fragmentation, and of the devolved system of the Resource Management Act more generally, is that it potentially increases the costs of enacting plan changes for territorial authorities. This is partly because of the uncertainty caused by any inconsistencies with higher documents, but also because of the extensive government and community consultation involved when enacting plan changes.

Fear of legal liability, and the capacity for the devolved planning system to be “gamed”

Three signature components of the Resource Management Act make it vulnerable to being strategically gamed by developers and property owners. The first is the heavy emphasis that is placed upon public participation; the second is the emphasis on the system being “effects based”; and the third is the broad powers of review that are conferred upon the Environment Court. The consultation and evidentiary requirements for making plan changes, in combination with the powers of the Court to direct or amend plan changes as a result of appeals, judicial

⁹⁴ Insurance Council of New Zealand, above n 21, at 7: “No one agency is responsible for leading and co-ordinating New Zealand’s response to natural hazards. As a result, gaps exist.”

⁹⁵ For the functions of Regional Councils see RMA, s 30(1)(c) (iv); for Territorial Authorities see RMA, s 31(1)(b)(i).

⁹⁶ Lawrence, above n 56, at 315.

⁹⁷ At 308.

⁹⁸ At 308.

review or declarations, provide objectors with ample opportunities to slow down any plan change processes, and thus increase the cost to local authorities. This is further compounded by the tacit threat of appeal to the Environment Court, which will be discussed in the next section.

More broadly, local government is particularly fearful of having to suffer the cost and time of going to Court, whether via appeal under the planning regime, judicial review or declaration, or via suit for damages through the civil courts. Local government in New Zealand has a had a lot of experience in being sued, including through the ‘leaky homes’ saga, and understandably may take an overly defensive approach to implementing climate adaptation policies. Fear of liability was identified by the Australian Productivity commission as being one of the key obstacles to effective climate adaptation (see Box 2).

BOX 2: Australian Productivity Commission on liability fears in local government⁹⁹

In September 2012 the Australian Government Productivity Commission published a report on “Barriers to Effective Climate Change Adaptation”. The report, commissioned by the incumbent Labour Government, was to investigate these regulatory and policy barriers and to identify and evaluate priority reform options.¹⁰⁰ One such barrier was the fear of liability by local government.

The report explained that councils face a liability dilemma.¹⁰¹ On one hand, if they take no adaptation action, they could attract liability. Withholding information could cause people to purchase land unaware of its risks. Approving consents without due regard to climate change impacts could encourage risky development. Failing to install protective structures such as seawalls could lead to property damage. These kinds of inactions might even breach legal duties owed by councils to their residents, and thus open the possibility of damages claims.¹⁰² At the same time, proactive action by councils could also theoretically result in successful legal challenges to the validity of adaptation measures, or result in claims for compensation. For example, if the measures taken are insufficient (such as seawalls providing inadequate protection) or incorrect (such as inaccurate information regarding risk-prone areas), then parties who have made decisions based on a council’s actions could in theory have grounds to sue.

⁹⁹ Australian Government Productivity Commission, *Barriers to Effective Climate Change Adaptation* (No. 59, 19 September 2012).

¹⁰⁰ Australian Government Productivity Commission, above n 99, at iv.

¹⁰¹ At 166.

¹⁰² At 168.

Furthermore, some council actions require compensating affected parties. For example, Queensland’s “injurious affection” provisions require compensation for those whose existing rights are impacted by plan changes.¹⁰³ The Commission’s report found that this uncertain legal environment can push councils to take a conservative approach towards climate change adaptation rather than being proactive:¹⁰⁴

Uncertainty about the circumstances in which councils are liable affects local government decisions - in particular, the extent to which adaptation considerations are incorporated into land-use planning and development practices. Several participants suggested that the prospect of legal challenge has prevented councils from acting proactively, and has resulted in the adoption of conservative approaches to development approvals.

The Commission commented that when it is merely the perception of liability that impedes adaptive action, clarification around councils’ actual liability will dispel this problem.¹⁰⁵ However, where the threat of liability is real, the solution is less clear. Many Australian councils advocate for legal protection from liability as a solution. In New South Wales, councils are only liable if they do not act in good faith¹⁰⁶ or if they make a decision so unreasonable that no other authority could consider it reasonable.¹⁰⁷ This has supposedly improved their willingness to make decisions. However, such protection is a double-edged sword. The Australian Network of Environmental Defenders Offices argues that it is “likely to protect councils which fail to act appropriately in relation to climate change risks just as much as they are likely to protect councils that are proactive”.¹⁰⁸ Furthermore, even with a ‘good faith’ provision as protection from liability, councils can still face legal challenges.¹⁰⁹ This occurred when several residents from the New South Wales town of Byron Bay wanted to undertake their own anti-erosion works and appealed the council’s refusal to grant them consent.¹¹⁰ While the cases were settled, they still required council resources because the possibility of liability could not be completely foreclosed. Therefore, while liability protection may have some merit, what is really needed is a way to reduce potential liability by having clear guidance on what evidence is required for decisions.

¹⁰³ Australian Government Productivity Commission, above n 99, at 167.

¹⁰⁴ At 168.

¹⁰⁵ At 168.

¹⁰⁶ Peel and Osofsky, above n 52, at 2241.

¹⁰⁷ Australian Government Productivity Commission, at 167.

¹⁰⁸ At 169.

¹⁰⁹ At 169.

¹¹⁰ Peel and Osofsky, at 2240

The Commission therefore suggested providing government guidance and ensuring that information is current and reliable, so that all decisions are fully informed.¹¹¹

Interviews of Australian practitioners conducted by Peel and Osofsky support and build on these findings of a “liability dilemma”.¹¹² One respondent provided the following comment about the pressures faced by local government decision-makers:¹¹³

[I]f they reject an application that goes before them for a development in an area that's then to be potentially vulnerable to inundation at some point then they face the prospect of that decision being taken to an appeals tribunal or land and environment court. If they approve it then they face the prospect in the future of winding up, you know, facing the court once again, but this time in a damages claim if the property is subsequently inundated and there's damage to the property or injury to the people dwelling there.

Another respondent described how their council was having conflicts with their insurers over their backtracking on climate adaptation, with their insurers pointing out that the evidence attesting to the climatic threats had not changed.¹¹⁴ A third respondent recounted that a Queensland council was attempting to indemnify themselves against any future liability by advising applicants that they bore full responsibility for the accuracy of the information used to assess their planning applications.¹¹⁵ Respondents from New South Wales specifically commented upon the impact of the Byron Bay saga. One respondent asserted that the saga was “instrumental in making councils generally very concerned about their potential legal liability in relation to this damage”.¹¹⁶ Another claimed that for “most coastal councils in New South Wales,” the liability issue was now the “single most important issue. It is the only thing on the agenda.”¹¹⁷

Climate adaptation in the Environment Court

The legality of some climate adaptation measures has been left to the Environment Court to resolve. There are a few possible reasons why the Environment Court may have been relied

¹¹¹ Australian Government Productivity Commission, above n 99, at 169.

¹¹² Peel and Osofsky, above n 52, at 2238.

¹¹³ At 2238.

¹¹⁴ At 2239.

¹¹⁵ At 2239.

¹¹⁶ At 2241.

¹¹⁷ At 2241.

upon to articulate climate adaptation policy. For example, it might be because local authorities have chosen not to create a comprehensive policy for political reasons, such as not wanting to expend resources on a politically damaging policy; or for reasons of perceived administrative capacity or expertise. Councils may deem it to be in their best political interests, or even in the best interests of the region or district, for the Environment Court to make the final decision on choice of policy. Alternatively, the reason might be because local government plans or consents have been routinely taken to Environment Court by well-organised objectors. In both cases, the reason for the Environment Court having such a significant role in climate adaptation policy is the fact that the Environment Court has such expansive jurisdiction under the Resource Management Act 1991. An underlying reason could be that there is a lot of leeway within national planning and guidance documents for local government to choose the local adaptation approach.

The potential inappropriateness of the Environment Court as an institution for establishing adaptation policy is noted by Judy Lawrence et al:¹¹⁸

While nine of the 57 councils have taken steps to restrict development in areas subject to coastal hazards, they have all used different methods... Different approaches are vulnerable to being treated differently by the Courts, often with different outcomes when issues are re-debated by different experts in an ad hoc manner through the statutory processes. This has resulted in ongoing caution by councils in considering climate change effects.

Similar observations were made in a paper by Catherine Iorns et al, assessing a number of recent climate adaptation decisions in both the Environment Court, and the High Court:¹¹⁹

The results of [climate adaptation cases] are varied, with some measures being upheld by courts and others being denied. While expert evidence underpins the planning processes, the use of expert evidence does not always serve to protect decisions from being overturned by courts. Further, results have not been predictable; different courts emphasise different reasons for the results, including illustrating varying approaches to risk and caution. This demonstrates the need for more consistency and clarity in the legal frameworks to assist the planning process, and thereby assist decision-making on climate adaptation measures.

This also affirms the same trend found in earlier research conducted by Rive and Weeks. Their analysis is detailed below in Box 3.

¹¹⁸ Lawrence and others, above n 56, at 313.

¹¹⁹ Catherine Iorns Magallanes, Vanessa James and Thomas Stuart, "Courts as Decision Makers on Climate Adaptation Measures: Lessons from New Zealand" in Walter Leal Filho (Ed), *Climate Change Impacts and Adaptation Strategies for Coastal Communities* (Springer International, Cham, 2018), at 316.

BOX 3: Climate Change in the Environment Court before 2010

Research conducted by Vernon Rive and Teresa Weeks published in 2011 found significant inconsistencies between Environment Court decisions addressing climate adaptation in the coastal zone under the previous NZCPS.¹²⁰ This was due in part to the dearth of clear Ministry for the Environment or Department of Conservation guidelines in place throughout the previous two decades, and the variety of estimations provided by the scientific literature on sea-level rise at the time. The authors noted that by 2010 the Environment Court had begun to rely upon Ministry guidelines in combination with official estimates from the IPCC.¹²¹

On the issue of appropriate planning horizons, the authors found that the court had begun to settle upon a 100-year period in line with the 2008 guidelines from the Ministry for the Environment.¹²² However, on the issue of forecasted sea-level rise, the authors still found major inconsistencies between the figures that were accepted by the Court.¹²³ These range from 0.16-0.3m by the year 2100,¹²⁴ to 0.8 by 2100.¹²⁵ The authors noted that the uncertainty inherent in making such projections had produced a wide range of figures, and that this uncertainty was compounded by the necessity of employing different levels of caution depending on the type of proposal being made – eg, that a boatshed demands less caution than a substation. They noted that local government was thus placed in “the unenviable position of having to reconcile conflicting figures for projected sea-level rise within government guidance documents, New Zealand scientific publications, and overseas expert assessments”.¹²⁶ At the time, it seemed clear that the Court had not provided any firm direction on how to reconcile this information in a consistent fashion, therein heightening the legal uncertainty around pursuing a climate adaptation agenda.

The remaining source of inconsistency concerned the extent to which Courts and/or local authorities should intervene to limit voluntary exposure to the risks posed by sea-level rise. Unlike the prior points of inconsistency, this issue is more of a value judgement rather than a matter to be decided with reference to available evidence. Rive and Weeks noted two distinctive

¹²⁰ Vernon Rive and Teresa Weeks “Adaptation to Climate Change in New Zealand” in Alastair Cameron (ed), *Climate change law and policy in New Zealand* (LexisNexis, Wellington, 2011) 345.

¹²¹ Rive and Weeks, at 9.7.1.

¹²² At 9.7.3.

¹²³ At 9.7.2.

¹²⁴ *Buckley v South Wairarapa District Council* EC Wellington W004/09 4 February 2008, at 27.

¹²⁵ *Waterfront Watch Inc v Wellington Regional Council* [2009] NZEnvC 345, at [64].

¹²⁶ Rive and Weeks, at 9.7.2.

approaches to EC decision making prior to 2010: one more conservative and paternalistic; the other more liberal and founded on the notion that risk could be voluntarily assumed on the basis that “the Act does not require the elimination of all risk”.¹²⁷ In their conclusion, they noted that two cases involving virtually identical fact patterns – namely, a single story residential development in an area exposed to coastal hazards – were treated very differently by the Court.¹²⁸

It is unclear as to whether an approach founded upon the “voluntary assumption of risk” should be as readily allowable under Policy 25 of the 2010 New Zealand Coastal Policy Statement, which directs decision makers to “avoid” new development or redevelopment in hazardous areas. On the one hand, in the 2014 *Gallagher* decision, the Environment Court prohibited further development in a hazardous coastal area, citing the necessity of applying Policy 25 of the 2010 NZCPS, in combination with Objective 5, mandating the use of a precautionary approach.¹²⁹ A similar approach was employed in the *Carter Holt Harvey* decision.¹³⁰ However, the 2014 *Mahanga* decision allowed a residential coastal development to occur subject to the lodgement of a bond to cover the eventual costs of removing each building.¹³¹ As Iorns et al comment, the same inconsistencies are still present under the current regime in spite of the NZCPS.¹³² The Court in *Gallagher* distinguished *Mahanga* on the basis that it concerned a consent application in an area zoned for residential land use, whereas *Gallagher* concerned a plan change application. They noted that the consent process only required authorities to *have regard* to the NZCPS, whereas the plan change process under sections 67 and 75 required authorities to *give effect* to the NZCPS.¹³³

A related explanation for this divergence in approach – and an additional reason for distinguishing the case – is the influence of the Supreme Court’s decision in *King Salmon*. The *King Salmon* decision was released a matter of days after the *Mahanga* decision so it was not available to assist the Court in the *Mahanga* decision (should the Court have thought it appropriate to apply *King Salmon* to a resource consent application). However, it was used in *Gallagher* to note the strength of the NZCPS directives; in addition, *Sustain our Sounds* was used

¹²⁷ At 9.7.4. See also, *Waterfront Watch*, above n 125, at [74].

¹²⁸ Rive and Weeks, above n 120, at 9.7.6.

¹²⁹ *Gallagher v Tasman District Council* [2014] NZEnvC 245.

¹³⁰ *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25.

¹³¹ *Mahanga E Tu Inc v Hawkes Bay Regional Council and Wairoa District Council* [2014] NZEnvC 83.

¹³² Iorns, above n 119, at 316.

¹³³ *Gallagher*, above n 129, at [176].

by the court in *Gallagher* in relation to the need to take a precautionary approach. The Environment Court would presumably similarly implement stronger guidance if it was forthcoming, at least in respect of the need to uphold the climate adaptation provisions of the NZCPS. We will need to see the result from the *Davidson* decision, once it is final, in order to see the influence on consent decisions.

The detailed analysis by Vernon Rive and Teresa Weeks of the particular science accepted by the Environment Court has not been repeated for cases decided after the adoption of the 2010 New Zealand Coastal Policy Statement. It is noted that the 100-year planning horizon was confirmed in the 2010 NZCPS. However, it does not get into any detail about climate change science, for example. This gap has been filled by the 2017 Ministry for the Environment *Coastal hazards and climate change: Guidance for local government ('Guidance')*.¹³⁴

The 2017 MfE *Guidance* and with the 2017 DoC guidance are designed to assist local government decision-makers in providing for coastal hazards in climate change. This *Guidance* is discussed in detail in Chapter 3 so will not be described here. We will simply note that it will likely also be of assistance to the Environment Court for detailing the kind of science that councils are expected to use and the approaches to precaution that will be indicated, as well as providing more clarity on the most appropriate adaptation measures as well as decision-making procedures.

4. Conclusion

This chapter aims to give a reader some insight into the range of strategies and legal instruments that could be deployed to meet the challenge of maladaptive coastal development. In sum, the objective of climate adaptation for residential coastal development has two broad objectives. The *first* objective is to prohibit or severely restrict additional development in areas that will be subject to coastal hazards due to sea-level rise. This objective includes preventing rezoning of existing land to allow for residential development, but also extends to preventing intensification of existing residential development and to ensuring that any development that does occur is subject to stringent mitigation conditions, such as a requirement to relocate any building once an area becomes sufficiently hazardous.

¹³⁴ MfE, *Guidance*, above n 3.

The *second* objective involves establishing policies and measures appropriate to deal with existing development as it becomes subject to ever increasing risk of erosion and inundation from storm surge, amongst other hazards. The legal and political obstacles to addressing existing maladaptive development are far greater than those faced in preventing further development. This is because the current planning paradigm treats resource consents for residential development as akin to private property. It does this by granting use rights in perpetuity to be surrendered only upon the payment of full compensation by the state. It does not conventionally allow for existing use rights to be revoked, for example, even when changes in the surrounding environment fundamentally alter the nature of the current use. Later chapters in this report will address how the four different adaptation strategies – ie, avoid, accommodate, protect, and retreat – are enabled or constrained by current law.

Beyond outlining the range of adaptation options, this chapter also provides insight into the many non-legal obstacles to implementing such policies, even when central and local government have the requisite power under law. It notes that, even if the current planning regime theoretically provides the necessary legal capacity for preventing additional development in hazardous areas – and it arguably does – the problem of maladaptive coastal development has clearly required central government to provide leadership. The leadership required relates to provision of guidance on the necessary scientific evidence to implement adequate coastal zoning rules, to the provision of at least guidance on appropriate adaptation measures and policies, and preferably the provision of clear directives which can withstand legal challenge in the Environment Court. In the absence of such directives and/or guidance, local government has generally shied away from action for fear of the legal and/or political consequences of facing down well-organised groups who oppose planning restrictions or prohibitions on developing land in the coastal area. Furthermore, until recently, the lack of guidance has produced inconsistencies in policy, often with the Environment Court being called upon to resolve these issues on an ad hoc basis. This has compounded the legal uncertainty facing local government, and is likely to produce a similar fear of liability in New Zealand to that observed in Australia.

Part One:

Zoning under the current planning system

Chapter 2: Outline of the RMA

Chapter 3: Climate adaptation and coastal
development: key principles,
considerations and directives

Chapter 2: The Resource Management Act 1991

This chapter outlines the structure and provisions of the Resource Management Act (RMA) that are relevant to decision-making on climate adaptation measures. It discusses the powers and responsibilities of local government in this area, particular aspects of relevant decisions such as zoning and plan changes, and provides examples of the application of the relevant rules. It is designed as an introductory overview; those who work with the RMA daily and want to get straight into the details of the legal requirements for different adaptation measures may prefer to turn straight to Part 3 of this Report.

The following topics are addressed in this chapter:

- (1) The role of Part 2 in plan making and consenting:
 - (a) The old approach: the overarching purpose of Sustainable Management, and the “overall broad judgement” approach to all decision-making under the RMA
 - (b) The new approach: giving renewed weight to RMA plans and policies – the impact of the *King Salmon* and *Davidson* cases
- (2) Powers and Responsibilities of Central Government
- (3) Powers and Responsibilities of Local Government
- (4) Legal requirements for the passing of all plans:
 - (a) Section 32 evaluations
 - (b) Consultation requirements
- (5) Activity classifications
- (6) Legal challenges to zoning under the RMA
 - (a) The general bar on compensation
 - (b) Plan change applications under section 293
 - (c) Plan change applications under section 85

Example of application: *Fore World Developments Ltd v Napier City Council*

1. The role of Part 2 in plan making and consenting

The RMA creates a scheme where three layers of government (central, regional, and territorial/district), exercising different statutory functions, exercise their legal powers to achieve the overarching purpose of “sustainable management” under Part 2 of the Act. Beyond this overarching purpose, the Act provides for the promulgation of policies and plans within a

formal statutory hierarchy of documents, with central government at the top, regional councils in the middle, and territorial authorities at the bottom. In addition to giving substantive effect to the overarching purpose of sustainable management, each document is required to give effect to any higher-level documents. To quote the Supreme Court:¹³⁵

[T]he RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5, and to pt 2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

The overarching purpose and principles contained in Part 2 of the RMA have been referred to as the “engine room” of the Act because they are intended to guide almost every discretionary power conferred by the statute.¹³⁶ This includes both the creation of plans and policies at all levels, and the issuance of consents. Section 5 of the Act reads as follows:

5 Purpose

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

To understand why “sustainable management” was included in the statute, it pays to look back into the political history of the time. This is captured in this lengthy passage:¹³⁷

The standard account of the RMA’s legislative history identifies three somewhat competing philosophies that influenced its development. On the one hand were those, like Upton, on the right of the political spectrum. Their main aim was to develop an economically efficient planning model that focused on the effects of activities on the natural environment as opposed to the previous planning regime which was based on regulating types of activities. The political left, on the other hand, were motivated by a strong desire to empower local communities and increase community influence on environmental decision-making. The environmental lobby straddled the two positions: like the right-wingers, they wanted a system of rules that focused on the effects of activities on the natural environment; but they also wanted enough flexibility in the national framework to meet the environmental needs of specific localities and opposed the right’s overriding desire to construct a development-friendly framework.

¹³⁵ *Environmental Defence Society v King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, at [30].

¹³⁶ *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC), at [47].

¹³⁷ Stephen Rivers-McCombs, “Planning in Wonderland: The RMA, Local Democracy and the Rule of Law (2011) 9 NZJPL 43, at 62-63 (footnotes omitted).

Labour's left were the strongest advocates for the concept of "sustainable management" that eventually formed the central purpose of the RMA. The term had been developed as an environmental policy by two influential reports commissioned by the United Nations. "Sustainable development", as the reports termed it, identifies the natural environment as a key element of societies' well-being; but it also recognises that environmental quality is one part of a broader well-being, which includes economic, social and cultural factors. The aim of sustainable development, therefore, is to manage the environment in a way that enables both environmental and other aspects of community well-being to be maintained across generations. The notion of sustainable development melded well with the left's desire for strengthened local democracy, which the report writers saw as vital for two reasons: first, they recognised that the natural and physical environment varies between regions; second, they believed that local communities were best placed to define their own concepts of well-being because of its value-laden nature.

The old approach: sustainable management and the “overall broad judgement” approach to decision-making under the RMA

When the Act was passed, there was significant disagreement as to how Part 2 ought to be interpreted. Initially the Courts adopted an “environmental bottom line” approach, wherein “use, development and protection of natural and physical resources” could not be traded off against the matters listed in the subsections. This approach was eventually supplanted by the “overall broad judgement” approach, which held that decision-makers and courts ought to consider the issues listed and then reach a “broad judgement” about whether this promoted the single purpose of “sustainable development”. This was justified on the basis that statutory language had deliberately been left open by Parliament, and thus ought not to be read in a strict manner.¹³⁸

Both the inclusion of “sustainable development” and the “broad judgement” approach have long been subject to criticism for the uncertainty they are deemed to cause. Rivers-McCombs notes that, at the time of the RMA’s passing, groups on the conventional ‘right’ of the political spectrum, and especially the Treasury, were deeply opposed to the inclusion of “sustainability”. They had hoped instead to pass a statute that was primarily concerned with regulating objective environmental effects, rather than resolving disputes between diverse members of local communities.¹³⁹ Recent – albeit unsuccessful – efforts to reform the RMA have also focused on the uncertainty deemed to be caused by the broad judgement approach.¹⁴⁰

¹³⁸ Eleanor Milne, “Fishing for answers: the implications of *Environmental Defence Society v King Salmon*” (2015) 46 VUWLR 213 at 218-219.

¹³⁹ Rivers-McCombs, above n 137, at 63.

¹⁴⁰ See Technical Advisory Group *Report of the Minister for the Environment’s Resource Management Act 1991 Principles* (CR 129, February 2012).

The new approach: giving renewed weight to RMA plans and policies – the impact of the *King Salmon* and *Davidson* cases.

The *King Salmon* decision

In the *King Salmon* decision, the Supreme Court affirmed that the meaning of “while” in section 5 meant “at the same time as”, therein endorsing the “broad judgement approach” for the application of Part 2.¹⁴¹ Yet they also concluded that section 5 is more than just an aid to interpretation,¹⁴² and the inclusion of “protection” lends great weight to the protection of the environment when undertaking the broad judgment.¹⁴³

More importantly, the Supreme Court also commented that section 5 should not to be used for the purpose of making operative decisions because the Act intends for plans and policies to be set as the primary means of achieving sustainable management.¹⁴⁴

Section 5 was not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made; rather, it sets out the RMA’s overall objective. Reflecting the open-textured nature of pt 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of pt 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt 2 remains relevant. It does not follow from the statutory scheme that because pt 2 is open-textured, all or some of the planning documents that sit under it must be interpreted as being open-textured.

The particular facts of *King Salmon* concerned the validity of a decision by a Board of Inquiry, who had applied the broad judgement approach even though clear direction had been provided for the matters at issue under the New Zealand Coastal Policy Statement 2010. The Supreme Court held that the statute could not have been intended by Parliament to allow decision-makers to undertake a broad judgement when the field was already covered by policy or planning documents.

Dispute has subsequently arisen over how far this finding of the Supreme Court ought to apply. The first question is whether this includes all national documents, or whether this is limited to the Coastal Policy Statement. A more radical question is whether the *King Salmon* decision ought to be construed as barring local authorities from undertaking a broad judgement approach when granting consents on a matter directly provided for under a relevant regional or district plan. This second proposal has been the subject of recent litigation in the *Davidson* cases.

¹⁴¹ *EDS v King Salmon*, above n 50, at [24](c).

¹⁴² At [24](a).

¹⁴³ At [24](d).

¹⁴⁴ At [151].

The *Davidson* decision

In 2017 the High Court in *Davidson* endorsed the application of *King Salmon* to the consenting process. It held that the relevant planning documents had already given substance to the principles in Part 2,¹⁴⁵ and that “it would be inconsistent with the scheme of the RMA and *King Salmon* to allow Regional or District Plans to be rendered ineffective by general recourse to Part 2 in deciding resource consent applications.”¹⁴⁶ The High Court also allowed for the same narrow caveats allowing recourse to Part 2 as in *King Salmon*.¹⁴⁷

In 2018 the Court of Appeal overturned the High Court decision, holding that the *King Salmon* approach does not apply to consents, and that it is permissible for consent authorities to have regard to Part 2.¹⁴⁸ However, the Court of Appeal did not hold that a broad judgement approach was always required either. Rather, they held that it was a permissible action in certain circumstances.

In deciding that *King Salmon* did not apply to the consents process, the Court considered that the wording contained in section 104 (“subject to Part 2”) is not equivalent to the sections regarding plan changes, and that the words in section 104 “clearly show that a consent authority must have regard to the provisions of Part 2” when appropriate.¹⁴⁹ It stated that the *King Salmon* decision did not reference the relevant wording in section 104(1),¹⁵⁰ and the Supreme Court’s decision was not intended to have general application, and thereby was not intended to apply to the consents process.¹⁵¹

The Court then considered when it would be permissible for the consent authority to refer to Part 2. It concluded that, if it is clear to the consent authority that a plan was “prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes,” then the result of such “genuine process” would be to implement those policies.¹⁵² There would be no need to refer to Part 2 in this case, as it would add nothing, and could not justify a different outcome.¹⁵³ The focus is on the planning process, and whether the plan has

¹⁴⁵ *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 at [76].

¹⁴⁶ *RJ Davidson* (HC), at [77].

¹⁴⁷ *RJ Davidson* (HC), at [76].

¹⁴⁸ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

¹⁴⁹ *RJ Davidson* (CA), at [70].

¹⁵⁰ At [67].

¹⁵¹ At [68].

¹⁵² *RJ Davidson* (CA), at [74].

¹⁵³ At [74].

“been competently prepared” such that the consent authority can “feel assured” that reference to Part 2 would add nothing.¹⁵⁴ This reasoning is clearly coloured by *King Salmon*.

However, the Court also stated that “absent such assurance, or if in doubt” that the plan has been prepared in a way that appropriately reflects Part 2, the consent authority is “required to give emphasis to Part 2.”¹⁵⁵ This is the implication of the words “subject to Part 2” in section 104(1).¹⁵⁶ The consent authority can therefore refer to Part 2 in broader circumstances than those prescribed by the three narrow caveats under the *King Salmon* approach (invalidity, incomplete coverage, or uncertainty), and the Court of Appeal expressly rejected that narrower approach.¹⁵⁷

The New Zealand Coastal Policy Statement was again at issue in this case. The Court noted that this document has been confirmed by the Supreme Court as compliant with the RMA’s requirements which distinguishes it from other RMA instruments.¹⁵⁸ Where a proposal would be “demonstrably in breach” of the NZCPS, reference to Part 2 is unnecessary as doing so may amount to “subverting a clearly relevant restriction in the NZCPS.”¹⁵⁹ However, if it is unclear on the Coastal Policy Statement whether a proposal should be granted, the authority is able to look to Part 2 for assistance.¹⁶⁰ The Court considered a similar approach should be taken for resource consents under other RMA instruments.¹⁶¹ It also warned that a plan provision is not properly had regard to “if it is simply considered for the purpose of putting it on one side.”¹⁶²

(We note that the CA decision in *Davidson* is currently under appeal to the Supreme Court.)

¹⁵⁴ At [75].

¹⁵⁵ At [74].

¹⁵⁶ At [75].

¹⁵⁷ At [76].

¹⁵⁸ At [71].

¹⁵⁹ At [71].

¹⁶⁰ At [72].

¹⁶¹ At [73].

¹⁶² At [73].

Analysis of the new approach to Part 2

The Court of Appeal's approach in *Davidson* is subtler than that of the Supreme Court in *King Salmon* and, if confirmed upon appeal, it will require consent authorities to consider the nature of planning and policy instruments, and will allow for the continued exercise of judgement by planners and the Environment Court. However, the Court of Appeal's decision is clearly influenced by the *King Salmon* approach in that recourse to a "broad judgement" under Part 2 is now heavily constrained in law.

Interestingly, it has been suggested that the Environment Court is unlikely to treat recourse to the broad judgement approach as some kind of residual power to only be used on rare occasion. As Marks and Thomas noted, an Environment Court decision released a matter of days after the High Court decision in *Davidson*, contained a clear affirmation of the "broad judgement" approach. Marks and Thomas suggested that any exceptions under the *King Salmon* precedent would be used by the Environment Court to jealously guard this broad decision-making power.¹⁶³

Nevertheless, the *Davidson* decision may still reshape environmental decision-making. It may make the utility of prior Environment Court cases applying the broad judgement approach to residential development in areas subject to coastal hazards less relevant. It could also make the content of plans and policies become the primary driver of climate adaptation; this could remove some of the legal uncertainty faced by local councils assuming that their policies and plans are a sufficient source of guidance.

2. Powers and Responsibilities of Central Government

Central government action on climate adaptation has been slower than action on mitigation. From the period of 2001-2008, only 3 out of 39 papers addressing climate change touched upon the issue of adaptation.¹⁶⁴ Unlike climate change mitigation, which requires standardised regulation at the national level, climate change adaptation has a stronger local dimension to its implementation. Following this logic, central government has until recently taken a

¹⁶³ Hannah Marks and Georgina Thomas, "King Salmon reigns ... for now" [2017] Resource Management Journal 19, at 23.

¹⁶⁴ Andy Reisinger and others, "The role of local government in adapting to climate change: Lessons from New Zealand" in James Ford and Lea Berrang-Ford (eds), *Climate Change Adaption in Developed Nations: From Theory to Practice* (Springer Netherlands, Dordrecht, 2011) 303, at 306.

comparatively hands-off approach, and left adaptation to the judgement of regional and district councils, assisted only by non-binding guidance manuals.

The RMA provides central government with significant power to pass both framing instruments and regulatory instruments which can guide and/or set the parameters for the promulgation of local government plans. Under the RMA scheme it was envisaged that central government would provide leadership through the promulgation of national policy statements and national environmental standards. However, with the exception of the 1994 Coastal Policy Statement which is obligatory under the Act,¹⁶⁵ no other national policy statement was passed until 2008. As of 2018, there are only four National Policy Statements currently in effect, other than the updated 2010 Coastal Policy Statement.¹⁶⁶ This lack of action from government has been blamed in part for the perceived failures of the RMA in many other spheres of environmental management, leaving local authorities unguided and unrestrained, and thus producing a great deal of inaction, inadequate action, and/or inconsistency.¹⁶⁷ Maladaptive coastal development may simply be another example of where a hands-off approach from central government has failed to produce sustainable outcomes.

An additional reason in favour of climate adaptation being pursued through the promulgation of national documents is the fact that this would discharge central government's climate adaptation obligations under international law. As with most legislation, the RMA is silent on whether it is legitimate for international obligations to be factored into its decision-making processes. It is an accepted principle of statutory interpretation that a court will attempt to uphold New Zealand's international obligations. This duty also applies to decision-makers. However, with the exception of proposals of national significance, the decision-makers under the RMA are local government, not central, with fewer capacities to consider international law; in addition, central government is the entity bound by international law. The promulgation of national documents is thus arguably preferable to local government being tasked with ensuring

¹⁶⁵ RMA, s 57(1).

¹⁶⁶ See the Ministry for the Environment, *National Policy Statement on Electricity Transmission 2008*; *National Policy Statement for Renewable Electricity Generation 2011*; *National Policy Statement for Freshwater Management 2014* (amended 2017) and; *National Policy Statement on Urban Development Capacity 2016*.

¹⁶⁷ Milne, above n 138, at 214-215.

compliance with the crown's international obligations.¹⁶⁸ It has been argued that this is preferable to courts reading these matters into the statute:¹⁶⁹

National policy statements present an ideal opportunity for central government to clarify the extent to, or the way in which, its international obligations apply in the resource management context. Rather than the courts inferring that such obligations are relevant to decision-making in a particular context, national policy statements could fulfil that role.

To an extent, this practice already occurs. For instance, the 2010 Coastal Policy Statement identifies compliance with international obligations as one of its 7 objectives.¹⁷⁰ However, such obligations have not yet been mentioned explicitly in climate adaptation decisions. This is in spite of the fact that New Zealand has signed several international treaties committing the country to pursuing climate adaptation, including its 2016 ratification of the Paris Agreement, and the 2015 Sendai Framework.¹⁷¹

None of this should imply that there has been no movement to create formal instruments, nor that the Ministry for the Environment has not assisted councils through its *Guidance* on how to address coastal hazards and/or climate change adaptation. For example, there were indications from the Ministry for the Environment in 2009 that a national environmental standard on sea-level rise would be developed, but this plan was subsequently abandoned in 2011 with the Ministry choosing instead to rely on non-binding guidelines.¹⁷² This is arguably in keeping with central government practice, which has adopted guidelines more than produce national level documents through the designated RMA process. In the case of National Policy Statements, this preference for guidelines is almost certainly due to the extensive legal requirements for passing a national policy statement. (These requirements will be addressed more below.)¹⁷³

Beyond the promulgation of national documents and non-binding guidelines, the Minister for the Environment also has a number of relevant powers. For example, the Minister may direct a regional or territorial authority to prepare, change, vary or review a plan in order to address an issue within the authority's power.¹⁷⁴ This could be used in respect of climate adaptation

¹⁶⁸ Arla Marie Kerr "Untapped Potential: Administrative Law and International Environmental Obligations" (2008) 6 NZJPI 81, at 90.

¹⁶⁹ Kerr, above n 168, at 90.

¹⁷⁰ Department of Conservation, New Zealand Coastal Policy Statement 2010 (4 November 2019) (Hereinafter NZCPS 2010).

¹⁷¹ Boston and Lawrence, above n 20, at 4.

¹⁷² Rive and Weeks, above n 120, at 9.7.2.

¹⁷³ Milne speculates that National Environmental Standards are seen as easier to establish than a National Policy Statement: Milne, above n 138, at 229. However, there are a similar number of each.

¹⁷⁴ RMA, s 25A and 25B.

policies. The Minister also has a “residual power” to replace local officials with a designated representative if the Minister deems that the local authority is “not exercising or performing any of its functions, powers, or duties” under the RMA to the extent that they consider “necessary to achieve the purpose” of the Act.¹⁷⁵

This power is supplemented by the Minister for the Environment’s call-in powers for “proposals of national significance” under Part 6AA of the Act. This mechanism allows the Minister to refer the matter directly to the Environment Court, or a Board of Inquiry.¹⁷⁶ Under section 142(3)(a), the Minister has wide latitude to determine that a matter is of “national significance”. This power applies to all forms of environmental decision making under the Act, be they plan proposals, plan changes or consents.¹⁷⁷

3. Powers and responsibilities of local government

Functions, policies and plans of Regional Councils

Regional Councils are tasked with producing policies and plans which facilitate the integrated management of natural and physical resources within the region;¹⁷⁸ regional policy statements are the instrument intended to achieve this purpose.¹⁷⁹ It is compulsory to have a regional policy statement,¹⁸⁰ and any regional plan must give effect to the regional policy statement.¹⁸¹

Section 62 sets out the content that must be covered by a regional policy statement; this includes stating which local authority is to be responsible for managing land use in a particular area for the purpose of avoiding or mitigating hazards, natural or otherwise.¹⁸² The regulation of land use for this purpose is common between regional and district councils, but district councils must give effect to the directives passed by the regional council.¹⁸³ Controls over residential land use, while commonly the preserve of district councils, can also be imposed by

¹⁷⁵ RMA, s 25.

¹⁷⁶ RMA, s 140(3).

¹⁷⁷ RMA, s 140(2).

¹⁷⁸ RMA, s 30(1)(a).

¹⁷⁹ RMA, s 59.

¹⁸⁰ RMA, s 60(1).

¹⁸¹ RMA, s 66.

¹⁸² RMA, s 62(1)(i).

¹⁸³ RMA, s 30(1). See *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189; [1995] NZRMA 452 (CA) 459.

regional councils where natural hazards are at issue. However, the relationship between the two councils is viewed by the courts as being cooperative.¹⁸⁴

The control of the use of land for the avoidance or mitigation of natural hazards is within the powers of both regional councils and territorial authorities. There will no doubt be occasions where such matters need to be dealt with on a regional basis, and occasions where this is not necessary, or where interim or additional steps need to be taken by the territorial authority.

For example, as an illustration, this power to regulate land use for mitigation or avoidance of natural hazards allows regional councils to impose a building line restriction in areas subject to coastal erosion.¹⁸⁵ Regional plans allow for activities within the jurisdiction of the regional council to be restrictively classed as being non-complying or prohibited, and this extends to creating setbacks/building lines in the coastal zone for the purpose of avoiding or mitigating exposure to natural hazards from the sea.¹⁸⁶ In the *Francks* decision, the Environment Court explicitly rejected the argument that the regulation of land use activities by the regional council was inherently ultra vires, and affirmed that such rules (eg, prohibitions) could be made for the purpose of avoiding or mitigating natural hazards.¹⁸⁷ This power would undoubtedly extend to residential land at risk of inundation due to sea-level rise, or more generally at risk of being subject to storm surges.

District plans must in turn give effect to regional policy statements, and not be inconsistent with regional plans.¹⁸⁸ Minor inconsistencies are allowed where these do not affect the intent or purpose of the regional policy.¹⁸⁹ Regional policies are not limited to stating broad objectives or containing only flexible directives, and may contain fixed directives if the circumstances justify it.¹⁹⁰

Functions and plans of Territorial/District Councils

Territorial or District Councils are primarily responsible for the regulation of land use through their district plans and consent procedures, including setting rules and granting consents for subdivision. In common with regional councils, district councils have a common function of

¹⁸⁴ RMA, s 30(1). See *Canterbury Regional Council*, above n 183, at [13].

¹⁸⁵ *Franks v Canterbury District Council* [2005] NZRMA 97 (HC).

¹⁸⁶ *Franks*, at 110-113. The ability to affect existing use rights is considered in more detail below.

¹⁸⁷ *Franks*, at [68]-[70].

¹⁸⁸ RMA, ss 75(3), (4).

¹⁸⁹ RMA, s 82.

¹⁹⁰ *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA) at 23.

avoiding or mitigating natural hazards affecting land.¹⁹¹ However, in the instance of an inconsistency between the two hazard management plans, the regional document will prevail.¹⁹²

4. Legal requirements for the creation of plans and policies

(a) Section 32 evaluation reports

Section 32 specifies a particular process for assessing the costs, benefits and alternatives to passing any plan or policy under the RMA, including applications for a private plan change. It requires a preliminary report to be produced in order to establish whether it is necessary to create any proposed additional rules and to consider other alternatives prior to publicly notifying the intended changes.¹⁹³ The report must also evaluate the risk of acting or not acting if there is uncertain or insufficient evidence/information. The s 32 report is taken seriously, and the evaluation is a key component of any plan-making process.

However, the level of detail within the evaluation report is not high for all topics. For example, the section requires a consideration of costs and benefits of environmental, economic, social and cultural effects, including cumulative effects and future effects on these factors; however, this is not required to be monetised or quantified in economic terms. Weight must also be given to the unquantifiable values specified in Part 2 of the Act. Likewise, the requirement to consider alternatives does not extend to every conceivable alternative, and the selection of the “most appropriate” option does not require that the option be perfect, merely suitable.¹⁹⁴ Furthermore, the section also allows for a precautionary approach to be employed, therein lessening the evidential burden upon those proposing plans or plan changes by not requiring definitive proof of harm.¹⁹⁵ However, research by Judy Lawrence and others has indicated that planners and engineers have been very reluctant to apply a precautionary approach because they have viewed uncertainty as indicating a lack of sufficient evidence to suggest harm, and thus insufficient evidence to justify changes such as restrictions on use and development beyond

¹⁹¹ RMA, section 31(b)(i).

¹⁹² RMA, ss 75(3), (4).

¹⁹³ Kenneth Palmer, “Resource Management Act 1991” in Derek Nolan (ed) *Environmental and Resource Management Law* (6th ed, LexisNexis, Wellington, 2017) 101, at 3.84.

¹⁹⁴ Grant Hewison, “The Resource Management Act 1991” in Peter Salmon and David Grinlinton (ed) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) 533, at 11.7.2.

¹⁹⁵ RMA, s 32(2)(c). Kenneth Palmer *Local authorities law in New Zealand* (2nd ed, Brookers, Wellington, 2012), at 17.5.

existing provisions.¹⁹⁶ This suggests that the evidential standards required by Section 32 are still being misconstrued by some planners and engineers in spite of the precautionary principle existing by implication and being obligatory according to those terms. Amendment of Section 32 to provide an explicit direction to apply the precautionary principle would resolve this problem.

Finally, while the Environment Court has the ability to consider the adequacy of a section 32 report, it is reportedly unable to require a local authority to undertake any additional evaluations.¹⁹⁷

(b) Public Participation

In the 1980s, public participation was seen as being core to achieving sustainable development, and the importance of public participation culminated in its inclusion as principle 10 of the 1992 Rio Declaration.¹⁹⁸ It is unsurprising that the RMA contains extensive obligations upon all levels of government to engage in public consultation when promulgating new plans or policies. As the Supreme Court has noted:¹⁹⁹

[It is] the general policy of the Act that better substantive decision-making results from public participation.

There are several rationales for extensive public consultation. The intrinsic rationale relates to the greater legitimacy accorded to institutions which engage and/or include communities in decision-making. This is especially so where the matters being decided are value laden and are thus political in nature, as the “sustainable management” purpose of the RMA is.²⁰⁰ Janet McLean suggests that public participation gives the otherwise vague directives of the RMA meaning.²⁰¹

[I]t could be argued that participation saves the otherwise vague ... delegations of power in the Act from illegitimacy and that the process can become a purpose.

¹⁹⁶ Lawrence and others, above n 56, at 305.

¹⁹⁷ Palmer, “Resource Management Act” above n 193, at 3.84.

¹⁹⁸ “United Nations Conference on Environment and Development: Rio Declaration on Environment and Development” 31 International Legal Materials 874, at 878.

¹⁹⁹ *Westfield (New Zealand) Ltd v North Shore City Council* [2005] 2 NZLR 597 (SC), at [25], per Elias CJ.

²⁰⁰ Rivers-McCombs, above n 137, at 60.

²⁰¹ Janet McLean “New Zealand’s Resource Management Act 1991: Process with Purpose?” (1992) 7 Otago Law Rev 538, at 543.

A similar justification is that, because the “environment” is defined under the RMA at section 2(1) as including people and communities, those people and communities ought to have a voice in decision-making.²⁰²

The more instrumental rationale is that decision-makers are able to make better decisions because of the evidence they obtain from the process, and that affected parties are able to better protect their affected interests. To quote the Supreme Court:²⁰³

The purposes of public participatory processes are twofold — first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests, and, second, to enhance the quality of decision-making.

The type of consultation required differs for the different levels of government, central and local. With the passing of the Resource Legislation Amendment Act 2017, all “national directions” are now required to be passed through a single process.²⁰⁴ “National directions” includes both National Policy Statements and National Environmental Standards. The single process actually provides a choice of two processes: an alternative consultation process, or through the appointment of a Board of Inquiry.²⁰⁵ The alternative consultation process for national directions is not described in a prescriptive manner; the Act simply states that the proposal must be notified, submissions should be called for, adequate time should be allowed for submissions to be received, and a report and recommendations must be provided to the Minister about the submissions and the subject-matter of the national direction.²⁰⁶ No further detail about process is provided, and no time limits are imposed. The Minister thus has a lot of discretion about how to conduct a public consultation. The Board of Inquiry process is more codified and is more like a local authority consultation process, in that active steps are explicitly required to alert members of the public to the proposed changes and a public hearing is to be conducted.²⁰⁷ However, it is noted that common law consultative principles apply and thus active steps are impliedly required in both processes. No time limits are imposed.

There is much less discretion for consultation obligations by local authorities. For example, in respect of planning, Schedule 1 of the RMA codifies the processes for “[p]reparation, change, and review of policy statements and plans” at the local government level in great detail. The obligations of local authorities to consult and/or request public submissions under the Act are

²⁰² Hewison, above n 194, at 11.7.

²⁰³ *Westfield*, above n 199, at [46].

²⁰⁴ RMA, ss 46A-51.

²⁰⁵ RMA, s 46A(3).

²⁰⁶ RMA, s 46A(4).

²⁰⁷ RMA, ss 48-50.

not vaguely worded duties, or merely matters of best practice without legal force. There is much less discretion contained in Schedule 1 in comparison to the process for passing national direction documents, and more statutory time-limits.

In summary, under the Schedule 1 standard process the Council must:

1. Publicly or limited notify the proposed document, including the s.32 evaluation;²⁰⁸
2. Receive submissions on the document;²⁰⁹
3. Compile a summary of decisions requested and make this and the submissions received available to the public;²¹⁰
4. Receive further submissions from persons who either represent a relevant aspect of the public interest, or who have an interest in a matter addressed by the document that exceeds that of the general public for proposed policy statement or plans, or publicly notified policy statement change or plan change; or in the case of limited notification, proposed changes to policy statement or plans being persons given limited notification under cl 5A(3) or a copy of the proposed change under cl. 5A(8);²¹¹
5. Issue a s.32AA further evaluation report if necessary;
6. Hold a hearing to receive oral submissions if requested by submitters;²¹²
7. Produce a decision outlining the authority's reasons for accepting or rejecting the decisions requested in submissions received;²¹³
8. Publicly notify the final decision regarding the content of the policy or plan.²¹⁴

There are two alternative RMA plan making processes, the Streamlined Planning Process and Collaborative Planning Processes. Both provide alternative processes to the standard Schedule 1 process, with different opportunities for community or public participation, and different appeal rights.

²⁰⁸ RMA, sch 1, cl 5.

²⁰⁹ RMA, sch 1, cl 6(3).

²¹⁰ RMA, sch 1, cl 7(1).

²¹¹ RMA, sch 1, cl 8(1).

²¹² RMA, sch 1, cl 8B.

²¹³ RMA, sch 1, cl 10.

²¹⁴ RMA, sch 1, cl 11.

Alternatively, national directives can require local authorities to amend their plans and policies without having to follow the process ordinarily required under Schedule 1.²¹⁵

5. Activity classifications

A resource consent is required for land use whenever an activity is not expressly permitted by the plan or national standard rules.²¹⁶ Section 9 of the RMA allows for any use of land to occur provided that it does not contravene any of the aforementioned documents. In theory this makes land use under the RMA “permissive”.²¹⁷ However, in practice, most activities involving land use still require a resource consent.²¹⁸

Under section 87A the RMA provides for six types of activity status. The type of activity status will determine the situations and conditions under which a consent is required or can be granted.

At the two ends of the spectrum, no resource consent is required for an activity that has *permitted* status, while no resource consent may even be applied for an activity that has *prohibited* status. If an activity is classified as prohibited, an applicant will need to acquire a plan change under section 293 or section 85 in order to undertake that activity. In between these two statuses, there are a range of regulatory statuses that control the conditions under which consents can be granted.

Under *controlled* activity status a consent must be granted if the necessary documentation is provided. This status may also require that certain conditions be placed on the consent. The hallmark of this status is that, subject to s.106 rights of refusal, there is no discretion over the issuing of a consent because the information required and the relevant conditions are entirely codified by the relevant plan.²¹⁹ By contrast, *restricted discretionary* activity and *discretionary* activity statuses confer discretion upon the consent authority over whether to grant the consent. In the case of discretionary activities, the requirements for granting a consent and the

²¹⁵ Palmer, “Resource Management Act”, above n 193, at 3.73.

²¹⁶ RMA, s 87.

²¹⁷ This is because the other sections under Part 3 of the RMA clearly state that a resource consent must be sought for any activity affecting a given aspect of the environment (For example, discharges, activities in the coastal marine area).

²¹⁸ Matt Casey “Land Use” in Peter Salmon and David Grinlinton (ed) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) 595, at 12.1.5.

²¹⁹ RMA, s 87A(2).

conditions that may be imposed are entirely up to the consent authority.²²⁰ In the case of restricted discretionary activity status, both the matters to be addressed and the matters of discretion are limited to those matters codified in the plan.

Under *non-complying activity status*²²¹ a consent authority may grant a consent for a non-complying activity only if at least one of two specified gateways pursuant to section 104D are passed. The first gateway test is that the effects on the environment must be minor; the second is that allowance of the activity would not be contrary to the objectives and policies of the relevant plan or proposed plan. Because the use of prohibited activity status is expected to be very limited, many activities that may not be actively supported for the area but may be considered suitable in very limited circumstances are instead regulated through the use of non-complying activity status.

While not as restrictive as prohibited or non-complying activity status, *discretionary*, and *restricted discretionary* activity statuses can still be used to limit the level of development in a hazardous area, or at least require a high level of hazard mitigation for any development. For example, the *Mahanga* decision concerned an application for establishing five new residential properties in a coastal location, which could eventually become subject to potential hazards.²²² In that case, the establishment of the new development was classified as a *discretionary* activity under the plan.²²³ The application was only able to proceed once a number of stringent consent conditions were included, including a flood protective building design, provision for relocation and a bond to cover these costs.

If the ultimate objective is simply to prevent hazardous coastal development from occurring in a given zone, then clearly prohibited activity status is the most effective means of doing so.²²⁴ The difficulty with imposing prohibited activity status through individual plans is that, if the activity is not already prohibited, then the plan-makers are required to undertake a significant amount of analysis in order to justify its appropriateness. (This is discussed further in Ch 4.2, below.) Section 32(1) provides that an evaluation of a plan proposal must:

²²⁰ RMA, s 87A(4).

²²¹ RMA, s 87A(5).

²²² *Mahanga E Tu*, above n 131, at [1].

²²³ *Mahanga E Tu*, at [8].

²²⁴ This was the conclusion reached in a legal opinion by Simpson Grierson for Local Government New Zealand. See Simpson Grierson, *Councils' Ability to Limit Development in Natural Hazard Areas* (2018), above n 11, at 29.

- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
- (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
 - (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
 - (iii) summarising the reasons for deciding on the provisions; and
- (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

The resultant scale and significance of the effects anticipated by prohibiting an activity that was previously envisaged by the plan and may be found in the existing environment, are often considered large and may be judged inappropriate after the cost/benefit analysis. The existing uses priority (contained in s.10) can make an evaluation supporting change in an already-developed environment especially difficult. If appropriateness of *prohibited* status cannot be established under s 32, then *non-complying* activity status may have to suffice for preventing additional development. Additional government guidance on how best to use activity status to manage existing uses adaptation would be helpful, with or without RMA amendment.

6. Legal challenges to zoning under the RMA

(a) The general bar on compensation for takings of property

Unlike the United States and Australia, New Zealand provides no constitutional entitlement to compensation for takings of property by government. To the extent that New Zealand provides for the protection of property from expropriation, this is contained in the Magna Carta and the common law more generally, but only in holding that the power of expropriation needs to be conferred by a statute. Building upon this tradition, the Courts will interpret any statutory provision narrowly to ensure that a fair payment is made for any taking of property.²²⁵ However, in order for that interpretive presumption to be triggered, there must first be a ‘taking’ of property. The Supreme Court has held that a requirement for attaining a resource consent cannot amount to a “taking”.²²⁶ More broadly, Ken Palmer asserts that this precedent can be

²²⁵ *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, at [45].

²²⁶ *Waitakere CC*, at [48].

read to mean that any valid exercise of power under the Act cannot amount to a ‘taking’.²²⁷ An attempt to advance the argument that a managed retreat policy amount to a “seizure” of property under the Bill of Rights Act 1990 was dismissed in the case of *Faulkner v Gisborne District Council*.²²⁸

Under the previous planning regime of the Town and Country Planning Act 1977, compensation was available under a very narrow set of circumstances, resulting in few successful claims ever being brought.²²⁹

Under the original version of section 85, the Resource Management Act removed any general entitlement to compensation for takings of interests in land. Section 85(1) states that “[a]n interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.” This has been interpreted to mean that regulation under the Act will not be construed as amounting to a ‘regulatory taking’ of property, and will not be found to trigger the compensation mechanisms under the Public Works Act 1981.²³⁰

As the statute makes clear, compensation may be payable where expressly provided for in other sections of the RMA. One example is the availability of compensation for land taken to establish esplanade reserves upon approval of a subdivision.²³¹ Section 85 contains an explicit exception for properties that were subject to a heritage order or designation, and compensation for the impact of a heritage order can be made under 185(5). Under section 185 the Environment Court can order that land subject to a heritage order or designation be purchased if it can be shown that the land can no longer be sold.

²²⁷ Palmer, *Local Authorities Law*, above n 195, at 17.8.3.

²²⁸ *Faulkner*, above n 63, at 633.

²²⁹ Palmer, at 17.8.3.

²³⁰ See *Re Steven* [1997] NZEnvC 337, (1998) 4 ELRNZ 64 at 5, per Judge Jackson:

“[Section 85(1)] provides the starting point of Parliament’s answer to the Act’s interference with common law property rights by creating a statutory fiction with respect to those rights. It does that by providing that no interest in land is deemed to be taken by any rule in a plan — thus recognising that in the absence of the deeming provision an interest in land may be taken by a rule (or other provision in a plan). The immediate practical consequence of section 85(1) is that the compensation provisions of the Public Works Act 1981 do not apply, and thus property owners have no right to money in lieu of their interests in the property if those interests are in effect taken away or otherwise adversely affected.”

²³¹ RMA, ss 237E-F.

Section 86 of the Act also provides councils with the power to acquire property by agreement for the purpose of terminating any non-complying or prohibited activity. Presumably, compensation could also be offered if provision was made for doing so in a district or regional plan. The RMA also contains various other provisions for the direct acquisition of land.

The 2017 amendments to the RMA have changed the operation of section 85 in a number of ways. Firstly, the section is now entitled “Environment Court may give directions in respect of land subject to controls”, rather than “Compensation not payable in respect of controls on land”. The policy intent of the change was to add an additional remedy, not to change the prior interpretations of section 85 that unequivocally found that no compensation was available under the Act.²³² The Regulatory Impact Statement for the 2017 amendments to the RMA does not suggest that the changing of the title has any significance beyond the expanded remedies now available in very particular circumstances.²³³ It also ruled out an ‘alternative’ option of allowing the Environment Court to order compensation more generally because ‘this option carries a fiscal risk which is difficult to quantify but could be significant’.²³⁴

The expanded remedies available under s 85(3A) now include the ability for the Environment Court to make an order for a local authority to acquire the land, part of the land, or an interest in the land pursuant to the Public Works Act 1981. Notably, acquisition is not available in respect of challenges to regional coastal plan provisions. Such an order is only available when the local authority agrees that it is the “appropriate” option – as opposed to modifying, deleting or replacing the relevant plan provision – and when the challenger agrees and consents to it. In other words, whereas previously the only remedy available was the modification of the plan, now the plan maker/council can decide between getting an order from the Court to modify the plan, or purchasing a sufficient interest in the land subject to the person with an estate or interest in the land agreeing. The logic behind this seems sound: some award of compensation through this process may be preferable to the ordinary remedy of modifying, deleting or replacing the plan provision at issue.²³⁵

²³² See, Ministry for the Environment, Departmental Report no. 1 on the Resource Legislation Amendment Bill 2015 (September 2016) at 65. *Local Government and Environment Committee, Resource Legislation Amendment Bill Information Requests* (13 May 2016) <www.parliament.nz> at 4. *Local Government and Environment Committee, Resource Legislation Amendment Bill Information Requests* (7 April 2016) <www.parliament.nz> at 10.

²³³ Ministry for the Environment *Regulatory Impact Statement - Resource Legislation Amendment Bill 2015*, at 4.3.

²³⁴ MfE, *Regulatory Impact Statement*, at 391.

²³⁵ MfE, *Regulatory Impact Statement*, at 383.

Section 85 is addressed in more detail below, Ch 2.6(c) in relation to plan change challenges.

Criticism of the previous bar on compensation

The general bar on compensation under the RMA has attracted a significant amount of criticism from commentators. For example, a conservative ‘property rights’ approach is evident in Kathleen Ryan’s argument that some restrictions on land uses ought to attract compensation. For example, Ryan argues that the generous reading of “amenity values” by the Environment Court goes beyond what the framers could have envisaged, and has created a class of regulations that ought to attract compensation because of their lack of “objective adverse effects”.²³⁶ She also notes that there is some evidence suggesting that the availability of compensation decreases opposition to implementing strong environmental protections.²³⁷

In relation to the specific situation of managed retreat from the coast, Boston and Lawrence argue for a national system of compensation for those affected by any future policy of managed retreat.²³⁸ They stress that compensation is necessary to provide such a policy with legitimacy, given the imposition on existing residential development. However, they have also questioned the wisdom of pursuing such a policy through the courts and argue for a more certain and consistent national scheme.²³⁹

In an obiter comment in *Faulkner*, Barker J criticised what he saw as a gap in the Resource Management Act for the payment of compensation when councils were pursuing a policy of managed retreat. He suggested that New Zealand should acquire some kind of system of compensation akin to that provided by the United Kingdom Coast Protection Act 1949.²⁴⁰

We do not argue that such compensation needs to be provided – that is not within the scope of this paper. We merely note that there may be an avenue to receive compensation under s 85(3A), but that this involves a court determination on a case-by-case basis, which is contrary to other recommendations such as those by Boston and Lawrence for a national program for managed retreat and compensation.

²³⁶ Kathleen Ryan “Should the RMA Include a Takings Regime?” (1998) 2 NZJEL 63 at 79.

²³⁷ Ryan, at 76.

²³⁸ Boston and Lawrence, above n 20, 23-25.

²³⁹ At 18.

²⁴⁰ *Faulkner*, above n 63, at 633-634.

(b) Plan Change Applications under section 293

The RMA confers upon the Environment Court the power to review the content of district and regional plans and make changes, upon appeal or inquiry.²⁴¹ This power to review plans was first expanded to include ensuring that plans and policies properly discharged the statutory functions of the regional or territorial authority, and later expanded to assessing whether “sustainable management” under Part 2 of the Act was being achieved, taking an “overall broad judgement”.²⁴² This is justified in part by section 290(1), which states that the Environment Court “has the same power, duty, and discretion in respect of a decision appealed against” as the person making the decision being appealed. In effect, this allows the Environment Court to make its decision in place of, and as though it was, the local authority.

There have been many critiques of this broad power;²⁴³ these are not the concern of this paper and we note that it is not uncommon for specialist tribunals to have the power to remake a decision on the merits. However, the availability of such broad powers may empower well-organised objectors to challenge climate adaptation policies in the coastal zone. This heightens fears amongst local authorities that making difficult decisions will expose councils to the expense of challenge and litigation, even if the Environment Court decides that they are right. And when there is uncertainty over the best way to proceed, there is more room for challenge than when there is precedent and clarity on the standard required in an area. Currently, it appears safer for councils to delay implementing controversial adaptation policies. We don't suggest that review rights be removed, but that stronger guidance or direction be provided on the options for climate adaptation measures so that councils can better know that they are adopting and implementing coastal adaptation policies in the right way.

(c) Plan changes and challenges under section 85

Section 85 provides persons with a recognised interest in land to challenge the provisions of either a proposed plan or an existing plan on the basis that these provisions render the land

²⁴¹ RMA, sch 1, cl 14, 16; s 293.

²⁴² Rivers-McCombs, above n 137, at 48.

²⁴³ See Rivers-McCombs, at 56-60, who argues that it is contrary to the separation of powers and lacks democratic legitimacy as the Environment Court is effectively making quasi-legislative decisions that were originally made by elected officials. Moreover, it is largely dependent on the evidence of the parties who come before it and it lacks the resources necessary to conduct proper policy evaluation. At 77.

“incapable of reasonable use”.²⁴⁴ The applicant of a s 85 challenge is required to establish both that the plan provision in question “makes any land incapable of reasonable use” and that it places an “unfair and unreasonable burden” on any person having an interest in the land. This additional requirement in relation to the burden has been described by Environment Court as “probably explicable by the absence of an opportunity for general public participation in a proceeding which might well lead to substantive changes to a Plan — participation which the structure and processes of the Act otherwise strongly encourage”.²⁴⁵

These two limbs been termed the “joint fundamentals” by the Environment Court.²⁴⁶ The burden of proof is on the applicant to establish each limb, although the Environment Court has stated that a section 32 evaluation is not required.²⁴⁷ Overcoming this burden is not easy as the legal tests required under section 85 are difficult to prove or disprove:²⁴⁸

[I]t can be difficult for an applicant to overcome the assumption that the provision should be retained in light of the wider public interest. Equally, it is often difficult for a council to justify the wider public benefit in retaining restrictive provisions over private property.

The requirements for establishing the two limbs are considered in detail below.

The difficulty and cost of amassing the evidence necessary to meet the section 85 threshold could be one explanation for why there have been so few section 85 appeals. Between the passing of the Act in 1991 and 2015 there were only 3 successful s 85 applications for a plan change out of a total of 15.²⁴⁹ Much of this evidence is likely to be highly technical, and thus highly expensive to produce:²⁵⁰

Depending on the provision that is being challenged, other evidence may need to be called, for example heritage, engineering, and quantity surveying evidence in the case of heritage buildings/item listings. This can be a costly exercise for an applicant, with no guarantee of success. It can be a difficult task to prepare such evidence as often assumptions will need to be made about matters such as rates of return, the appropriate level of earthquake strengthening, and the associated costs involved.

²⁴⁴ The section did not previously apply to apply to regional coastal plans. See *Gavin H Wallace Ltd v Auckland Council* [2011] NZEnvC 336 at [9]-[10]. But a 2017 amendment explicitly included regional coastal plan challenges.

²⁴⁵ *Riddiford v Masterton District Council* [2010] NZEnvC 262 at [42].

²⁴⁶ *Steven v Christchurch City Council* [1998] NZRMA 289 (Env C), at 15.

²⁴⁷ *Steven*, at [26].

²⁴⁸ Bill Loutit and Corina Faesenkloet, “The Difficulties With Making a Case Either Way on Reasonable Use” [2012] RMJ 29 at 30.

²⁴⁹ MfE, *Regulatory Impact Statement*, above n 233, at 388, and 394.

²⁵⁰ Loutit and Faesenkloet, above n 248, at 31.

Another reason for the small number of applications overall might be the limited remedies that were previously available. A plan change may only have been thought worth pursuing for a large developer or other large business, rather than for an individual resident.

As discussed above,²⁵¹ in 2017 an additional remedy was added to s 85: the ability for the Environment Court to order that the local authority acquire the challenger's interest in the land with compensation under the Public Works Act. The perceived value of a s 85 plan change application and/or challenge may increase now that the Environment Court can effectively make an order for compensation for a local authority. An applicant may challenge a territorial plan provision (or proposed territorial plan provision) with the aim of receiving compensation an interest in their land. This is likely to increase the numbers of such applications and thus increase the potential fiscal risks or liabilities of territorial councils.

Preliminary requirements for a remedy under s 85

Limb 1 - “Incapable of reasonable use”²⁵²

The first limb of the test requires the applicant to demonstrate that the land is incapable of reasonable use. The meaning attached to “incapable” has not been read as literally requiring all reasonable uses to be identified as being barred – ie, interpreting the section to mean “incapable of *any* reasonable use”. Rather, it has been read to mean “incapable” of being used for a desired use which is also reasonable.²⁵³

The Act provides some guidance as to what could to be deemed as “reasonable use”. It expressly states that “reasonable use, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.”²⁵⁴

The test for what constitutes “reasonable use” is also objective, rather than focusing on what the applicant believes to be reasonable use.²⁵⁵

[T]he test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner’s private rights), but whether it serves the statutory purpose

²⁵¹ Ch 2.6(a), notes 225-235 and accompanying text.

²⁵² RMA, s 85(3B)(a).

²⁵³ See discussion by Rod Thomas “Compensation Issues and the Meaning of Section 85 of the RMA” (2002) 6 NZJEL 255 at 269-270.

²⁵⁴ RMA, s 85(6).

²⁵⁵ *Hastings v Auckland City Council* A068/01 EnvC Auckland, 6 August 2001 at [98].

of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

The Environment Court has considered a range of other matters in deciding whether an activity constitutes a “reasonable use” including:²⁵⁶

- Whether the owners can provide for their economic wellbeing, although the courts have also held that “reasonable use is not synonymous with optimum financial return”,²⁵⁷
- Whether sustainable management is advanced by the restriction;
- Whether the entirety of the land is affected, or just a small section;²⁵⁸
- A systematic comparison between the uses that could be made between and after the plan change.²⁵⁹

*Limb 2 - “Unfair and unreasonable burden”*²⁶⁰

Unlike “reasonable use”, no guidance is provided for the meaning of “unfair” or “unreasonable”. The Environment Court in the leading *Steven* case notes that these terms are difficult to interpret because they are different from the language used in the rest of the Act, and because “unfair” is difficult to distinguish from “unreasonable”.²⁶¹ They suggest that “unfair” may refer to qualitative matters while “unreasonable” dealt with “quantitative” matters.²⁶² They also assert that the inclusion of “burden” must mean that some level of imposition is reasonable.²⁶³ This is in keeping with recent statements of the Environment Court which state that it cannot be an unreasonable requirement to simply attain a resource consent in order to mitigate, avoid or remedy an adverse effect; something more is required.²⁶⁴

The court also established a list of seven considerations that may be relevant to determining whether the second limb of the test is met. Those seven considerations are:²⁶⁵

- The natural and physical resources at issue in the case;
- Whether the first test is met: whether the land is incapable of reasonable use;
- Part 2 of the Act;

²⁵⁶ Loutit and Faesenkloet, above n 248, at 30.

²⁵⁷ *Landco Mt Wellington v Auckland City Council* [2008] NZEnvC 192, at [18].

²⁵⁸ *Landco Mt Wellington*, above n 257. *Gordon v Auckland Council* [2012] NZEnvC 7.

²⁵⁹ *Riddiford v Masterton District Council* [2010] NZEnvC 262.

²⁶⁰ RMA, s 85(3B)(b).

²⁶¹ *Steven v Christchurch CC*, above n 246, at [15], [40].

²⁶² *Steven*, at [40].

²⁶³ *Steven*, at [40].

²⁶⁴ *Riddiford*, above n 259, at [45].

²⁶⁵ *Steven v Christchurch CC*, at [34]-[37].

- Part 3 of the Act, including its implicit protection of property rights under section 9;
- The provisions of the plan or proposed plan;
- The rebuttable presumption that the plan is “effective and efficient”;
- The personal circumstances of the applicant.

It has been criticised that, in practice, the second limb of the test has tended to prioritise upholding the integrity of plan as a whole on the basis that this is necessary for achieving sustainable management, rather than interpreting the section in order to protect private property rights.²⁶⁶ Nevertheless, the approach employed in *Steven* is the dominant approach.

Examples of application and remedy

As mentioned earlier, between the passing of the Act in 1991 and 2015 only 3 out of 15 applications for compensation due to a plan change were successful.²⁶⁷ No cases of a successful invocation of section 85 were found from the subsequent years.

From their analysis of the cases in 2012, Loutit and Faesenkloet concluded that the key feature of successful section 85 claims was that the land was rendered incapable of *any* reasonable use, rather than merely having a restriction imposed on the extent of possible uses.²⁶⁸ One case (*Hastings*) concerned a highly restrictive zoning control upon land intended to be used for business purposes.²⁶⁹ Another case (*Steven*) involved a heritage listing that prohibited the demolition of the building, therein locking the owner into several hundred thousand dollars’ worth of renovations.²⁷⁰ In the third case (*Mullins*), the Environment Court held that limitations on the allowable density of housing were disproportionate in their suddenness.²⁷¹ As a remedy,

²⁶⁶ Thomas, above n 253, at 273-274. See also page 278: “[E]xisting judicial pronouncements, which assert relief is only available where the proposed plan change does not endanger planning controls are, with respect, misconceived. Further, such a requirement cannot be sustained against the clear thrust of the RMA, which is “effects” based legislation. To the extent controls in existing plans do not embrace this philosophy, they remain liable to attack under s 85. A judicial emphasis on maintaining the credibility of existing controls also unfairly prejudices landowners who have no other option but to seek a plan change given the absolute bar in s 85(1) on compensation being sought due for injurious affection of land values. Indeed, the present judicial approach to s 85 may encourage local authorities to impose restrictive planning controls with impunity, knowing landowners have no effective remedy.”

²⁶⁷ MfE, *Regulatory Impact Statement*, above n 233, at 388 and 394.

²⁶⁸ Loutit and Faesenkloet, above n 248, at 31.

²⁶⁹ *Hastings*, above n 255.

²⁷⁰ *Steven v Christchurch CC*, above n 246.

²⁷¹ *Mullins v Auckland City Council* Planning Tribunal A35/96, 17 April 1996.

the Environment Court directed the Council to allow an exemption for the affected properties, subject to a sunset clause of two years.²⁷² This was despite the fact that an application for a consent of non-complying activity was still possible. As a result, this case seems like an anomaly. Nevertheless, it shows that the Environment Court is able to fashion appropriate remedies when exercising its powers under section 85.

In most cases, invocation of section 85 has not proven successful. More specifically, there has been no case in which a section 85 challenge has successfully challenged the validity of zoning restrictions on residential development in a hazardous coastal area, although there have been two attempts. In *Francks v Canterbury Regional Council*, the Environment Court declined an application to modify a provision in the regional plan placing a prohibition on buildings being erected on the seaward side of a line intended to protect properties from erosion, and in reliance upon the precautionary principle. The decision was subsequently upheld by the High Court, who declined to rule that section 85 ought to have been considered by the Environment Court.²⁷³ In the *Fore World* case, the Environment Court refused to find that the creation of a hazard line and a more general zoning restriction on residential development amounted to a rendering of the land “incapable of reasonable use”.

Example of application: *Fore World Developments Ltd v Napier City Council*²⁷⁴

Fore World Developments owned three separate blocks of coastal land in Bay View, north of Napier. The different blocks were referred to as Gill Road, Rogers Road and Franklin Road. Fore World had subdivided Gill Road into 12 lots under the Napier City District Plan (operative Plan). It further desired to subdivide Franklin Road for a medium-density development. In preparing the proposed City of Napier Plan (proposed Plan), the City Council received advice from an expert coastal consultant. The consultant assessed the coastline at Bay View and predicted the extent of erosion over the next 100 years based on historical observations and photos. The calculated extent of shoreline retreat was used to inform the proposed Plan’s coastal hazard zoning.

In the proposed Plan, new buildings or structures within the coastal hazard zone (CHZ) would be prohibited activities.²⁷⁵ The CHZ in the proposed Plan extended over seven of the Gill Road lots

²⁷² *Mullins v Auckland CC*, at 9.

²⁷³ *Franks v Canterbury DC*, above n 185.

²⁷⁴ *Fore World Developments Ltd v Napier City Council* EC Wellington W29/06, 13 April 2006.

²⁷⁵ At [5].

and approximately half of the Franklin Road property.²⁷⁶ Gill Road would also be changed from ‘residential’ to ‘rural settlement’ zoning, increasing the minimum non-serviced lot size for a dwelling to be a permitted activity.²⁷⁷ For Rogers and Franklin Roads, both would be changed from ‘deferred residential’ to ‘main rural’ zoning, increasing the minimum lot size for a controlled activity subdivision.²⁷⁸

Fore World submitted on a proposed plan, and then appealed the plan decision in relation to the extent and characteristics of the CHZ, as well as making an application under s 85 of the Resource Management Act 1991 (RMA), arguing that the proposed Plan rendered their land incapable of reasonable use.

Requested amendment to Proposed Plan, and matters of appeal

Fore World requested, first, that the CHZ zoning should be split into three graduated sub-zones (CHZ1, coastal yard and CHZ2) and, second, that private beach re-nourishment could mitigate the current and future risk posed by erosion to the properties. Fore World proposed that the cost of the re-nourishment scheme should be shared between the owners of the sub-divided land under some kind of formalised arrangement, akin to body corporate fees.²⁷⁹ Fore World claimed that if the re-nourishment scheme occurred then new buildings and structures within the coastal yard and CHZ2 should be reclassified as controlled activities.²⁸⁰ This was because the Council could impose conditions on these buildings and structures to ensure that they were relocatable, subject to “trigger points” for determining when relocation needed to occur.²⁸¹ In sum, the amendments to the proposed plan requested by Fore World would have allowed for more of its land to be utilised for residential development.

The Court rejected Fore World’s appeal its entirety. The Court held that graduated hazard zoning would add unnecessary complexity to a narrow stretch of land and, while it accepted the “technical feasibility” of relocating buildings, it had considerable doubts about the practicality of doing so.²⁸² Foreseeable problems included finding sufficient land, obtaining resource

²⁷⁶ *Fore World Developments*, at [4] and [8].

²⁷⁷ See [100]–[107].

²⁷⁸ See [108]–[111].

²⁷⁹ At [20].

²⁸⁰ At [14].

²⁸¹ At [14].

²⁸² At [26].

consents, social impacts, and the cost of relocating many houses.²⁸³ The Court accepted that the beach re-nourishment scheme might be possible, but had doubts about enforcing payment from land-owners, and therefore held that there would be a real risk that this burden might eventually fall back on the Council.²⁸⁴

After discarding each aspect of the appeal to amend the proposed plan, the Court moved on to assessing the appropriate extent of the CHZ for itself. The Court received evidence on the rates of erosion and sea-level rise from various experts and it was decided that the inner boundary of the CHZ should be set at 24 meters from the barrier scarp.²⁸⁵ In making this assessment, the Court had been mindful that a precautionary approach was appropriate.²⁸⁶

There is no doubt that if the worst case scenario came to pass and there was severe and swift erosion along this stretch of foreshore, the endangerment of perhaps 100 homes would be regarded as a ...high...impact on the relevant environment, even if there is unlikely to be direct threat to life and limb.

Challenge under Section 85

The second challenge made by Fore World against the proposed Plan was under s 85 of the RMA. Section 85 provides an alternative avenue for a person with an interest in land to challenge a proposed provision where it would render that person's interest incapable of reasonable use. Having found that the appropriate extent of the CHZ overlay to achieve sustainable management should be 24 metres, the Court considered the proposed zoning and possible uses of Fore World's land, and whether that test - "incapable of reasonable use" - was met.

Rogers and Franklin Roads had both had been deemed 'deferred residential' under the operative Plan. This meant that when certain conditions had been met, the Council would reconsider whether the land should be re-zoned for residential use. Until such a time the land was subject to the rules of the Bay View rural zone.²⁸⁷ The minimum lot size for subdivision in the operative Plan was 1.5 hectares. Under the proposed Plan, both blocks of land were now to be zoned as 'main rural' and any subdivision of these properties would require a consent as a restricted

²⁸³ *Fore World Developments*, at [25].

²⁸⁴ At [20].

²⁸⁵ At [87].

²⁸⁶ At [32].

²⁸⁷ At [110].

discretionary activity.²⁸⁸ The Court noted, however, that there was a wide range of permitted (non-residential) activities for which the land could be used.²⁸⁹

Fore World’s planning witness argued that there was no credible use for the land at Rogers and Franklin Roads under the proposed Plan.²⁹⁰ This was because the land at both Rogers and Franklin Roads were shingly and unsuitable for viable agricultural use.²⁹¹ Fore World therefore argued that residential use ought to be permitted.

The Court dismissed this argument as fallacious. The Court pointed out that it was not the zoning which made the land unproductive, but rather the fact that the land was of inherently low quality itself.²⁹² The Court stated that:²⁹³

...although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use.

The Court said that it was important to acknowledge that the reason for a CHZ was the fact that portions of Fore World’s property was exposed to natural hazards. They further commented that hazardous areas are more suitable for passive uses such as gardening and landscaping, whereas areas outside the CHZ might still be feasibly suitable for subdivision. Although this would not allow Fore World to develop the land in the way they most desired, the land was not incapable of reasonable use because, as they stated, “[r]easonable use is not synonymous with optimum financial return.”²⁹⁴ Furthermore, the need to apply for a discretionary activity consent (at worst) did not impose an unreasonable restriction on Fore World’s use of the land.²⁹⁵

Conclusion

The *Davidson* decision may still reshape environmental decision-making. For example, it may make the utility of prior Environment Court cases applying the broad judgement approach to

²⁸⁸ *Fore World Developments*, at [108].

²⁸⁹ At [108].

²⁹⁰ At [112].

²⁹¹ At [122].

²⁹² At [122].

²⁹³ At [123].

²⁹⁴ At [125].

²⁹⁵ At [125].

residential development in areas subject to coastal hazards less relevant. It could also make the content of plans and policies the primary driver of climate adaptation, which could remove some of the legal uncertainty faced by local councils assuming that their policies and plans are a sufficient source of guidance.

The expanded section 85 now provides the Environment Court with the ability to order compensation for land which could be used in removing residential uses in coastal hazard areas, for example. However, this is only upon individual Environment Court decisions and upon agreement of both the relevant territorial authority and landowner; it does not meet the Boston and Lawrence suggestions for a national system of managed retreat and compensation.

The plan-making process benefits from public participation, but it is very slow. The need to adopt measures to reduce exposure to coastal hazards now suggests that central government direction would be beneficial.

Further research could usefully be conducted on s 85, particularly its original intent or purpose, but also on aspects about likely application. More and more councils are likely to be restricting coastal development through mechanisms such as hazard lines on plans and possibly rezoning, and thus there may be attempts to challenge them using s 85. The issues addressed in chapter 7 on managed retreat may be relevant to consider in conjunction with the likely future operation of s 85.

Chapter 3: Climate adaptation and coastal development: key principles, considerations and directives

This chapter addresses some general considerations in relation to adopting climate adaptation measures.

The following topics are addressed in this chapter:

- (1) Relevant Part 2 values:
 - (a) Climate change
 - (b) Natural hazards
 - (c) Other Part 2 values
- (2) The importance of the Precautionary Principle and Approach
 - (a) Rationale for the Precautionary Principle
 - (b) Recognition under the RMA
 - (c) Operationalising the Precautionary Principle
 - (d) Relevance of adaptive management
- (3) Guidance from Central Government:
 - (a) The New Zealand Coastal Policy Statement 2010
 - (b) Non-binding guidance
 - (c) Proposals for additional guidance

1. Relevant Part 2 values

There is no specific mention of climate adaptation in Part 2, yet alone direct mention of climate adaptation anywhere in the RMA. However, the underlying subject matter – namely, hazard management and climate change – are both expressly addressed in Part 2 of the Act. This section will explore how these two key considerations, as well as other Part 2 values, have been applied to the issue of residential development in hazardous coastal areas.

(a) Climate Change

Prior to amendments passed in 2004, the 1994 Coastal Policy Statement was the only legal directive to take climate change into account under the RMA scheme.²⁹⁶ The Resource Management (Energy and Climate Change) Amendment Act 2004 added climate change to the section 7 list of “other matters” that decision-makers “shall have particular regard to”. Specifically, subsection 7(i) lists “climate change”, and subsection 7(j) lists “the benefits to be derived from the use and development of renewable energy.” “Climate change” was also added to the definitions in section 2:

climate change means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods

The Resource Management (Energy and Climate Change) Amendment Act 2004 is credited with removing climate scepticism from the planning process.²⁹⁷ The High Court subsequently ruled in *Meridian Energy v Central Otago District Council* that it was not open to decision-makers to raise questions about “the causes, direction and magnitude”:²⁹⁸

Like the Environment Court we find it significant that Parliament has used the word “attributed” rather than “caused by”. We consider that the definition has been framed in this way to reflect the statutory assumption that climate change is occurring. We also agree with the Environment Court’s comment that climate change is an extremely complex subject and that in the absence of a clear direction from Parliament the Court should not enter into a discussion of its causes, directions and magnitude.

However, consideration of climate change under s 7(i) has been found to be limited to climate adaptation (“effects of climate change”) rather than climate change mitigation (eg, “contribution to climate change”).²⁹⁹ Regional and territorial authorities are only allowed to take account of climate mitigation when it is a question of how much renewable energy will assist in lowering national emissions.³⁰⁰

Nevertheless, research indicates that climate change considerations began to feature more prominently in local government policies and plans after 2004 reforms.³⁰¹ The application of

²⁹⁶ Reisinger and others, above n 164, at 306.

²⁹⁷ Rive and Weeks, above n 120, at 9.7.1.

²⁹⁸ *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482, [2010 NZRMA 477 (HC), at [157] (footnotes omitted).

²⁹⁹ See *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803, at [37].

³⁰⁰ See RMA, s 70A, as construed by the Supreme Court in *West Coast ENT v Buller Coal Ltd* [2013] NZSC 87.

³⁰¹ Reisinger and others, above n 120, at 312.

section 7(i) to the issue of hazardous coastal development has had the effect of heightening the focus on the future hazards that an area might be exposed to.³⁰²

(b) Natural hazards

Section 2 of the Act has always contained a definition of “natural hazard”:

natural hazard means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslide, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment

The Resource Legislation Amendment Act 2017 has also added “the management of significant risks from natural hazards” to the list of “matters of national importance” under section 6 of the Act.³⁰³ Following the 2012 earthquakes, the Canterbury Earthquakes Royal Commission recommended adding an amendment to the principles in sections 6 and 7 of the Act to explicitly bring management of natural hazards into the list of things that should be considered when councils are exercising their functions under the RMA.³⁰⁴

The RMA Principles Technical Advisory Group (the Advisory Group) also identified that, while the law as it stood adequately empowered local authorities to plan for natural hazards, it was not being effectively implemented.³⁰⁵ The Advisory Group recognised a number of things that appeared to be taking priority over natural hazards when resource decisions were made, including current direct impacts as opposed to planning for long-term hazards, the dominance of private property rights, and land development.³⁰⁶ It concluded that lack of statutory recognition for managing the risk of natural hazards was a contributor to this problem.³⁰⁷

³⁰² See for example the following passage from *Southern Environmental Association (Wellington) v Wellington City Council* [2010] NZEnvC 114, in which the Environment Court considers section 7(1) in the context of a plan change development in an area prone to flooding and erosion, with tenuous security of access, at [124]:

“We accept that there may be the potential for the effects of climate change on the land to be managed through design. However, that does not take into consideration the possible effects of climate change on the wider area. It also puts additional houses and people in a position where access is along a road already subject to heavy seas in high tides and certain weather events (a health and safety consideration too). That road is subject to erosion and in the future could require major physical works to provide for continued access to the two sections.”

³⁰³ RMA, s 6(h).

³⁰⁴ Canterbury Earthquakes Royal Commission, Final Report Volume 7: Roles and Responsibilities (Department of Internal Affairs, 2012) at 99.

³⁰⁵ MfE, *RMA Principles*, above n 140, at 24.

³⁰⁶ At 24.

³⁰⁷ At 24.

The Advisory Group also discussed how, although not explicitly referred to in the RMA as it was then, natural hazard planning already focuses on risk-reduction, which involves “identifying and analysing long-term risks to human life and property” and eliminating those risks where practicable and reducing their likelihood and magnitude.³⁰⁸ The Regulatory Impact Statement for the Resource Legislation Amendment Bill similarly noted that inserting section 6(h) would codify existing best practice in councils in relation to risk management.³⁰⁹

The wording recommended by the Advisory Group was “managing the significant risks associated with natural hazards.”³¹⁰ The final wording appearing in the amending legislation is “management of significant risks from natural hazards.”³¹¹ A “significant” risk is not defined in the Act, and its meaning will need to be developed by the courts. (Eg, is it likely to take the same meaning as in the other places it is used in the RMA, such as “significant effects”.)

(c) Other Part 2 values

While climate change, natural hazards and the precautionary principle are the most directly relevant factors when addressing hazardous residential development in the coastal area, a number of other factors can be of indirect relevance to RMA plan-setting and decision making around residential development in hazardous coastal areas.

Perhaps most importantly, section 7(b) of the RMA requires that decision-makers “have particular regard” to the “efficient use and development of natural and physical resources”. The Environment Court has held on multiple occasions that the allowance of hazardous development in the coastal zone is not an efficient use of natural and physical resources, in part because the gains may only accrue to the developer, while the wider community is potentially threatened by having to bear the future costs or harms of maladaptive development. One key form of inefficiency is the need for the public to maintain access ways for hazardous coastal settlements, when these access ways are themselves subject to significant hazards. To quote the Environment Court in *Carter Holt Harvey HBU Ltd v Tasman District Council*:³¹²

We do not consider that allowing development of a residential subdivision whose practical physical access is under present and future threat [from erosion, flooding and sea-level rise] and the upkeep of which is uneconomic, constitutes efficient use and development of natural resources.

³⁰⁸ MfE, *RMA Principles*, above n 140, at 22.

³⁰⁹ MfE, *Regulatory Impact Statement*, above n 233, at 23.

³¹⁰ MfE, *RMA Principles*, at 13.

³¹¹ Resource Legislation Amendment Act 2017, s 6.

³¹² *Carter Holt Harvey*, above n 130, at [234]. For another example see *Southern Environmental Association*, above n 302, at [120].

On the other hand, it is important to note that some Part 2 values can also weigh in favour of approving new residential development in hazardous coastal areas. For example, new development may be accompanied by the vesting of an esplanade reserve, which can be portrayed as providing for and enhancing “the maintenance and enhancement of public access to and along the coastal marine area”, which is deemed a matter of “national importance” under section 6(d). Likewise, new development can also allow Māori to reconnect or maintain a relationship ancestral and/or sacred sites.³¹³ In the *Hemi* decision, an application was made to build a family home in an area subject to coastal inundation and at risk from future sea-level rise. This activity was classified as a non-complying activity under the plan. In order to meet the requirements, the Environment Court asserted that a successful non-complying activity application needed to represent unusual qualities or be a true exception.³¹⁴ The Court gave significant weight to the fact that *Hemi* had an ancestral connection with the land, and sought to honor that through the design of the house, while also making the area available to others wishing to reconnect with the land.³¹⁵

Finally, efforts to open up coastal land for residential development can also be prevented by the natural character, amenity, landscape and recreation values enshrined in Part 2 of the RMA. In some instances, such as in *Southern Environmental Association (Wellington) v Wellington City Council*, aesthetic or amenity issues can be just as important as the exposure of people and property to coastal hazards.³¹⁶

³¹³ See RMA, s 6(e) (“the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga”) and 6(g) (“the protection of protected customary rights”), s 7(a) (“kaitiakitanga”), and s 8 (“In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)”).

³¹⁴ *Hemi v Waikato District Council* [2010] NZEnvC 216 at [196], and [170].

³¹⁵ *Hemi*, at [170]. Although note that we consider that *Hemi* is not likely to provide a helpful precedent today: see Iorns, *Treaty of Waitangi duties*, above n 2, at 147-160.

³¹⁶ See for instance *Southern Environmental Association*, above n 302, at [93], where the Environment Court commented:

“We conclude that the adverse effects of the proposed residential development significantly outweigh the positive effects. Those adverse effects are significant adverse effects on natural character, amenity, landscape and recreation values. Potentially too, residential development involves putting people into a location where there are significant coastal hazard risks.”

2. The Importance of the Precautionary Principle/Approach

The most famous articulation of the precautionary principle is contained in the 1992 Rio Declaration on Environment and Development, to which New Zealand was a signatory. It reads:³¹⁷

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Despite being a key principle of environmental law for over 30 years, there is significant disagreement over what implementation of a precautionary approach enables and/or requires decision-makers to do. Indeed, this particular version of the principle is itself fairly conservative and many countries have adopted more stringent versions. The principle should therefore be understood having a range of interpretations, some of which are more contested than others.

(a) Rationale

The simplest rationale for the precautionary principle stems from the fact that scientific uncertainty is inherent in most environmental decision-making about the effects of any proposal.³¹⁸

What is unknown or uncertain now may be the accepted truth in five or ten years. Equally, there may still then be the same uncertainties as exist now. But *we do not have the luxury of being able to wait until we know all there is to know before making a decision* (emphasis added).

These issues of uncertainty in the prediction of future harms is especially important in the case of hazardous coastal development. The difficult task of predicting future effects is now compounded by the uncertain predictions for future sea-level rise, and is further enhanced by the requirement of 2010 New Zealand Coastal Policy Statement for decision makers to adopt a planning horizon of at least 100 years under Policy 24(1). This can be further compounded by uncertainties around the maintenance of flood or erosion protection structures currently funded and/or consented to by the regional council.³¹⁹

A precautionary approach is also understood as allowing for precautionary measures to be taken, including prohibition, where there is a sufficiently plausible risk of significant harm occurring. This means that uncertainty about a significant future impact cannot be decisively construed against measures to prevent those impacts occurring, and that a plausible scientific

³¹⁷ Rio Declaration, above n 198, principle 15.

³¹⁸ *Day v Manuwatu-Wanganui Regional Council* [2013] NZEnvC 44 at [17], per Thompson J.

³¹⁹ *Gallagher v Tasman DC*, above n 129, at [155].

theory, in spite of uncertainty, can still found the basis for taking precautionary measures, provided that that the potential harm is sufficiently serious.

Lastly, a more subtle rationale for taking a precautionary approach is that it counteracts the tendency of decision-makers to downplay/under-value the importance of scientific uncertainty. David Dana, a writer associated with behavioral economics, has endorsed the precautionary principle as a means of correcting a “tendency to under-weigh the costs of not taking action to prevent or mitigate possible environmental and health risks.”³²⁰ These tendencies to undervalue uncertainty can persist, even when a precautionary approach has been explicitly mandated, such as in the 2010 NZCPS.³²¹

Uncertainties are [still] perceived by the decision-makers as lack of evidence and thus practitioners use single numbers, or the middle or low end of the range to express climate risk, despite the precautionary approach advocated in the national guidance and the NZCPS.

(b) Recognition under the RMA

The precautionary principle is not expressly included within the text of the RMA, even though it has been given explicit recognition in other New Zealand statutes.³²² Yet, despite a lack of explicit recognition within the text of the RMA, caution is commonly accepted as being implicit within many key sections of the statute: see particularly the definition of “effect” in section 3 and the purpose statement in section 5. This has been discussed in cases concerning residential development in hazardous coastal areas, such as the *Fore World* decision.³²³ In that case the Environment Court gave the following reasons for why the “precautionary principle” was “inherent in the RMA”:³²⁴

We can begin by reciting part of the extended definition of effect in s 3 [of the] RMA: ...

(d) Any cumulative effect which arises overtime or in combination with other effects- regardless of the scale, intensity, duration, or frequency of the effect, and also includes-

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact.

³²⁰ David Dana “The Contextual Rationality of the Precautionary Principle” (2009) 35 Queen’s LJ 67 at 70.

³²¹ Lawrence and others, above n 56, at 305: “Uncertainties are perceived by the decision-makers as lack of evidence and thus practitioners use single numbers, or the middle or low end of the range to express climate risk, despite the precautionary approach advocated in the national guidance and the NZCPS.”

³²² See section 7 of the Hazardous Substances and New Organisms Act 1996, section 64(1) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and section 10 of the Fisheries Act 1996.

³²³ *Fore World Developments*, above n 274.

³²⁴ *Fore World Developments*, at [32] and [30].

It is (f) that has particular resonance here. It means that the RMA has an inbuilt requirement to have regard to potentially high impacts, even if they might be of low probability. That is of course a requirement to be cautious: - to take precautions. The references in the (s5) purpose of the RMA to ... *sustaining the potential of natural and physical resources...to meet the reasonably foreseeable needs of future generations and to ...safe guarding the life-supporting capacity of air, water, soil and ecosystems...* have precaution inherent in them [sic].

While a general recognition of the ‘precautionary approach’ as a standalone principle has been contested in earlier decisions of the Environment Court,³²⁵ its relevance to decisions about coastal development is put beyond any doubt by its inclusion in the 1994 New Zealand Coastal Policy Statement, and the current 2010 New Zealand Coastal Policy Statement. Policy 3(1) of the current NZCPS requires decisions to “[a]dopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but potentially significantly adverse.”

(c) Steps towards operationalising a precautionary approach

Despite the fact that a precautionary approach is mandated for residential development in hazardous areas, what exactly is required of decision makers in implementing a precautionary approach is less clear. The general question of how to operationalise a precautionary approach is an issue that courts around the world have grappled with ever since the concept gained in prominence through its inclusion in major international treaties, leading to its direct incorporation into domestic statutes without any additional detail as to the substantive content.

There is on-going scholarly dispute over how formal and prescriptive any operationalisation of the principle ought to be. Broadly, the debate is over whether there should be a step-by-step inquiry in a formal, more prescriptive approach, or whether a precautionary approach simply requires decision makers to carefully consider any scientific uncertainties in the evidence presented to them and then be cautious in the exercise of discretion – i.e. a discretionary approach.

Australian planning tribunals have widely adopted a formal three-step approach:

1. a formal threshold for establishing a plausible yet uncertain threat;

³²⁵ See *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC), at 134-135.

2. a shifting of the “burden of proof” to the proponent to prove that the threat is either non-existent or “negligible”,³²⁶ and
3. a final decision concerning the appropriate “*precautionary response*”, which must also be proportionate to the level of the threat and degree of uncertainty.³²⁷

A more discretionary approach, which was originally adopted by the Australian courts, would simply require that a decision-maker is under a duty to exercise caution when making decisions that were subject to scientific uncertainty.³²⁸

The Courts in New Zealand appear to have taken an approach somewhere in between these two positions. On the one hand, and largely because of the inquisitorial evidential procedures used in the Environment Court, there has been no endorsement of any formal shifting in the ‘burden of proof’ when applying a precautionary approach.³²⁹ There also appears to be reluctance towards adopting a step-by-step inquiry. To quote the Environment Court in the *Mahanga* decision:³³⁰

As has been noted by the Court in a number of decisions ... the concept of a precautionary approach has moved from the 1992 Rio Declaration sense of not using a lack of full scientific certainty as a reason to avoid or postpone measures to prevent or mitigate adverse effects on the environment, to that of taking steps in advance to prevent something undesirable from happening, or at least to mitigate its effects to the point of acceptability. The short point is that what is required, if there is an unknown degree of risk, but possible significant adverse effects if the risk comes to pass, is that *those undertaking whatever it is should be very careful in assessing what activities might be regarded as appropriate in that place* (emphasis added).

There also appears to be reluctance to develop any formal presumption in favour of prohibitive measures³³¹ or conservative predictions. To quote the Environment Court in *Rotorua Bore Users Association v Bay of Plenty Regional Council*:³³²

³²⁶ *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 146 LGRA 10, at [150].

³²⁷ *Telstra Corporation*, at [128].

³²⁸ See *Leatch v National Parks and Wildlife Service* [1993] 81 LGRA 270 at 281–282:

“In my opinion the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.”

³²⁹ See Greg Severinsen “Bearing the Weight of the World: Precaution and the Burden of Proof Under the Resource Management Act” (2014) 26 NZULR 373.

³³⁰ *Mahanga E Tu*, above n 131, at [51].

³³¹ *Gallagher v Tasman DC*, above n 129, at [158].

³³² *Rotorua Bore Users Association Inc v Bay of Plenty Regional Council* ENC Auckland A138/98, 27 November 1998, at 49. This proposition was endorsed by the Environment Court in *Fore World Developments*, above n 274, at [32].

The underlying rationale for the [precautionary] approach stems from the need for decision-makers to actually make decisions. It is not dependent, as some may think, on a proposition that one should be inherently conservative in assessing actual and potential effects (emphasis added).

The Department of Conservation Guidance note to Policy 3 of the NZCPS also appears to support this non-prescriptive/discretionary approach to decision making when dealing with uncertain threats. Specifically, it states that the application of the precautionary approach “is a risk management approach rather than a risk assessment approach”, meaning both that it must be applied as a matter of judgement rather than as a formal presumption in favour of conservative estimates, and that “[t]he applicability and weighting of Policy 3 will be a matter for case-by-case assessment.”³³³

On the other hand, the Courts in New Zealand also appear to have accepted a broad requirement for proportionality in applying a precautionary approach. The Supreme Court in the *Sustain Our Sounds* decision identified two key factors for applying a precautionary approach to the question of whether an activity should be prohibited under the RMA. They are:³³⁴

- The extent of environmental risk, including the gravity of the consequences if the risk is realised; and
- The importance of the activity

These two factors were readily applied by the Environment Court in the *Gallagher* case, in which an applicant unsuccessfully challenged the district council over their classification of residential development as a prohibited activity within a hazardous coastal area.³³⁵ The implicit significance of *Gallagher* is that the Environment Court has affirmed that the *Sustain Our Sounds* statement of the precautionary approach can be as readily applied to the prevention of harm in the form of property damage or risk to human safety due to flooding, as it was applied to ecosystem and biodiversity protection in the *Save Our Sounds* decision.

With respect to the first factor of environmental risk, the Court in *Gallagher* considered that there was a high level of hazard exposure to people and property.³³⁶ Interestingly the Court gave

³³³ Department of Conservation, NZCPS 2010 Guidance note Policy 3: Precautionary approach (2013), at 6.

³³⁴ *Sustain Our Sounds Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 40, [2014] 1 NZLR 673, at [129].

³³⁵ *Gallagher v Tasman DC*, above n 129, at [157]-[158]: “To the extent that there is uncertainty as to the extent of that risk [ie, inundation], prohibition is the correct response having regard to the relevant factors identified in *Save Our Sounds*...”.

³³⁶ *Gallagher v Tasman DC*, at [157].

significant weight to the lack of safe access to the property in event of flooding.³³⁷ This meant that, even if a building could be raised to such a level so as to mitigate the occurrence of any flood damage in the short term, the existence of hazards beyond the property were still of such a level that, taking a precautionary approach, the application ought to be declined. The Court in *Gallagher* also held that the proposal for intensifying residential development in the area “increase[d] the risk of social, environmental and economic harm from coastal hazards in that it places a greater number of persons and residential buildings at risk... thereby increasing the consequences of any flood event from coastal overtopping”.³³⁸ With respect to the second factor (importance of the activity), the Court in the *Gallagher* decision held that the gains of any development would be primarily conferred to the developer given the potential future harms that could ensue, and the fact that alternative land was readily available in the area for residential development.³³⁹

This approach taken in *Gallagher* could be seen to be at odds with other decisions concerning hazardous residential development in the coastal area which have stressed that risk can be voluntarily assumed, especially with respect to property damage. In the *Mahanga* case, which was also decided after the passing the 2010 NZCPS, the Court held that a precautionary approach did not require the consent application to be declined, and reached this decision on the basis that “the people involved have express knowledge of that risk and choose to accept it, without significantly expanding the area in which either structures or people will exist”.³⁴⁰ However, significantly, the land in the *Mahanga* case was less hazard prone, the development was smaller in size, and residential development was classified as a discretionary activity.

Similar, albeit slightly different considerations, can be seen in cases prior to the *Sustain Our Sounds* decision. For example, in the *Hemi* decision, the Environment Court accepted submissions from coastal experts that an upper estimate for sea-level rise should apply to “expensive investments with high public welfare and benefit and no hazard adaptation options”, while a lower estimate “should apply to investments of lower value where personal safety is not an issue and viable adaptation options are available.”³⁴¹ In the *Hemi* case, the lower estimation for sea-level rise was adopted because of the comparatively small size of the development. In this respect, the Environment Court appears to endorse an approach to potential harm which

³³⁷ *Gallagher v Tasman DC*, above n 129, at [136].

³³⁸ At [154].

³³⁹ At [158].

³⁴⁰ *Mahanga E Tu*, above n 330, at [51].

³⁴¹ *Hemi*, above n 131, at [57].

looks at the value of any investment as much as the severity and likelihood of any natural hazard event materialising.

It must be noted that the precise facts of both *Hemi* and *Mahanga* could be decided differently today, given the updated MfE *Guidance*, the *Davidson* decision, and updated planning documents. However, the general principle of consideration of the potential harm and its severity and likelihood still may be applicable.

(d) Relevance of adaptive management

Closely related to the precautionary approach is adaptive management. Adaptive management allows for activities to occur which are subject to uncertain threats, provided that they are kept at a small scale and are subject to strenuous monitoring to better assess the likelihood of any threat materialising. If the information obtained suggests that a significant threat is materialising then the activity is required to cease. But if no threat appears to materialise then the activity is allowed to increase in scale. In the *Sustain Our Sounds* case, the Supreme Court held that for an adaptive management to be valid, it must be consistent with the precautionary principle.³⁴²

For our purposes in this report, the finer details of a valid adaptive management regime can be put to one side because the term “adaptive management” has not been used in any case concerning residential development in hazardous coastal areas. However, the general approach required for adaptive management may be relevant for the establishment of adaptive consenting for residential buildings. *Trigger points* – where sea-level rise or erosion reaches a certain level of severity – have been used in newer consents to determine when a building may need to be moved or disestablished. Theoretically, the setting of trigger points could be subject to an adaptive management scheme. For these reasons, the Parliamentary Commissioner for the Environment identifies adaptive management as a necessary strategy for dealing with the uncertainties of sea-level rise:³⁴³

Strategies for coastlines must be able to deal with the uncertainty in the rate of sea-level rise and the uncertainty in the impacts on different parts of the coast. In many places, an adaptive management approach will be needed. For this, monitoring of coastal parameters is vital for identifying when trigger points have been reached. Such monitoring is also required if we are to develop better models of erosion and accretion.

³⁴² *SOS v King Salmon*, above n 334, at [124]-[125].

³⁴³ Parliamentary Commissioner for the Environment, *Preparing New Zealand for Rising Seas: Certainty and Uncertainty* (November 2015), at 79.

Such an approach is also consistent with the Dynamic Adaptive Planning Pathways approach advocated in the 2017 MfE *Guidance*.

On the other hand, drawing upon the requirement for adaptive management to be consistent with a precautionary approach, an adaptive management regime would be less suitable where there was a threat of sudden flooding which could endanger human safety.

3. Guidance from Central Government

(a) The New Zealand Coastal Policy Statement 2010

The purpose of the New Zealand Coastal Policy Statement is to “state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand”.³⁴⁴ There is no definition of the “coastal environment” in the RMA, although section 2 contains definitions of related concepts. Ken Palmer concludes that the NZCPS is not limited to the “Coastal Marine Area” and recommends that the scope of the NZCPS be approached from how it defines the “coastal environment”.³⁴⁵ The current 2010 NZCPS contains an expansive definition of the “coastal environment” under Policy 1, which includes “areas at risk from coastal hazards”,³⁴⁶ this includes residential property at risk of sea-level rise.

As discussed above (chapter 2.1), the NZCPS is more than mere guidance; it is mandatory for RMA decision-makers to not only take into account but also comply with it where it provides clear direction. This applies to the adoption of planning documents and - at least to some extent – resource consents.³⁴⁷ It is thus applicable to decision-making on climate adaptation measures.

The first 1994 Coastal Policy Statement was ahead of its time in both referring to sea-level rise and mandating a precautionary approach, but it was criticised for providing only minimal guidance by merely requiring councils to consider “the possibility of sea-level rise”. This lack of direction was criticised for inadequately shielding and/or deterring claims against the council in the Environment Court, alleging that sea-level rise was too scientifically uncertain to justify planning restrictions or that it was so distant that it should not be factored into current plans.³⁴⁸

³⁴⁴ RMA, s 56.

³⁴⁵ Palmer, “Resource Management Act”, above n 193, at 3.74.

³⁴⁶ NZCPS 2010, policy 1(2)(d).

³⁴⁷ Consents are covered by *Davidson*, discussed above, section 2.1.a. This case is currently under appeal to the Supreme Court.

³⁴⁸ Reisinger and others, above n 164, at 312.

The passing of the 2010 NZCPS has arguably tipped the balance further in favour of disallowing developments which increase the exposure of residential property to natural hazards in the coastal area. In contrast to its predecessor, the 2010 NZCPS provides a firm recognition of sea-level rise and the adoption of a planning horizon of at least 100 years when evaluating coastal hazards.³⁴⁹ The new document also clearly mandates the use of a precautionary approach for decisions affecting activities in the coastal environment.³⁵⁰ A number of listed objectives and policies also reference the necessity of considering managed retreat for existing development. As a result of these changes, the NZCPS has altered the field with respect to residential development in hazardous coastal areas, making Environment Court decisions before the passing of the 2010 NZCPS of “little assistance” for current appeals.³⁵¹

Although the term “adaption” or “adaptation” is not included in the document, Objective 5 lists several objectives that would be core to any adaptation initiative in respect of at-risk coastal property. It reads:

Objective 5

To ensure that coastal hazard risks taking account of climate change, are managed by:

- locating new development away from areas prone to such risks;
- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

Protection of the coastal environment from inappropriate “subdivision, use and development” is also provided for by Objective 6. It reads:

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area...

³⁴⁹ NZCPS 2010, policy 24(1)(a). The 1994 NZCPS also required the use of a precautionary approach but was worded differently.

³⁵⁰ See NZCPS 2010, policy 3. This extends to both current uses of the coastal environment, and proposed activities.

³⁵¹ *Gallagher v Tasman DC*, above n 129, at [176].

Because Objective 6 expressly states that it is intended to “enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development”, it has the potential to be misconstrued by applicants as a pro-development counterweight to Objective 5. This error was encountered by the Environment Court in the *Gallagher* case. The Court cleared this up by confirming that Objective 6 was intended to protect the coastal environment from inappropriate development, while Objective 5 was intended to protect development from coastal hazards. In making this finding, they concluded that there was no conflict between the two Objectives because they clearly dealt with distinct issues.³⁵² They also found that, in applying Objective 6, the availability of other land for residential development in the area can tilt against favouring development in a hazardous area.³⁵³ Finally, the Court firmly dismissed Tasman Council’s suggestion that Objective 5 should override Objective 6 in the event of a conflict.

Objectives 5 and 6 of the NZCPS are also supplemented by several policies that explicitly endorse the implementation of adaptation initiatives that are of direct relevance to coastal hazards affecting residential property.

Policy 24 requires local authorities to identify coastal hazards and risks, prioritising areas of high risk, where hazards need to be assessed "over at least 100 years". It then provides a list of eight matters that need to be considered in assessing hazard risks, including cumulative effects of sea-level rise.

New uses and development in areas of coastal hazard risk are addressed in Policy 25; this states that decision makers should:

In areas potentially affected by coastal hazards over at least the next 100 years:

- (a) avoid increasing the risk of social, environmental and economic harm from coastal hazards;
- (b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;
- (c) encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;
- (d) encourage the location of infrastructure away from areas of hazard risk where practicable;

³⁵² *Gallagher v Tasman DC*, above n 129, at [161]-[163].

³⁵³ *Gallagher*, at [161].

(e) discourage hard protection structures and promote the use of alternatives to them, including natural defences; and

(f) consider the potential effects of tsunami and how to avoid or mitigate them.

The use of "avoid" in (a) and (b) provides a strong direction to local authorities; it is to be compared with the softer "encourage", "discourage" and "consider" used in the other provisions.

Existing development is addressed in Policy 27:

(1) In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes:

- (a) promoting and identifying long-term sustainable risk reduction approaches including the relocation or removal of existing development or structures at risk;
- (b) identifying the consequences of potential strategic options relative to the option of 'do-nothing';
- (c) recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations;
- (d) recognising and considering the environmental and social costs of permitting hard protection structures to protect private property; and
- (e) identifying and planning for transition mechanisms and timeframes for moving to more sustainable approaches.

(2) In evaluating options under (1):

- (a) focus on approaches to risk management that reduce the need for hard protection structures and similar engineering interventions;
 - (b) take into account the nature of the coastal hazard risk and how it might change over at least a 100-year timeframe, including the expected effects of climate change; and
 - (c) evaluate the likely costs and benefits of any proposed coastal hazard risk reduction options.
- (3) Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.
- (4) Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.

Finally, Policy 26 addresses natural defences, and requires local authorities to

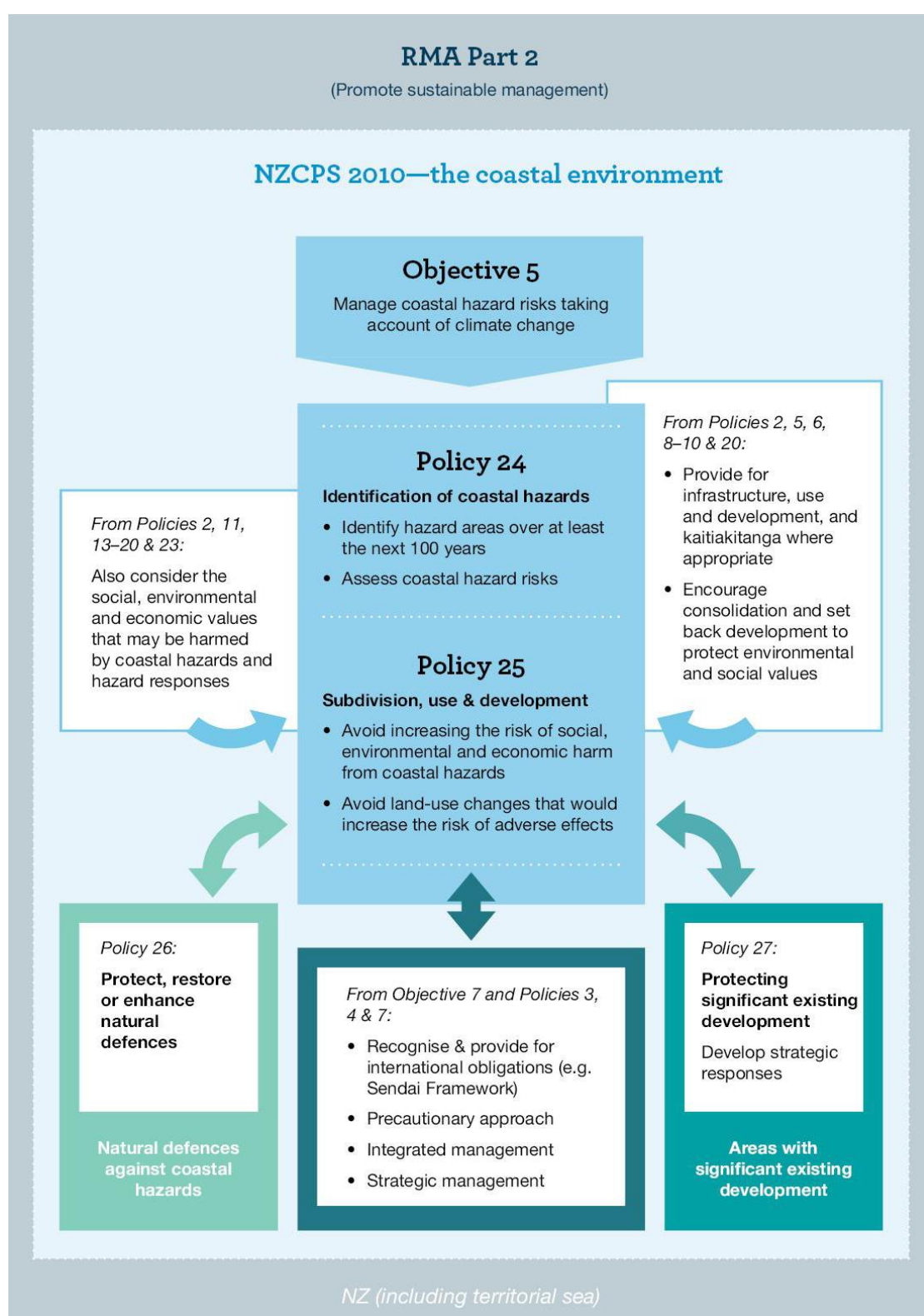
1. Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards.

2. Recognise that such natural defences include beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands.

These provisions of the 2010 NZCPS are discussed in more depth in later chapters, as the relevant topic arises. It is noted here that additional guidance for application of the NZCPS is provided in the Department of Conservation guidance notes, particularly the guidance note on *Coastal Hazards*, discussed in the following section.

It is also noted that these policies are, of course, supported by other Objectives and Policies of the NZCPS. Of particular importance is Policy 3 on taking a precautionary approach, discussed above.³⁵⁴ Others are identified in the diagram below, showing the interrelation of the various Objects and Policies relevant to coastal hazards.

³⁵⁴ See Chap 3.2.



"Figure 1. Where the NZCPS 2010 coastal hazard objective and policies apply, and some key interactions with other policies"³⁵⁵

³⁵⁵ Department of Conservation, *NZCPS 2010 guidance note: Coastal Hazards* (December 2017), Fig 1, at 7.

(a) Non-binding guidance

National guidance documents give an indication of what central government deems to be good practice for decision-making on climate adaptation measures. They are based on firm evidence and have been helpful to councils and the Environment Court in deciding upon climate adaptation measures (for example, adopting a 100-year planning period when assessing the impact of sea-level rise³⁵⁶). However, there have also been difficulties due to legal uncertainties about the weight to be accorded to such guidelines over other sources of evidence presented to the Court, and inconsistencies between different sets of guidelines. Rive and Weeks have commented that the Environment Court had struggled to adopt a consistent approach when planning for sea-level rise, and that local government had been placed in “the unenviable position of having to reconcile conflicting figures for projected sea-level rise within government guidance documents, New Zealand scientific publications, and overseas expert assessments”.³⁵⁷ By 2010 the Environment Court had begun to rely upon the 2008 Ministry for the Environment guidelines on coastal hazards, in combination with official estimates from the IPCC, for sea-level rise predictions and other relevant climate change scientific projections.³⁵⁸ In December 2017 both the Department of Conservation and the Ministry for the Environment released updated guidance documents on coastal hazards. In addition, in May 2018 the NZ Climate Change Adaptation Technical Working Group made recommendations for how the government should handle the increasing climate threat to the coasts.³⁵⁹ All these guidance resources would form part of best practice for climate adaptation decision-making by councils today and would thus be taken note of by courts in this respect.

³⁵⁶ See *Southern Environmental Association*, above n 302, at [85]: “For all practical purposes it would be prudent to design for a 100-year planning period, according to MfE guidelines”.

³⁵⁷ Rive and Weeks, above n 120, at 9.7.2.

³⁵⁸ At 9.7.1.

³⁵⁹ Climate Change Adaptation Technical Working Group, *Adapting to Climate Change in New Zealand: Recommendations* (Ministry for the Environment, Wellington, 2017) ('MfE, *Recommendations*'); Climate Change Adaptation Technical Working Group, *Adapting to Climate Change in New Zealand: Stocktake Report* (Ministry for the Environment, Wellington, 2017) ('MfE, *Stocktake*').

(i) Department of Conservation Guidance on Coastal Hazards

The Department of Conservation has prepared a comprehensive set of guidance notes to accompany the New Zealand Coastal Policy Statement 2010. There is an individual note for each NZCPS policy, as well as an introductory note to explain the purpose and structure of the guidance notes generally.³⁶⁰ The guidance notes place great emphasis on the importance of understanding the way in which the policies are expressed, with different levels of flexibility and direction. The aim is to ensure that those with responsibilities that involve coastal management and planning, have the necessary information to provide correct and coherent decision making.

A guidance note on the precautionary approach was released in 2013.³⁶¹ It notes that Policy 3(2) "singles out" coastal resources as potentially vulnerable to climate change effects, and that:³⁶²

"Despite current uncertainties, local authorities and applicants are required to implement risk-based precaution in responding to the effects of climate change on the coastal environment".

Such an approach "will be forward-thinking and consider the development of appropriate strategies for the future management of coastal resources".³⁶³ The guidance note points to other resources including the MfE *Guidance* as providing assistance for management of the climate change effects on coastal resources.

DoC *guidance note on Coastal Hazards* was adopted in Dec 2017 and addresses objective 5 and policies 24-27 together in one *guidance note* (DoC *Guidance*).³⁶⁴ Perhaps the most important contextual statement for decision-makers is:³⁶⁵

The overarching goal of the coastal hazard objective and policies is to manage coastal hazard risks so that the likelihood of them causing social, cultural, environmental and economic harm is not increased.⁴ This includes harm arising from responses to those coastal hazards, such as the addition of hard protection structures. The adoption of long-term risk-reduction approaches is strongly encouraged.

³⁶⁰ See, Department of Conservation, *NZCPS 2010 Implementation guidance: Introductory note* (May 2018).

³⁶¹ Department of Conservation, *NZCPS 2010 Guidance note, Policy 3: Precautionary approach* (2013).

³⁶² At 8.

³⁶³ At 6.

³⁶⁴ *NZCPS 2010 guidance note: Coastal Hazards*, above n 3.

³⁶⁵ At 5. Footnote 4 reads: "'Social, environmental and economic harm (from Policy 25(a)) is taken to include 'cultural' harm. See also RMA section 5, and NZCPS 2010 Objectives 3 and 6 and Policies 2 and 6."

The *Guidance* explains a range of terms in the policies, including in relation to risk, harms and benefits that should be considered by decision-makers. For example, variations of likelihood used in the Policies are helpfully explained.³⁶⁶ An illustration of an explanation of harms and benefits in relation to coastal protection works is that:³⁶⁷

"'Environmental and social costs' and 'public or environmental benefit' may have been intended to make explicit that hard protection structures may be associated with a range of adverse effects that need to be considered (due to both the presence of the structures themselves and their interaction with coastal processes), as set out in the Board of Inquiry report where it was stated that hard protection structures often resulted in individual benefit to landowners but a loss to the community of public space, amenity values and natural values, such as native biodiversity (Board of Inquiry 2009)."

Most attention is given to explaining how to implement Objective 5 and Policies 24-27, with a clause-by-clause commentary on each.³⁶⁸ This guidance note explains the definition of some terms used, explains what factual matters to consider in order to implement the policies, and includes some examples and more detailed discussion of application.

The discussion of the assessment of risk is quite extensive, with frequent reference to where to find more information, most often in the Ministry for the Environment guidance on sea-level rise and coastal hazards but in additional materials as well. Terms are defined, and several case study boxes elaborate on particular aspects. The methods of assessment and summary of its results was before the court in the case of *Weir v Kapiti Coast District Council* (discussed below, chapter 8.2³⁶⁹). It is extremely important for local authorities to get this right, as it is the coastal hazard risk assessment which will underpin every other aspect of the decision on the appropriate measures to implement in order to deal with the risk(s) and hazard(s) identified.

Decision-making for existing development are also discussed in detail, including options for 'do nothing', managed retreat and hard coastal protection structures. Relevant matters for decision-makers to consider are identified, the definition of some terms are discussed, and references to further information is provided. Overall, they provide excellent guidance for best practice

³⁶⁶ NZCPS 2010 guidance note: *Coastal Hazards*, at 14-18.

³⁶⁷ NZCPS 2010 guidance note: *Coastal Hazards*, at 14, citing: Board of Inquiry of the proposed NZCPS 2008. Report and recommendations, Volume 1 findings, recommendations and recommended NZCPS (2009).

³⁶⁸ At pp 26-74.

³⁶⁹ *Weir v Kapiti Coast District Council* [2013] NZHC 3522; see below pp 212-219.

decision-making in this area. Relevant aspects are utilised in the substantive discussion of the law on the different topics in their respective chapters below.

(ii) Ministry for the Environment Guidance on Coastal Hazards

The most recent guidance from the Ministry for the Environment on sea-level rise and coastal hazards was released in December 2017 (the *MfE Guidance*).³⁷⁰ The lead authors of the *MfE Guidance* state (in a separate article) that the Ministry's decision to revise the 2008 guidelines was based on four things:

1. the notable legislative and policy changes that had occurred in the preceding years (for example, the passing of the 2010 New Zealand Coastal Policy Statement);
2. updates to the scientific literature for estimating future sea-level rise, most notably the revised IPCC estimates from 2014;
3. the emergence of new adaptive tools/approaches for guiding policy and/or decision making pertaining to uncertain threats; and
4. the emergence of new public engagement approaches for communities affected by sea-level rise.³⁷¹

The 2017 *MfE Guidance* goes beyond the provision of specific estimations of sea-level rise to guide policy and decision-making. Specifically, the 2017 *Guidance* provides a detailed “adaptive planning” framework for managing the uncertainties around sea-level rise using sea-level rise projections that are formulated as four separate sea-level rise scenarios. Those four scenarios are as follows:³⁷²

1. A low-emissions, effective mitigation scenario;
2. An intermediate-low emissions scenario;
3. A high-emissions, no mitigation scenario;

³⁷⁰ Ministry for the Environment, *Preparing for coastal change: A summary of coastal hazards and climate change guidance for local government* (ME 1335, December 2017).

³⁷¹ Judy Lawrence and others, “National guidance for adapting to coastal hazards and sea-level rise: Anticipating change, when and how to change pathway” (2018) 82 *Environmental Science and Policy* 100 at 101.

³⁷² *MfE, Summary*, at 18.

4. A higher, more extreme H+ scenario.³⁷³

The lead authors give the following rationale for using four plausible scenarios of varying severity:³⁷⁴

More recent SLR projections that include updated polar ice sheet responses mean that it is difficult to pre-determine what coastal future might eventuate for any community, even over planning timeframes of the next 100 years. It is therefore more appropriate and inherently flexible to use a range of SLR scenarios to test the emergence of an adaptation threshold for the current situation and the performance of adaptive actions, than attempting to provide either a worst-case or “most-likely” estimate of SLR to devise a policy or plan.

The lead authors describe the downside of using single estimates as follows:³⁷⁵

The previous New Zealand coastal guidance recommended that hazard and risk assessments consider a range of SLR values for the 2090 planning timeframe, but provided two numeric SLR tie points (starting with a minimum 0.5 m, and to consider at least 0.8 m by the 2090s). Beyond 2100, a 10 mm/year heuristic was recommended. In practice, users either simply adopted the minimum value or used the second value without running through hazard and risk assessments for a range of SLR values.

Beyond the compiling of revised scientific estimates, the 2017 *Guidance* sets out a 10-step process for fostering “adaptive pathways planning”. This objective is succinctly described in the accompanying summary document as follows:³⁷⁶

[adaptive pathways planning]...identifies ways forward (pathways) despite uncertainty, while remaining responsive to change should this be needed (dynamic).

The summary document also contains this more expansive description:³⁷⁷

An adaptive pathways planning approach is a risk-based approach which avoids the need to have firm ‘predictions’ or to use only one scenario as a basis for decision-making. It accommodates uncertainty, and can enable active community and stakeholder engagement and community capacity building.

To achieve this objective, the new *Guidance* contains extensive detail about how local government ought to consult with the community around issues of sea-level rise, and how uncertainty ought to be factored into planning and decision-making. Each of these issues is addressed by a separate chapter in the *Guidance*: Chapter 3 on ‘Community Engagement Principles’ adopts an approach based on the approach of the International Association of Public

³⁷³ The Summary guidelines note that this is “included primarily for the purpose of stress-testing adaptation plans or pathways and major new development at the coast”. See MfE, *Summary*, at 18. It was reportedly designed to allow for some polar ice melt that may be significantly higher than the 2014 IPCC figures allowed for.

³⁷⁴ Lawrence and others, “National Guidance”, above n 371, at 103 (Citations omitted).

³⁷⁵ At 103 (citations omitted).

³⁷⁶ MfE, *Summary*, above n 372, at 5.

³⁷⁷ At 26.

Participation,³⁷⁸ and Chapter 4 on uncertainty in risk management includes a proposed taxonomy for four types of uncertainty that planners will encounter.³⁷⁹

This Guidance is then organised into ten sequential steps, which are in turn structured into five questions. Those five questions and the ten steps that accompany them are as follows.³⁸⁰

A. What is happening?

1. Preparation and context

This step concerns the preliminary steps to begin making an action plan. This requires the establishment of a multi-disciplinary team to implement the 10-step cycle, and then a preliminary analysis of both the scope of the changing risk (eg, looking at the risk exposure of the area, such as the infrastructure and buildings close to sea-level), and the compiling of relevant information about the local community context.³⁸¹

2. Hazard and sea-level rise assessments

This step requires the team to obtain and closely analyse the existing information estimating the range of future sea-level rise. As mentioned, the guidance contains a range of estimates grouped into scenarios of increasing severity, based on the 2014 IPCC forecasts. When undertaking this step, the Guidance advises that risk assumptions should be calibrated to take note of the value or importance of an asset or activity. For example, coastal subdivision, greenfield developments and major new infrastructure should be avoided by using the most severe sea-level rise estimates (ie, looking at sea-level rise beyond 100 years according to the extreme H+ scenario). By contrast, and as a minimum transition measure where a single value is required, “[n]on-habitable short-lived assets with a functional need to be at the coast, and either low-consequences or readily adaptable” can be assessed according to an assumed sea-level rise of 0.65 m during the next 100 years.³⁸²

³⁷⁸ MfE, *Guidance*, above n 3, at 51.

³⁷⁹ At 141.

³⁸⁰ See diagram contained in MfE, *Summary*, above n 372, at 9. This diagram is repeated throughout the Guidance documents.

³⁸¹ MfE, *Summary*, at 9. For a list of considerations relevant to establishing the “context”, see MfE, *Guidance*, at 26, box 3.

³⁸² MfE, *Summary*, at 21.

B. What matters most?

3. *Values and objectives*

This step requires the team to identify: what is of value that is potentially affected by sea-level rise, who it is of value to, and where it is located. What objects or activities have “value” is to be determined by investigating community perspectives, rather than narrowly focusing on economic measures.³⁸³

4. *Vulnerability and risk*

Once values and objectives have been identified, the team needs to undertake a formal ‘vulnerability assessment’. This involves looking both at the *sensitivity* of the object effected (ie, the extent to which an item will be directly or indirectly effected by sea-level rise), and the *adaptive capacity* of the object (ie, the ability of an object to adapt to climatic changes with minimal impact or cost).

C. What can we do about it?

5. *Identify options and pathways*

This step requires different strategies to be evaluated with respect to the identified hazards. These include *avoiding* and/or *retreating* from the hazard, *accommodating* the hazard, or *protecting* the object or asset.³⁸⁴ The summary document stresses that the identification of options and/or pathways is not intended to lock a community into one strategy. Rather, in keeping with the objective of *adaptive pathways planning*, strategies are to be implemented subject to the proviso that new information may require a reappraisal to be made.

6. *Option evaluation*

The *Guidance* identifies a number of “decision support tools” for evaluating various options. These are grouped into “traditional decision support”, “uncertainty decision support”, “traditional economic decision support”, and “economic decision making under uncertainty”.³⁸⁵ The implicit objective is to guarantee that a comprehensive range of analytic techniques and other considerations are deployed, and that economic analysis or general uncertainty is neither over-emphasised, nor over-valued.

³⁸³ MfE, *Summary*, above n 372, at 23.

³⁸⁴ At 25.

³⁸⁵ MfE, *Guidance*, above n 328, at 202.

D. How can we implement the strategy?

7. Adaptive planning strategy (with trigger-points)

This step consists of two smaller steps. The first involves developing “signals and triggers”, and the second involves identifying the best instruments and measures for implementing the plan. “Signals and triggers” need to be specified and observable phenomena linked to sea-level rise, which can communicate that a risk has risen to a level that requires action to be taken. In other words, a trigger or signal sets a measurable limit where it is agreed that the current course of action/pathway is not meeting the objectives of the plan. The most obvious trigger or signal would be a measure of sea-level rise, but it could also include such measurements as the level of salt-water in ground water systems.³⁸⁶

8. Implementation plan

Implementation refers to the planning devices that could be used to implement any measure decided upon. This may involve embedding a coastal adaptation plan within statutory documents. The summary guidelines even suggest adding a coastal adaptation plan to the appendix of a district or regional plan.³⁸⁷

As the adaptive planning strategy will be longer term than the life of most regional and district plans, it may need to be incorporated in such plans through an appendix or schedule, where it can provide long-term context and guidance for planners and decision-makers.

The full *Guidance* provides extensive guidance across three summary tables (25-27) on the full range of legal and/or planning measures, including which ones are best suited to specific tasks.³⁸⁸ This list does not include a discussion of national statutory documents, given that the guidance is about developing local level solutions.

E. How is it working?

9. Monitor

Monitoring is necessary to effectively measure the on-going efficacy of any pathway. Obviously, any monitoring needs to be sufficiently robust if it is to accurately inform decision-making. It needs to be undertaken over time, be consistent, standardised, and undertaken in consistent measurement locations.³⁸⁹

³⁸⁶ MfE, *Summary*, above n 372, at 30.

³⁸⁷ At 30.

³⁸⁸ MfE, *Guidance*, above n 3, at 224-233.

³⁸⁹ MfE, *Summary*, at 32.

10. Review and adjust

This step reinforces that a coastal adaptation plan may need to be adjusted in light of new information. In a sense, this step exists to reinforce the objective of “dynamic adaptive pathways planning”, wherein plans can continually be updated in light of new information, therein avoiding the pitfall of a local authority becoming “locked” into a maladaptive pathway.

The efficacy of the new *Guidance* will only be revealed with the passage of time. No Environment Court decisions referring to it were found in the course of the research undertaken for this report. Nevertheless, it is fair to assume that the new *Guidance* will provide valuable evidential assistance for disputes over coastal adaptation measures, particularly councils wishing to implement more stringent controls on new or intensified residential development in hazardous coastal areas.

The other major positive contribution of the *Guidance* is that it proposes an intellectually rigorous framework for adaptive planning. This framework takes account of the need for local policies, plans and decisions to undertake extensive consideration of the uncertainty that is inherent in sea-level rise, and the need for extensive public consultation. In this respect, the *Guidance* clearly breaks new ground in addressing the issue in New Zealand. As the lead authors note, there are aspects of the approach which are new to New Zealand, and these will take some time to implement.³⁹⁰ The Hawkes Bay councils in conjunction with iwi post-governance settlement entities trialled a community consultative decision-making procedure similar to that contained in the *Guidance*, and it has already produced valuable insights.³⁹¹ The Wellington city and regional councils have also undertaken a similar pilot consultation process with the Makara Beach community.³⁹²

Shortfalls

In spite of these positive aspects, the *Guidance* cannot in and of itself address the full scale of the problem. While the procedural framework proposed hints at a high-level solution, it is also potentially both overly ambitious and insufficient to challenge the shortfalls of the current planning paradigm. This is understandable given the parameters within which they were drafted. Nevertheless, these are still shortcomings that need to be discussed.

³⁹⁰ Lawrence and others, “National Guidance” above n 371, at 102.

³⁹¹ See, Clifton to Tangoio Coastal Hazards Committee, above n 9. See also Lawrence and others “National Guidance” above n 371, at 102.

³⁹² See, Wellington City Council, “Makara Beach Project” <www.youtube.com>.

Firstly, the *Guidance* does not deal in great detail with the core problem of existing residential property in hazardous coastal areas, nor does it propose a strategy for dealing with such politically sensitive assets. How to implement managed retreat is not discussed in any detail, nor are options for the payment of compensation. These are both extremely important matters and need to be considered more broadly, if retreat from the coast is to be managed well.

Secondly, the decision-making process proposed by the *Guidance* is ambitious, and potentially too ambitious for some smaller and/or cash-strapped councils. Even if a council wishes to address the issue of sea-level rise in the way that is described, they are likely to be concerned about the on-going administrative costs of a truly adaptive scheme, where there is constant planning, consulting, monitoring, and revising. Further, each of these steps is also accompanied by the real fear of being taken to Environment Court by well-organised lobby groups. A fair counter-argument to these concerns is that the proposed approach to adaptive planning is to occur over a very long stretch of time, and that would lessen the apparent costs. While this may be true, it may also be difficult to persuade an already cash-strapped council to venture down such an ambitious path without the assurances of further assistance from central government. Thus, the guidelines propose a very ambitious set of procedures for addressing sea-level rise, but local government is likely to still expect and/or hope for additional support from central government in the form of legally binding national level documents – such as national direction under the RMA – and additional financial support to meet the administrative costs of implementing the very ambitious approach that the guidelines recommend. For this reason, direction through statutory instruments (or similar), along with concurrent pledges of financial support, may be necessary before truly adaptive plans are embarked upon more widely around Aotearoa.

Third, the *Guidance* is helpfully flexible, to account for differing circumstances of different localities and local preferences. It is notably flexible enough to enable a council to avoid taking serious steps to deal with hazardous coastal development; this may be seen as a drawback. For example, the guidelines may not be followed fully even if the adaptive planning approach is initially embarked upon. This may result in sloppy compliance with plans in much the same way that resource consents are not currently consistently enforced around the country.³⁹³ One can imagine pro-forma consultation and/or decisions being made to not significantly alter a present

³⁹³ See, Ministry for the Environment, *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (ME 1251, November 2016) and Marie Brown, *Last Line of Defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (Environmental Defence Society, February 2017).

pathway/plan, resulting in a level of inaction similar to what currently exists amongst some local councils. If a coastal adaptation plan has trigger points for future review, that may in turn produce subsequent inaction or ineffectiveness when further reviews are triggered. It may hurt the credibility of the scheme if trigger points are set which are not genuinely honoured.

The flexibility in a scheme of adaptive planning may also result in lobby groups exerting political and/or legal pressure over adaptation policies, such as to remove hazard notification lines (as in the *Weir* case), or to forestall preventative measures or managed retreat policies. For this reason, national statutory documents are still needed both to compel councils to act and to protect them from real or perceived legal liability.

These various difficulties speak to the fact that the *Guidance* is only likely to work in practice if a local council genuinely wishes to implement it. This speaks to a recurring problem that, despite the councils having the necessary legal powers to regulate the issue of hazardous coastal development, the historical record has shown that councils have not utilised these powers. The reasons for doing so – eg, political, institutional and financial – have already been traversed in this report and have been accepted by lead authors of the *Guidance* in their accompanying journal article:³⁹⁴

The Guidance, along with statutory provisions, on the face of it, can enable SLR as a policy problem to be addressed. However, in practice, the institutional framework has been unable to motivate actions that address the uncertainty around the rate and magnitude of sea-level rise, especially for decisions that have long lifetimes, such as decisions on the subdivision of land, buildings, above and below ground infrastructure and existing uses.

Another issue is in relation to the amount of sea-level rise that councils should be basing their decisions on. The *Guidance* identifies different levels to be used for different types of development, basing it largely on the 2014 IPCC figures with adjustment for New Zealand's regional gravitation effects (plus the H+ designed to recognise that polar ice-melt may produce higher levels than was allowed for by the IPCC in 2014).³⁹⁵ They also recommend that individual councils seek expert advice on levels to use in their areas. This latter advice is likely to be the most helpful. It is important for central agencies to be establishing appropriate guidelines, but in an area of rapidly changing science they can easily become outdated. This could reduce their

³⁹⁴ Lawrence and others, “National Guidance”, above n 372, at 101.

³⁹⁵ This is because the science behind the sea-level rise predictions has advanced dramatically in the ability to incorporate Antarctic ice melt into sea-level rise computer models that were used at the time of the IPCC recommendations. It is thus recognised that the setting of the other limits based on the IPCC figures is unlikely to remove the debate on appropriate sea-level rise figures to use. For example, the scientific debate in the *Thompson* case was over whether climate targets should be based on the IPCC reports or on more recent models that showed more dramatic effects.

utility to the principle of having different levels for different types of development rather than the precise numbers associated with them. It is thus best that individual councils take advice from expert bodies (eg NIWA) on the best figures to use for their coastline and the development on it.

Comment

One conclusion is therefore that the new *Guidance* provides some excellent guidelines for how to implement a coherent strategy to climate adaptation, but the guidelines in themselves are unlikely to compel a council into taking action. Perhaps the *Guidance* instead provides the first blueprint of a strategy that will require additional support from central government through the passing of national level statutory instruments, alongside increased funding to implement such a scheme. Some councils will probably embark on implementing this framework with genuine vigour, and other councils will partially comply while at the very least familiarising themselves with the basics of a genuinely adaptive scheme. This will mean that, if national level documents are passed which are based on the current guidelines, then the adjustment period will be smoother than it would be in the absence of the guidelines. The intervening years will also allow for some problems to be identified with the current approach. However, at some stage, greater leadership from central government will be required.

(iii) Climate Change Adaptation Technical Working Group Reports

The Climate Change Adaptation Technical Working Group (CCATWG) provides recommendations to the Government about possible pathways for dealing with climate change. In 2017 a *Stocktake Report* was released providing information about the predicted impacts of climate change into the future;³⁹⁶ and in 2018 it made *Recommendations* for taking action.³⁹⁷ While most recommendations are aimed at how the Crown should handle the increasing climate threat to the coasts, and how it can assist local government, some are directed at local government, and can thus assist them with their own adaptation decision-making, if only as general guidelines.

³⁹⁶ MfE, *Stocktake*, above n 359.

³⁹⁷ MfE, *Recommendations*, above n 359.

Stocktake: Effects of climate change

The CCATWG describes the likely effects of climate change as “significant.”³⁹⁸ Coastal areas and floodplains, where “the majority of our population are located” will be at risk of flooding, sea-level rise, storm surge and inundation from rising waters.³⁹⁹ Furthermore, with changes in the climate and rising sea levels the coast will increasingly be eroded, surface and ground water quality will be degraded.⁴⁰⁰ The hearts of communities will be affected: homes, commercial assets and our vital infrastructure are in harm’s way.⁴⁰¹

Climate change will have broad economic implications. With an increase in the number and extremity of severe weather events, insurers will be paying out more. This will “inevitably be reflected in the premiums charged”.⁴⁰² For some, insurance will become unavailable due to price or due to the risky nature of their property which may “reshape the distribution of vulnerable groups.”⁴⁰³ For banks, this could result in the offer of shorter term mortgages which may make buying a home less affordable.⁴⁰⁴ Economic and social disruption could lead to conflict when access to resources are limited.⁴⁰⁵ When some groups in society are already receiving access to resources unequally, this will only be exacerbated by conflict and disruption.⁴⁰⁶

Assessing cultural, economic and the natural environment’s vulnerability to the risks associated with climate change is one of the best ways to prepare long term. By understanding that things will change and how they will change, the government can target its work to “the most effective actions or the most critical needs.”⁴⁰⁷

Principles to guide action

A set of eight principles have been produced by the Working Group “to guide, support and help sustain effective climate change adaptation” and to frame their recommendations for action:⁴⁰⁸

- anticipate change and focus on preventing future risks from climate change rather than responding as the changes occur

³⁹⁸ MfE, *Stocktake*, above n 359, at 10.

³⁹⁹ At 10.

⁴⁰⁰ At 25.

⁴⁰¹ At 10.

⁴⁰² At 37.

⁴⁰³ At 11.

⁴⁰⁴ At 38.

⁴⁰⁵ At 38.

⁴⁰⁶ MfE, *Recommendations*, above n 359, at 38.

⁴⁰⁷ At 24.

⁴⁰⁸ At 7.

- take a long-term perspective when acting
- take actions which maximise co-benefits, and minimise actions which hinder adaptation
- act together in partnership, *ara whakamua*, and do this in a way that is based on the principles contained in the Treaty of Waitangi
- prioritise action to the most vulnerable communities and sectors
- integrate climate change adaptation into decision-making
- make decisions based on the best available evidence, including science, data, knowledge, and *Mātauranga Māori*
- approach adaptation action with flexibility and enable local circumstances to be reflected.

As reflecting current best practice, these principles should at least be considered by councils when making decision on adaptation measures. Actions to implement them are considered below.

Actions recommended by CCATWG

The CCATWG recommends a wide range of actions "for adaptation to be effective",⁴⁰⁹ both "foundational" and immediate, aimed at central and local government. While most appear to be aimed at central government, even some of the wider foundational actions are relevant to local government decision-making; plus some are aimed at local government in particular. For example, recommended foundational actions include the need to provide strong leadership to ensure that action is taken including at local government level. Specific actions include:⁴¹⁰

Action 6: Incentivise and guide ongoing progress in adaptation action, including avoiding, accommodating, retreating and defending. ...

Action 8: Include the impacts of climate change in central and local government procurement processes.

Action 6 is the most relevant to the decision-making addressed in this report. However, the CCATWG does not provide any more guidance than is already produced elsewhere for councils: it refers to the NZCPS for the recommended hierarchy of approaches to decision-making for areas subject to coastal hazards, to the DoC *Guidance* on the NZCPS, and to the MfE *Guidance* discussed above.⁴¹¹

In terms of involving communities, the CCATWG helpfully identifies that local government decision making should be undertaken with iwi partners.⁴¹² It recognises that this partnership

⁴⁰⁹ At 8.

⁴¹⁰ At 9.

⁴¹¹ At 31.

⁴¹² At 52.

approach to decision making derives from an obligation under the Treaty of Waitangi⁴¹³ and that “[p]artnership is also essential for effective decision-making on the action that needs to be taken to adapt to climate change.”⁴¹⁴ Further, it recognises that Iwi/hapū are the source of mātauranga Māori, meaning that they have knowledge of the natural environment which is vital to New Zealand’s adaptation policy.⁴¹⁵ These recommendations suggest that best practice in this area will involve going further than the minimum requirements in the RMA in relation to involvement of iwi in local government decision-making.⁴¹⁶

While not the focus on this paper, the CCAWTG notes that climate change will impact local government decisions such as on water quality and quantity, and recommends:⁴¹⁷

Action 21: When implementing the National Policy Statement for Freshwater Management, councils have particular regard to adapting to the effects of climate change

It is finally noted that the CCATWG also makes recommendations about the reform of the RMA as a whole, as part of a better provision by central government of the frameworks necessary for local government to make better climate adaptation decisions. The CCATWG recommends that a review of the RMA be undertaken to identify inconsistencies and misalignment across legislation and policies that affect local government’s ability to undertake climate change adaptation. Local government could reflect on any impediments to decision-making resulting from the RMA and make recommendations to government on how to fix any that they identify. Difficulties with clarity around where legal liability lies in relation to some adaptation measures could be one such area.

(b) Proposals for additional guidance

(i) National Policy Statements

The purpose of a National Policy Statements (NPS) is to “state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act”.⁴¹⁸ An NPS can

⁴¹³ At 52.

⁴¹⁴ At 52.

⁴¹⁵ At 52.

⁴¹⁶ How local government might better uphold the principles of the Treaty in their adaptation decision-making is addressed in detail in Catherine Iorns, above n 2.

⁴¹⁷ MfE, *Recommendations*, above n 359, at 11.

⁴¹⁸ RMA, s 45.

apply throughout the country, or apply to a specific regions or set of regions.⁴¹⁹ As of 2018, with the exception of the updated 2010 Coastal Policy Statement, there are only four National Policy Statements currently in effect, although several are currently in development.⁴²⁰ The Ministry for the Environment considered developing an NPS on Flood Risk Management in 2008, but these plans were subsequently abandoned.⁴²¹ The previous Government announced plans for a NPS on Natural Hazards, but this was not progressed beyond the preparatory 2016 report discussed below.

In the *King Salmon* decision, the Supreme Court held that the New Zealand Coastal Policy Statement 2010 could set environmental bottom lines through the use of obligatory language (eg, words such as “avoid”), and therein prevent decision makers from making recourse to the purpose statement in order to deploy an “overall broad judgement approach”.⁴²² It has not been clarified whether this precedent would apply to national policy statements, although it is certainly possible and seems likely. Yet we can imagine it being argued that an NPS is made pursuant to a separate set of statutory provisions and, by way of comparison, the NZCPS is intended to provide a single specialised planning document in relation to the coastal marine area, while an NPS can cover a far wider range of topics.⁴²³ In particular, the purpose of national policy statements is to set policies that are “*relevant to achieving the purpose of this Act*”,⁴²⁴ while the purpose of the NZCPS is to set policies “*to achieve the purpose of the Act*”.⁴²⁵

In 2016, a report was produced by Tonkin and Taylor as part of the scope of a potential national policy statement.⁴²⁶ While the report is not government policy, it may inform the future direction of the law on natural hazards.⁴²⁷ The report highlights that risk management should align with section 7 of the RMA and the “effects of climate change,”⁴²⁸ as well as with the New Zealand Coastal Policy Statement 2010, which emphasises the potential effects associated with

⁴¹⁹ RMA, s 45A(3).

⁴²⁰ Palmer, “Resource Management Act”, above n 193, at 3.72.

⁴²¹ See Ministry for the Environment, *Meeting the challenges of future flooding in New Zealand* (ME 900, August 2008), Appendix 2.

⁴²² *EDS v King Salmon*, above n 50, at [152].

⁴²³ Eleanor Milne, “Fishing for answers”, above n 138, at 228.

⁴²⁴ RMA, s 45.

⁴²⁵ RMA, s 56.

⁴²⁶ Tonkin & Taylor Ltd, *Risk Based Approach to Natural Hazards under the RMA* (31463.001, June 2016), at 1.

⁴²⁷ At 1.

⁴²⁸ At 33.

climate change and requires a precautionary approach.⁴²⁹ Tonkin & Taylor emphasise that climate change is likely to change the frequency and intensity of existing risks and hazards, increase gradual impacts and exacerbate coastal hazards,⁴³⁰ and they recommend that all information, modelling and mapping of natural hazards now incorporate the impact of climate change.⁴³¹ If these recommendations are followed then the resulting national policy statement could be especially valuable for synthesising climate change with natural hazard management, and the precautionary approach – arguably the three most important concepts for regulating hazardous coastal development. Such a synthesis would provide valuable guidance for local government.

A cross-government work programme that is currently underway (2019) will consider the potential role of national direction such as a national policy statement or non-statutory guidance to assist councils in the management of risks of natural hazards, including those that are exacerbated by climate change.

(ii) National Environmental Standards

National Environmental Standards (NES) provide central government with the means to set nationwide standards.⁴³² This guarantees consistency by way of achieving minimum standards across regional and district council plans.⁴³³ NES can also specify the activity status of activity (eg, permitted, restricted or prohibited), and type of consent required to undertake a given activity activity that is not either permitted or prohibited.⁴³⁴ This could therefore be of great utility in establishing adaptive consenting of residential property, and other adaptive measures for handling existing development. Vernon and Weeks suggest that “sea-level rise is an obvious candidate for a national environmental standard under the RMA”.⁴³⁵

However, such standards are not absolute: section 9(1) states that non-compliance with a national environmental standard is allowed where a consent has been attained, or where the protection for existing uses is protected by section 10 (which provides protection for uses

⁴²⁹ Tonkin & Taylor Ltd, at 33.

⁴³⁰ At 33.

⁴³¹ At 33.

⁴³² RMA, ss 43-44A.

⁴³³ Palmer, *Local authorities law*, above n 195, at 17.5.2.

⁴³⁴ RMA, s 43A.

⁴³⁵ Rive and Weeks, above n 120, at 9.5.5.

lawfully established at the district level) or by section 20A (which addresses existing uses at the regional level).

The Minister for Environment may set national standards on the matters set out in ss 9 and 11-15 of the Resource Management Act: land use, subdivision, activities in the coastal marine area, uses of the beds and lakes of rivers, matters affecting water, and discharges into the environment.⁴³⁶ With the exception of minor amendments,⁴³⁷ a section 32 evaluation report must be prepared,⁴³⁸ and a full process of public consultation must be undertaken as per the usual rules for promulgating national directions.⁴³⁹

Vernon and Weeks note that in 2009 there were indications from the Ministry for the Environment that a national environmental standard on sea-level rise would be developed, but this plan was subsequently abandoned in 2011 with Ministry choosing instead to rely on non-binding guidelines.⁴⁴⁰

(iii) National Planning Standards

Prior to 2017 there were no national directives specifying how regional and district councils ought to structure their plans and/or policy statements.⁴⁴¹ The introduction of National Planning Standards is intended to create greater consistency between local government plans and policy statements, as well as facilitate the implementation of national environmental standards and national policy statements. It is also intended to enable councils to fulfil their new procedural obligations under s 18A to create plans that are clear, concise and efficient, as well as facilitating collaboration between local authorities on shared resource management issues.⁴⁴² At a minimum, National Planning Standards will allow for central government to more readily standardise the structure and format of regional and district level documents, including some definitions and the electronic accessibility of these documents. National Planning Standards can also require provisions to be included in plans and policy statements.

⁴³⁶ Palmer, *Local authorities law*, above n 195, at 17.5.2.

⁴³⁷ RMA, s 44(3).

⁴³⁸ RMA, s 44(1).

⁴³⁹ RMA, s 46A.

⁴⁴⁰ Rive and Weeks, above n 120, at 9.7.2.

⁴⁴¹ Palmer, "Resource Management Act", above n 193, at 3.71.

⁴⁴² RMA, s 58B.

The establishment of these standards is mandatory and the first set must be approved before April 2019.⁴⁴³ Ken Palmer notes that there is some doubt over whether the content of National Planning Standards will be reviewable in the Environment Court. He suggests that disputes will be restricted to how standards are to be implemented rather than extending to the validity of provisions themselves.⁴⁴⁴

The first set of National Planning Standards do not appear to have much likelihood of impacting climate adaptation policy. However, over time subsequent standards may result in changes of practice at the regional and district level which affect climate adaptation outcomes; this is particularly if coastal planning standards are released.

(iv) National Adaptation Plan

Local government has the ultimate responsibility for implementing central government plans and managing the risks of climate change.⁴⁴⁵ However, councils often struggle to take ambitious adaptation steps due to “a lack of leadership and support from central government; community buy-in; and resourcing constraints.”⁴⁴⁶ The CCATWG recognises that local government will need assistance if it is to achieve effective climate adaptation policies and it recommends that a planned approach is undertaken through the creation of a national adaptation plan.⁴⁴⁷ The recommended adaptation plan should “define a common set of outcomes,” provide transparency and increase consistency between policies and their implementation.⁴⁴⁸

The Zero Carbon Bill that is currently before Parliament has taken up this recommendation and requires the government to develop and implement policies for climate change adaptation as well as mitigation. If enacted, a National Adaptation Plan will be published within two years after every national risk assessment undertaken by the proposed Climate Change Commission. Local government should monitor the progress of this legislation and its implementation.

⁴⁴³ RMA, s 58G.

⁴⁴⁴ Palmer, “Resource Management Act”, above n 193, at 3.71.

⁴⁴⁵ MfE, *Stocktake*, above n 359, at 13.

⁴⁴⁶ MfE, *Stocktake*, above n 359, at 13.

⁴⁴⁷ At 21.

⁴⁴⁸ MfE, *Recommendations*, above n 359, at 22.

Part Two:

Implementing adaptation strategies: avoid, accommodate, protect, retreat

Chapter 4: Capacity to avoid

Chapter 5: Capacity to accommodate

Chapter 6: Capacity to protect

Chapter 7: Capacity to retreat

Chapter 4: Capacity to ‘Avoid’: preventing new development in hazardous coastal areas

This chapter addresses the range of measures open to councils in order to prevent new development in hazardous coastal areas. It outlines the legal requirements for these measures.

The following topics are considered in this chapter:

- (1) Application of the NZCPS to prevent new residential development
Example of application: *Gallagher v Tasman District Council*
- (2) Legal requirements for implementing prohibited activity status
Example of application: *Thacker v Christchurch City Council*
- (3) The limitations of non-complying activity status
Example of application: *Otago Regional Council v Dunedin City Council*
- (4) The power to decline subdivision applications
Example of application: *Carter Holt Harvey HBU Ltd v Tasman District Council*

1. Application of the NZCPS to prevent new residential development

How stringent are the new measures required to be?

While the passing of the 2010 NZCPS has unquestionably strengthened the mandate of local government and the Environment Court to take more stringent action on preventing hazardous residential development, questions remain over how stringent that mandate is, and how it ought to be exercised. The Supreme Court recently held that provisions of the NZCPS could constitute mandatory bottom lines if the relevant provisions were worded in an obligatory manner.⁴⁴⁹ In the *King Salmon* case, the two NZCPS Policies at issue contained the word “avoid”. In light of this precedent, Policy 25 of the NZCPS, which requires decision makers to “avoid increasing the risk of social, environmental and economic harm from coastal hazards” potentially contains a clear directive for decision-makers to both prohibit future resident development in areas subject to natural hazards, and prevent redevelopment that would

⁴⁴⁹ *EDS v King Salmon*, above n 50, at [126]-[127].

intensify these risks. By contrast, Policy 27 is identified by the Supreme Court as allowing for “a range of strategies”.⁴⁵⁰

The application of Objective 5 and Policy 25 were most thoroughly considered in the *Gallagher* case. There the Court found that, while Objective 5 was “highly directive in nature”, the wording of the Objective was about “ensuring” that natural hazards were “managed” rather than “avoided”.⁴⁵¹ In this respect, Objective 5 allows decision-makers some leeway to allow for development in hazardous areas. However, the court also found that Objective 5 must also be read in conjunction with Policy 25.

With respect to Policy 25, the Court found that, while the NZCPS does require decision-makers to “avoid increasing...risk” from natural hazards with respect to subdivision, use and development, these policies “do not require the complete avoidance of risk... but rather seek to avoid increasing risk”.⁴⁵² By this interpretation, the Court is concluding that the NZCPS does not obligate the mitigation or reduction of existing risks. Accordingly, and with reference to the NZCPS glossary, the Court found that the application of Objective 5 and Policy 25 required the identification of existing levels of risk, and of the extent to which any proposal increased that risk.⁴⁵³ The Court concluded that the proposed development increased the risk because it “places a greater number of persons and residential buildings at risk than is presently the case”.⁴⁵⁴ In doing so, the Court was firmly adopting an approach to hazard management that identifies the decision to locate development in hazardous areas as hazard-generating, rather than seeing hazards purely through the lens of natural events to be controlled.

By contrast, in the *Mahanga* case, the Court concluded that the risk was acceptable because it was confined to the properties, was mitigated by removal requirements, and that the risk was known and accepted by the applicants.⁴⁵⁵ The Court in *Gallagher* distinguished *Mahanga* on the basis that it concerned a consent application in an area zoned for residential land use, whereas *Gallagher* concerned a plan change application to prevent further residential use. They noted that the consent process only required authorities to *have regard* to the NZCPS under section 104, whereas the plan change process under sections 67 and 75 required authorities to *give*

⁴⁵⁰ At [127].

⁴⁵¹ *Gallagher v Tasman DC*, above n 129, at [149]-[150].

⁴⁵² At [151].

⁴⁵³ At [152].

⁴⁵⁴ At [154].

⁴⁵⁵ *Mahanga E Tu*, above n 131, at [51].

effect to the NZCPS.⁴⁵⁶ This could suggest that the strict approach to increasing risk taken by the *Gallagher* decision may not apply to consent decisions in the same way; the difference in treatment of consents and plan provisions was confirmed in *RJ Davidson (CA)*.⁴⁵⁷ However, we also suggest that *Mahanga* may itself be decided differently on its own facts today, in light of updated law and guidance; there thus may be less difference in the approaches than it appears.

Can a plan for “managed retreat” apply to new development, or only existing development?

There is some dispute in the Environment Court over whether Objective 5 allows for managed retreat to be planned for when granting a consent for new development, or whether managed retreat should only be considered with respect to existing development. If managed retreat is not something that can be provided for when granting consents for new development, then this may foreclose the use of relocatable buildings as a mitigating condition.

Objective 5 provides:

To ensure that coastal hazard risks taking account of climate change, are managed by:

- locating new development away from areas prone to such risks;
- considering responses, including managed retreat, for existing development in this situation; and
- protecting or restoring natural defences to coastal hazards.

In *Mahanga*, this section was interpreted as allowing for managed retreat for new development, through the inclusion of relocatable buildings:⁴⁵⁸

In this instance, we obviously accept that the proposed development is new, rather than existing, and thus the option of locating it away from risk-prone areas would be the first to be considered. That cannot be done, in the sense that the land is where it is, so the option of managed retreat has been chosen, recognising that this is new, and not existing development.

By contrast, the Environment Court in the *Carter Holt Harvey* case made the following assertion:⁴⁵⁹

[W]e note that in general terms the objective seeks to locate new development away from areas prone to coastal hazard risks and that *the response of managed retreat is intended to apply to existing development*.

As a result, the Court concluded that the proposal for multiple relocatable buildings in a hazardous coastal area was contrary to Objective 5. The Court went on to conclude that the

⁴⁵⁶ At [176].

⁴⁵⁷ *RJ Davidson (CA)*, above n 148.

⁴⁵⁸ *Mahanga E Tu*, above n 131, at [51].

⁴⁵⁹ *Carter Holt Harvey*, above n 130, at [157].

proposal in question was contrary to Policy 25, which sought the avoidance of increased risk to development subject to natural hazards. However, while the Court accepted that designing for relocatability was included in the NZCPS as an accepted means of mitigation under Policy 25, they also found that Policy 25 was inconsistent with Objective 5 in this regard, because it allowed for development to be located in hazardous areas, and for managed retreat to be approved in advance for new development.⁴⁶⁰ Ultimately the Court did not have to resolve this apparent conflict between the two sections because the relocation plan proposed by applicants was found to lack sufficient detail, especially with regard to relocation in the advent of a loss of access to the property.⁴⁶¹ However, if the relocation plan had had sufficient detail to be approved, then the tension between Objective 5 and Policy 25 would have had to have been examined more closely.

Example of application: Gallagher v Tasman District Council⁴⁶²

The Tasman District Council (the Council) publicly notified Plan Change 22 (PC22) in February 2011.⁴⁶³ PC22 sought to amend the Tasman Resource Management Plan in two key ways. Firstly, it identified areas suitable for residential development in the hills northwest of Ruby Bay.⁴⁶⁴ Secondly, it re-zoned low-lying areas of the coastal plain in Ruby Bay and Mapua to restrict subdivision and prevent the construction of non-relocatable homes.⁴⁶⁵ The Gallaghers' property consisted of two separate titles, comprising a total area of 3.2 hectares. PC22 introduced a Coastal Risk Area (CRA) in which subdivision of sections smaller than 1.5 hectares was a prohibited activity. The Gallaghers' property was within the CRA, which meant they would be unable to go ahead with their plans for a residential development to create 12 units on their land. They submitted to the Council that they ought to receive a special exception from PC22 to allow for their planned 12-unit development to occur.⁴⁶⁶ The Council refused to make an exception for the Gallaghers' property, and the decision was appealed to the Environment Court.

⁴⁶⁰ *Carter Holt Harvey*, above n 130, at [178]-[180].

⁴⁶¹ *Carter Holt Harvey*, at [180]-[181].

⁴⁶² *Gallagher v Tasman DC*, above n 129.

⁴⁶³ *Gallagher*, at [4].

⁴⁶⁴ At [8].

⁴⁶⁵ At [9].

⁴⁶⁶ At [10].

Present risk of overtopping

The most significant risk posed to the property came from “overtopping”, an effect caused by the interplay between tides, barometric pressure and offshore wave height.⁴⁶⁷ In certain weather conditions seawater overtopped the local revetment causing coastal properties to flood within one or two hours, and it took five hours before the water could begin to escape through a network of drains and culverts into the sea.⁴⁶⁸ Flooding of the coastal plain was also known to have occurred during Cyclone Drena in 1997. Despite the differences of opinion and evidence, the Court thought it was highly likely that there had been flooding on the Gallaghers’ property during the cyclone, in which “inundation would have proceeded quite rapidly and extensively” across land intended for subdivision.⁴⁶⁹ It was acknowledged, however, that present-day flooding was probably more “inconvenient” than hazardous.⁴⁷⁰

Overtopping in the Future

The Court found that events such as Cyclone Drena were approximately decadal in nature, but the frequency of these events was expected to increase with climate change.⁴⁷¹ The resource consent for the local revetment would expire in 2044 and, if it had to be removed, then the effects of overtopping would be worsened. The Council made no guarantee that the revetment would remain in place.⁴⁷² Experts agreed that one metre of sea-level rise by 2115 was the appropriate prediction to use. Two experts made calculations as to the amount of overtopping that would occur in 2115 based on a one-in-100-year event.⁴⁷³ The exact quantities were the subject of great dispute in the proceedings, but the Court gave stronger weighting to the evidence of Mr Reinen-Hamill for the Council. On this evidence, the Court found that in 2115 drainage channels could have water depths of two metres and extensive areas (including two main access roads) would have water depths of 1.0–1.25 metres.⁴⁷⁴ With heightened sea levels, the flooding would not begin to discharge for eight hours.⁴⁷⁵ The Court considered that the potential for rapid inundation, the spatial and temporal extent of flooding, combined with the

⁴⁶⁷ *Gallagher v Tasman DC*, above n 129, at [51].

⁴⁶⁸ At [117].

⁴⁶⁹ At [134].

⁴⁷⁰ At [136].

⁴⁷¹ At [135].

⁴⁷² At [155].

⁴⁷³ At [54].

⁴⁷⁴ At [116].

⁴⁷⁵ At [117].

access difficulties, all represented a high level of hazard to any occupants of the property in 2115.⁴⁷⁶ The Court also noted that other types of coastal storm could cause significant flooding from time to time in the future.⁴⁷⁷

Appropriateness of Subdivision

Due to the present risks of stormwater and coastal inundation on the Gallaghers' property, the Court said that the feasibility and wisdom of creating an intensive property development was "highly questionable".⁴⁷⁸ Although the proposed houses would be elevated above the levels of present-day flooding, there would still be effects on access, outbuildings, gardens and the amenity of people living in or visiting the property.⁴⁷⁹ The appropriateness of the relief sought by the Gallaghers (likened by counsel to a private plan change)⁴⁸⁰ was assessed against the provisions of the New Zealand Coastal Policy Statement 2010. With regard to the Supreme Court decision in *Environmental Defence Society v New Zealand King Salmon*,⁴⁸¹ the directiveness of the word "ensure" in Objective 5 of the NZCPS was considered. The Court held that Objective 5 is highly directive in nature, but it only requires that risks are managed rather than avoided.⁴⁸² The relevant policies did not require the complete avoidance of risk, but rather to avoid increasing risk.⁴⁸³ PC22 was designed to relocate new developments in elevated areas, therefore reducing risk. Allowing development to occur on the Gallaghers' property would have the opposite effect by increasing the risk of social, environmental and economic harm.⁴⁸⁴

The Gallaghers argued that their development had been planned in a way that would avoid risk, but the Court thought that there were too many uncertainties to be sure of this result. Uncertainties included the possible revetment removal, the disputed overtopping calculations, the possible underestimation of sea-level rise, unascertained groundwater levels, and the potential for floodwater to be diverted onto neighbouring properties.⁴⁸⁵ In considering whether PC22 was justified in prohibiting development on the Gallaghers' land the Court looked at the

⁴⁷⁶ *Gallagher v Tasman DC*, above n 129, at [120].

⁴⁷⁷ At [121].

⁴⁷⁸ At [138].

⁴⁷⁹ At [136].

⁴⁸⁰ At [123].

⁴⁸¹ *EDS v King Salmon*, above n 50.

⁴⁸² *Gallagher*, at [149]–[150].

⁴⁸³ At [151].

⁴⁸⁴ At [154].

⁴⁸⁵ At [105] and [155].

factors identified by the Supreme Court in *Sustain Our Sounds v New Zealand King Salmon Co Ltd*.⁴⁸⁶

The Environment Court concluded that there was a high-level hazard with potentially significant consequences and that, while the development was in the Gallaghers' economic interests, it did not benefit the wider community given that there was other, more suitable land available for residential development in the area.⁴⁸⁷ To quote:⁴⁸⁸

...we find that the Gallaghers' proposal is not an efficient use and development of the natural and physical resources of the area as it proposes the addition of significant further assets to the property thereby increasing the risk of exposure to coastal hazards contrary to the provisions of Objective 5 and Policy 25 NZCPS. The benefits of amending PC22 as proposed by the Appellants are the benefits which will accrue to them as a result of being able to subdivide and sell their land. The costs will accrue to those people who buy the subdivided lots and their successors... We consider that the costs substantially outweigh any benefit.

The Court also noted that, while the precautionary approach did not require prohibition in all circumstances, the risk of inundation in this case was sufficiently high, and that the *Sustain Our Sounds* factors indicated that prohibition was the correct response.⁴⁸⁹ The Court concluded that the nature of the relief sought by the Gallaghers was inappropriate with regard to the NZCPS.⁴⁹⁰

Other Matters

The Tasman council also argued that if the Gallaghers' proposal went ahead, then there would be an issue with precedent, as there was other similar land within the CRA. They submitted that allowing the Gallaghers to succeed would undermine the integrity of PC22.⁴⁹¹ The Court put this issue to one side, stating that the real concern came from the incompatibility between the proposal and the NZCPS.⁴⁹² Counsel also referred the Court to three other cases which were relevant to interpreting the NZCPS. One of these cases pre-dated the present NZCPS and was distinguished for that reason. The other two concerned resource consents.⁴⁹³ In determining

⁴⁸⁶ *SOS v King Salmon*, above n 334.

⁴⁸⁷ *Gallagher*, at [157].

⁴⁸⁸ At [181].

⁴⁸⁹ At [158].

⁴⁹⁰ At [166].

⁴⁹¹ At [168]–[169].

⁴⁹² At [171].

⁴⁹³ At [172]–[176].

resource consent applications, authorities need only “have regard to” the NZCPS. Plan changes require authorities to “give effect to” the NZCPS. In *Mahanga E Tu v Hawkes Bay Regional Council*⁴⁹⁴ the land was within residential zoning, which was a further reason for distinguishing the case.

2. Legal requirements for implementing prohibited activity status

If a local authority is seeking to prohibit additional development, using a prohibited activity status is clearly the preferable option. However, even though it may be the preferred option of a planning authority, as mentioned above in chapter 2.5, it may not be the ‘most appropriate’ option under the RMA section 32 analysis. Section 32 requires due consideration to be given to which specific activity status ought to be adopted, which requires considering why another status would not be more appropriate. To quote the Court of Appeal:⁴⁹⁵

The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is “the most appropriate” status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

The Environment Court has stated that prohibited activity status is intended to be used sparingly as it effectively precludes an examination of an activity’s effects under the consenting process.

To quote the Environment Court in *Thacker*:⁴⁹⁶

The imposition of prohibited activity status on any activity or activities is the most draconian form of control available under the RMA. A prohibited activity is not only one for which a resource consent must not be granted by a consent authority, but a proponent of such an activity may not even make an application for it. Although not specifically stated by any of the parties to these proceedings, there was an implicit acceptance that prohibited activity status was not one which should be imposed lightly and without detailed consideration.

For this reason, the appropriate use of prohibited activity status under section 32 must be limited. However, this does not require that the activity be forbidden for the life of the plan – with no intention of ever allowing the activity in the future – or that the activity must be unequivocally harmful for the environment.

The Court of Appeal in the *Coromandel Watchdog* case identified a number of lesser rationales that can be used for justifying prohibited status.⁴⁹⁷ One of these is an invocation of the precautionary principle in instances where the local authority has insufficient evidence about

⁴⁹⁴ *Mahanga E Tu*, above n 131.

⁴⁹⁵ *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2008] 1 NZLR 562, [2007] NZCA 473, at [28].

⁴⁹⁶ *Thacker v Christchurch City Council* ENC Christchurch CO26/09, 6 May 2009, at [42].

⁴⁹⁷ See the list of considerations in *Coromandel Watchdog*, above n 495, at [34].

the adverse effects of an activity, but has reasonable cause to believe that there may be a threat of significant harm to the environment. In such an instance, the council is entitled to prohibit an activity until more evidence is available. Another rationale could be that prohibited activity status is necessary to represent dominant social, cultural or political attitudes on an issue; the prohibition of nuclear power would be an example of this.

An additional rationale for using prohibited activity status is that it can be useful for a council in pursuing a policy of staged development. In other words, prohibited activity status can be used to control which areas are developed first. This argument was accepted in the case of *Robinson v Waitakere*, where the Environment Court described the benefits of prohibited activity status in the following way:⁴⁹⁸

- (1) it avoids difficulties with assessing accumulative effects on a site by site basis (if subdivision is discretionary or non-complying);
- (2) it manages the 'urban creep' phenomenon of accumulative effects during the life of the District Plan;
- (3) it allows the expression of the social and cultural outcome expressed by the Council's other policies in the District Plan; and
- (4) it gives greater certainty in the District Plan

There appears to be ample justification for employing prohibited activity status in order to prevent development in hazardous coastal areas. The more difficult aspect of justifying prohibited activity status is the requirement under section 32 to show that prohibited activity status is “*the most appropriate of the options available*”.⁴⁹⁹

In *Thacker*, this part of the section 32 analysis was held to require a comparative evaluation of different options to show that prohibited activity status was the most appropriate of the options available.⁵⁰⁰ The Environment Court found that the Canterbury Regional Council’s proposal to create a large planning zone in which prohibited activity status was applied to a number of activities involved with intensification of residential development, whilst pursuing a legitimate purpose (limiting the exposure of residential property to flooding), failed to give an adequate analysis of the various necessary and/or low risk activities that might be foreclosed within the zone. The lesson from *Thacker* is that, while prohibited activity status can be justified on the

⁴⁹⁸ *Robinson v Waitakere City Council (No 8)* ENC Auckland A003/09, 22 January 2009 at [1134].

⁴⁹⁹ *Thacker v Christchurch CC*, above n 496, at [45], citing *Coromandel Watchdog*, above n 495, at [23]-[31].

⁵⁰⁰ *Thacker*, at [50].

grounds of preventing additional development in hazardous areas, its invocation must not be crude (eg, applying to a large zone without exception for low risk activities).

A final issue affecting the imposition of prohibited activity status is whether the wording of a regional or national policy statement can be used to justify prohibition. The Supreme Court held that policies requiring decision makers to “avoid” particular effects may justify the use of prohibited activity status.⁵⁰¹ In light of this precedent, Policy 25 of the 2010 NZCPS contains a clear directive for decision-makers to both prohibit future resident development in areas subject to natural hazards, and prevent redevelopment that would intensify these risks. By contrast, Policy 27 is identified by the Supreme Court as allowing for “a range of strategies”.⁵⁰² These findings suggest that, while the wording of a policy may not be sufficient to compel the implementation of prohibited activity status, policy statements still need to contain sufficiently strong wording so as not to constrain a plan-maker’s ability to implement prohibited activity status if they want to use that option.

Example of Application: *Thacker v Christchurch City Council*⁵⁰³

In 2003 the Christchurch City Council notified “Variation 48” to the Christchurch City Plan in order to “manage the potential effects of flooding” in three areas: Henderson’s Basin, the Cashmere Stream flood plain on the Heathcote River, and the Lower Styx ponding area on the Styx River.⁵⁰⁴ These areas are prone to flooding but also have good flood water storage capacity during times of high rainfall times, thus reducing flooding downstream.⁵⁰⁵ As rural zones, these areas were already subject to some development control, but Variation 48 was to impose further flood-related controls. At one stage, these controls were to be prohibiting certain activities such as subdivision. However, the City Council ultimately re-categorised these prohibited activities as non-complying or restricted discretionary under the proposed plan.⁵⁰⁶

The Canterbury Regional Council appealed the City Council’s decision not to impose these prohibitions in the variation. They argued that development in these flood-prone areas needed to be more tightly controlled, specifically that the construction of additional residential units, subdivision and excavation and filling in any of the three specified areas should be a prohibited

⁵⁰¹ *EDS v King Salmon*, above n 50, at [92]-[96].

⁵⁰² *EDS v King Salmon*, at [127].

⁵⁰³ *Thacker v Christchurch CC*, above n 496.

⁵⁰⁴ *Thacker*, at [1].

⁵⁰⁵ At [2]-[4].

⁵⁰⁶ At [9].

activity. On this basis, Canterbury Regional Council submitted to the Court that the activities did not achieve the purpose and principles of the Resource Management Act 1990 or the objectives of the district plan. This was partially because such activities would “compromise the ponding areas’ water-holding functions”. However, their primary concern, which they argued the City Council had failed to assess, was the expected property damage that flooding could cause. People who had come to the area would “expect steps to be taken to stop their land from being flooded”, even if such steps were costly and unfeasible.⁵⁰⁷

The Regional Council advocated for prohibitive activity status to apply to a wide range of residential development activities despite the fact that development of additional residential units in the area would still be controlled through s106 of the RMA.⁵⁰⁸ The Court commented that the Regional Council’s concerns was therefore “directed at lesser levels of flooding than those which trigger the material damage provisions of s106”.⁵⁰⁹

The Christchurch City Council countered the Regional Council’s proposal with evidence that any dwelling houses built in these areas would be required to have floor levels above the water level of a 200-year flood. The Regional Council responded by arguing that though this may prevent damage to the buildings, residents would still inevitably lobby the City Council to protect the rest of their property from flooding; further, the flooding to other areas of properties would create “potential hazards for people trying to drive vehicles through flood waters or trying to move stock during floods”.⁵¹⁰

The Court began by analysing the relevant planning documents, and found that the objectives and policies of the proposed plan neither excluded nor expressly supported prohibitions on development.⁵¹¹

The Court then moved on to considering the appropriateness of prohibited activity status on the merits of the evidence submitted. It commented that “the imposition of prohibited activity status on any activity is the most draconian form of control available under the RMA”, it should

⁵⁰⁷ *Thacker v Christchurch CC*, above n 496, at [29].

⁵⁰⁸ This provision allows the relevant authority to refuse a consent for subdivision if the land or structures on the land could suffer material flood damage.

⁵⁰⁹ *Thacker*, at [30]–[31].

⁵¹⁰ At [34].

⁵¹¹ At [37]–[41].

not be imposed lightly.⁵¹² It analysed the precedent set by *Coromandel Watchdog* case⁵¹³ and concluded that the main question on the facts before it was “whether or not the allocation of [prohibited activity status] is the most appropriate of the options available”. This required looking at the statutory scheme, in particular the obligation under s32 of the RMA for local authorities to make evaluations when making rules and plans. The Court held that this required decision-makers to consider efficiency, effectiveness, costs and benefits, and the risk of acting or not acting with insufficient information.⁵¹⁴

The Court found that the Regional Council had not undertaken such an evaluation. They had not considered the costs that prohibiting excavation and filling activities would have on farmers in the area. In fact, the Court could not find any “substantial evidential basis which would enable [the court] to adequately assess the costs and benefits of imposing prohibitions as sought by [the Regional Council]”.⁵¹⁵ They noted that Regional Council’s position seemed to be based “almost entirely on the premise that those persons who come to reside on any subdivisions which may have been permitted in the flood prone areas might demand solutions to their problems should they be flooded in the future.”⁵¹⁶

In contrast to the Regional Council’s assertions, the Court found on the evidence that, even if the sites were developed to their maximum extent allowed, there would be “only a minor” effect on the floodwater storage and downstream flooding.⁵¹⁷ The Court therefore concluded that “the risk of not acting by declining to impose the requested prohibition is minimal”, since there would be no material effect on the area in terms of flood storage capacity, and concerns about complaints by residents were not enough to justify a prohibition.⁵¹⁸ They also remarked that “nothing in the Regional Council’s evidence convinced us that potential applicants for the various forms of development identified by the Regional Council ought to be denied the opportunity to make applications for resource consent”.⁵¹⁹ Therefore, the appeal by the Regional Council to impose prohibited activity status was denied.

⁵¹² *Thacker*, above n 496, at [42].

⁵¹³ *Coromandel Watchdog*, above n 495.

⁵¹⁴ *Thacker*, at [47]–[48].

⁵¹⁵ At [62].

⁵¹⁶ At [60].

⁵¹⁷ At [57]–[59].

⁵¹⁸ At [63].

⁵¹⁹ At [64].

3. The limitations of non-complying activity status

To reiterate a point made above, if prohibited activity status is deemed to be inappropriate then non-complying activity status is the logical fallback option.⁵²⁰ However, while non-complying activity status imposes a considerable hurdle for applicants for residential development in hazardous coastal areas, it is by no means insurmountable.

Section 104D of the RMA states that a consent may be granted for a non-complying activity if one of two tests is met. The first is that the effects on the environment will be minor; and the second is that allowance of the activity would not be contrary to the objectives and policies of the relevant plan or proposed plan. With respect to the first test, it is unlikely that a development in a hazardous coastal area would have only minor effects, unless the decision-maker is convinced that the consent conditions completely mitigate any exposure to natural hazards, and no other effects are deemed material – eg, there is no effect on the landscape. However, the second test can, and in fact *has*, provided an avenue for the approval of hazardous coastal development. In particular, an applicant can argue that they are voluntarily assuming an acceptable level of risk. These arguments succeeded in the *Holt* decision, in which the Environment Court found that the relevant regional and district plans (both being relevant for a coastal development) contained an implicit policy allowing for the assumption of reasonable levels of risk.⁵²¹ The Court therefore gave weight to the fact that the applicants were very aware of the risks they were incurring, were willing to sign deeds which would bind themselves and future owners from lobbying the council for coastal protection works or suing in negligence, and had agreed to a sufficient number of mitigating conditions to lower the risk to acceptable levels, such that they could voluntarily assume it.

This case is discussed in detail as an example of application, below. However, we discuss after that how it is very unlikely that the Environment Court's approach in *Holt* would still be possible under the 2010 NZCPS and other relevant rules in operation today.

⁵²⁰ Simpson Grierson, *Councils' Ability to Limit Development in Natural Hazard Areas* (2018), above n 11, at 2.

⁵²¹ *Otago Regional Council v Dunedin City Council* [2010] NZEnvC 120, NZRMA 263 (EC).

Example of Application: *Otago Regional Council v Dunedin City Council ('Holt')* ⁵²²

Rowen and Brendan Holt planned to build a house on their property approximately 35 kilometres north of Dunedin. Being a residential dwelling in a rural zone, the project required consent for a non-complying activity. This consent was originally granted by the Dunedin City Council ("DCC"), but the decision was appealed to the Environment Court by the Otago Regional Council ("ORC").⁵²³

The issues in the case stemmed from the fact that the site was less than one metre above mean sea level in a wetland area next to the Karitane estuary.⁵²⁴ This meant that the land is susceptible to flooding from multiple sources: rainfall in its own catchment, the secondary channel of the Waikouaiti river, storm surges, and tsunamis.⁵²⁵ The court found that the main adverse effects of granting consent came from the risk of flooding to people on the property. Flooding at low levels would reduce residential amenity for those living there, and at higher levels could pose safety threats.⁵²⁶ The Court commented that:⁵²⁷

"This is one of the relatively rare class of case under the RMA that directly raises the question of people's safety. Safety is a core part of the purpose of the RMA. As I have stated, the principal issue in this proceeding is the possibility of flooding causing damage to the land or loss of life to occupants of the proposed dwelling."

To mitigate these risks, the Holts proposed to build the structure on wooden poles, raising the floor to an elevation of 3.7 metres above mean sea level, 0.73 metres above the maximum probable flood levels.⁵²⁸ In addition, the Holts volunteered to have "a boat ... tied to the house except when the boat is being used elsewhere".⁵²⁹

Because the proposal was a non-complying activity under the district plan, it could only obtain consent if it passed the test set out in section 104D of the Resource Management Act 1990 ("RMA").⁵³⁰ Either the project's adverse effects had to be no more than minor, or the project

⁵²² *Otago RC v Dunedin CC*, above n 521.

⁵²³ At [5]–[7].

⁵²⁴ At [10].

⁵²⁵ At [22].

⁵²⁶ At [47].

⁵²⁷ At [53].

⁵²⁸ At [8] and [73].

⁵²⁹ At [69].

⁵³⁰ At [23].

could not be contrary to any relevant district and/or regional plan. Because the effects on the environment could not be considered minor, the applicants argued that the proposal was not contrary to the objectives and policies of the relevant regional and district plans.

The DCC district plan, Otago Regional Policy Statement, Otago Regional Plan and the New Zealand National Coastal Policy Statement all contained policies controlling development in flood-prone areas.⁵³¹ However, the district plan policies were contextualised by the concepts of “informed decision making” and “appropriate levels of risk”.⁵³² Likewise, the Regional Policy Statement states that people should have a choice to evaluate the risks of natural hazards against the benefits of the location. The Court found that “there is a thread in these policies that there is a level of risk that some might find acceptable, and that there should be flexibility for individuals to accept some risks.”⁵³³ Therefore, the court found that s104D was satisfied, since “in the light of the plan’s acceptance of varied responses and its policies of control of development in flood-prone areas ... it is very difficult to regard the proposal as ‘opposite in nature’ to its objectives and policies”.⁵³⁴ It further commented that while flooding could have adverse effects on the building itself, it “is in no way different in principle from placing a structure anywhere in New Zealand where it is at risk from an earthquake or tsunami.”⁵³⁵ Thus, they concluded that “the solution is to design the structure to a standard which reduces the risk to an acceptable level” rather than to deny consent altogether.

In turn, the Court found that that the mitigation measures taken by the Holts were sufficiently robust, meaning that it was “not unreasonable for them to assume the resulting risk.”⁵³⁶

However, the court also raised the issue of moral hazard. They were concerned that if consent was granted, the Holts may one day sell the property to a third party who “might be less well-informed or accepting of the risks”, and who would later “start taking political action (lobbying councillors or MPs) or legal action for negligence seeking a stopbank or damages as the case may be.”⁵³⁷ In response to this, the court explored the possibility of the Holts signing a voluntary deed with the council acknowledging the hazard and agreeing not to complain about it or seek

⁵³¹ At [28], [29], [31], [35], [38]–[40], and [43].

⁵³² At [32].

⁵³³ At [37].

⁵³⁴ At [54].

⁵³⁵ At [50].

⁵³⁶ At [82].

⁵³⁷ At [76].

flood protection works.⁵³⁸ The same deed would also need to be signed by future purchasers before the Holts could sell the property.

Weighing up these concerns, the court found that the house's design and the deed acknowledging risk "will sufficiently avoid or mitigate the adverse effects in terms of the policies in the statutory instruments and will satisfy the provisions in the Otago RPS about acceptance of risk."⁵³⁹ Thus, subject to these conditions, the appeal was dismissed and resource consent was granted. The ORC raised concerns about the precedent effect in similar neighbouring lots if consent was granted in this case. However, it was found that this particular site could be suitably distinguished in a number of ways, particularly by the conditions upon which this consent would be granted – specifically the deed to limit the risk of moral hazard.⁵⁴⁰

Revisiting *Holt*

In a separate article, Iorns and Dicken show how it is likely that the Court would decline an application with the same facts as the *Holt* case if it were to arise today.⁵⁴¹ In summary, the key differences between then and now are the changed sea level rise predictions, the directives to consider such risks out to at least 100 years, and the proposed planning documents that are more directive and that also remove the ability to accept certain levels of risk. In addition, the relevant planning documents could have a profound effect on the decision should such a case be decided today. For the planning documents in this particular case, it would be due to a change in activity status for the construction of such a property in the rural zone. Furthermore, even had the activity status remained the same, the likelihood of the proposal passing the RMA s 104D test of being consistent with all planning documents would be low. Notably, Dunedin and Otago councils are not the only councils who have updated their planning documents to better reflect the NZCPS. These results are thus likely for planning documents in other areas as well. The greater direction toward the avoidance of activities in coastal hazard prone areas is clear, and allowing such an activity would likely contradict the 2010 NZCPS and relevant planning documents.

Along with the 2010 NZCPS, the MfE and DoC guidance on coastal hazards and council decision-making is key. Had such information and guidance been available to the court when assessing

⁵³⁸ At [78] and [81].

⁵³⁹ At [83].

⁵⁴⁰ At [89].

⁵⁴¹ Catherine Iorns Magallanes and Matthew Dicken, "Climate Change Adaptation in the Environment Court: Revisiting the 2010 *Holt* case" (forthcoming, VUWLR, Dec 2019).

Holt, we suggest that a different outcome of the case would have arisen. Had the court known the potential effects from coastal inundation by 2120, along with the directive policy to *avoid* risk of such hazards, the Court would have found the effects to be unacceptable. Thus, we suggest that, following Policy 25 of the NZCPS, the Court would likely decline such a resource consent today. Managing the risk of social, environmental and economic harm from coastal hazards under Policy 25 is the most directive Policy in the NZCPS. Moreover, a precautionary approach should be adopted per Policy 3 in light of the uncertainties surrounding ice sheet instability and the reaction of other climatic processes to climate change. National policy that requires proactive, well-informed, precautionary and risk-based management of coastal hazards is provided and such an approach should be taken on the facts of the case.⁵⁴²

Perhaps the most dramatic factors that arise from the national guidance on coastal hazards are the newer calculations for sea-level rise and storm effects. With sea-level rise projections greater than those proposed in the initial case, this would have a flow-on effect and alter the inundation levels and concurrently, the related AEP. Thus, the adjusted values are most likely to cause the court to deny the consent as the risk posed by sea-level rise and the associated implications would warrant the level of risk to be determined as unacceptable. The increase of storm surge intensity, frequency and levels of water on site could be enough to change the Court's view on allowing the Holt family to accept the risk and sign the deed.

Overall, the greater direction from central Government allows the Court to be better prepared to analyse cases that involve complex issues such as coastal hazards. In conclusion, with the assistance of the national guidance and the directive policies of the NZCPS and planning documents, it is likely that the Court would decline such an application on the basis that the risks from future coastal inundation were unacceptable. This means that *Holt* does not provide a useful precedent for allowing buildings in a coastal hazard zone and should be disregarded.

4. The power to decline subdivision applications

All applications for a subdivision consent under section 106 of the RMA are subject to an additional set of legal hurdles which differ significantly from the range of considerations under the ordinary section 104 process. Specifically, section 106 gives decision makers and the

⁵⁴² NZCPS, Policy 23, at 9.

Environment Court the discretion to decline a subdivision application where it considers that “there is a significant risk from natural hazards” affecting the land in question,⁵⁴³ and/or, “sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision”.⁵⁴⁴ These two hurdles will be considered in turn.

The benefit of section 106 for preventing hazardous coastal development is that it provides decision makers with an opportunity to undertake a comparatively narrow investigation into the risk of natural hazards affecting a property and its access routes, and it gives decision-makers the discretion to decline a subdivision consent on these narrow matters alone.⁵⁴⁵

Specifically, and in contrast to section 104, section 106 does not expressly require decision makers to consider either Part 2 of the RMA or any relevant plans or policies. This means that section 106 can potentially operate as a discrete preliminary hurdle, such as a means of quickly dismissing poor applications. In the *Carter Holt Harvey* decision, the Environment Court stated that it would “deal with s 106 first, because it requires consideration of discrete and limited matters rather than the wider considerations provided for in s 104 and pt 2.”⁵⁴⁶ However, it should be noted that this approach to section 106 was implicitly contested in the *Mahanga* decision, in which the Environment Court declared that the absence of an express reference to Part 2 “may be a distinction without much practical difference, in that Part 2 contains the all-pervasive purposes and principles of the Act which are to be recognised and provided for; be given particular regard; or taken account of, in any decision-making.”⁵⁴⁷ [We have not considered whether *Davidson* (CA) would affect this.]

Regardless of whether or not the discretion in section 106 is subject to Part 2 of the RMA, the fact remains that it provides an additional check upon hazardous development, most directly through the fact that it applies to all activity status designations (eg, restricted, discretionary). The Environment Court in *Thacker* noted that section 106 could even apply to a consent application where subdivision was classified as a *controlled* activity – meaning that ordinarily the consent must be granted if the specified conditions are met.⁵⁴⁸ In this respect, section 106 provides decision-makers and the Environment Court with a residual discretion to prevent

⁵⁴³ RMA, s 106(1)(a).

⁵⁴⁴ RMA, s 106(1)(c).

⁵⁴⁵ *Carter Holt Harvey*, above n 130, at [229]: “we would decline to grant consent to the subdivision solely having regard to the provisions of s 106 RMA”.

⁵⁴⁶ *Carter Holt Harvey*, at [117].

⁵⁴⁷ *Mahanga E Tu*, above n 131, at [79].

⁵⁴⁸ *Thacker v Christchurch CC*, above n 496, at [31].

hazardous development otherwise allowed as a matter of right under a plan. This could prevent hazardous development in instances where a plan has arguably been made too permissible, or there has been a mistake in which a hazardous property has been zoned as being safe, and/or where additional knowledge or new hazards have emerged since the time of the zoning. The Environment Court in the *Carter Holt Harvey* case roundly dismissed the argument that section 106 is a mere “backstop provision” to be invoked only when insufficient control is provided by a relevant plan.⁵⁴⁹ In rejecting this argument, it reaffirmed the Court’s position that applications could be declined with reference to section 106 alone.

An additional benefit of section 106 for preventing hazardous coastal development is that it enlarges the scope of the hazards that can be considered in the area. In addition to applying to hazards affecting both the land and any buildings,⁵⁵⁰ the section also applies to hazards affecting any land proposed for use as an esplanade reserve⁵⁵¹ and, most importantly, to the roads needed to access any proposed subdivision.⁵⁵² Cumulatively, these requirements mean that an applicant cannot rely on proposed mitigation measures that protect solely buildings.

There are three limitations of the application of section 106:

1. it only applies to subdivision consents, and therefore cannot be used to stop smaller/singular residential developments in hazardous areas;⁵⁵³
2. because this concerns subdivisions, the discretion to approve or decline an application belongs solely to territorial and unitary authorities, not regional councils; and
3. the power to decline consents under section 106 is only discretionary.

The next section considers the two grounds for declining consents – namely, the exposure of the land to natural hazards, and provisions for security of access.

⁵⁴⁹ *Carter Holt Harvey*, above n 130, at [211].

⁵⁵⁰ At [126].

⁵⁵¹ At [125].

⁵⁵² RMA, s 106(1)(c).

⁵⁵³ See for example *Hemi*, above n 314, and *Otago RC v Dunedin CC*, above n 521. Both cases involving hazardous sites were allowed and concerned single lot developments. See also *Mahanga E Tu*, above n 330, which concerned a successful application for a small subdivision subject to minor hazards, although we consider that it would likely be decided differently should it arise today.

“Significant risk from natural hazards”

Section 106(1)(a) allows decision-makers to decline a subdivision consent “when there is a significant risk from natural hazards”. This provision was recently amended by the Resource Legislation Amendment Act 2017 to incorporate the same definition of “natural hazards” that is included throughout the RMA.⁵⁵⁴ The same amendments also added section 106(1A), which now requires decision-makers to undertake a more formalised risk assessment. It reads:

For the purpose of subsection (1)(a), an assessment of the risk from natural hazards requires a combined assessment of:

- (a) the likelihood of natural hazards occurring (whether individually or in combination);
- (b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and
- (c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).

The section is still subject to a threshold of “material damage” before discretion can be exercised. What amounts to “material damage” is of course a matter of judgment to be decided on the facts of the case. To the quote the Court in *Carter Holt Harvey*.⁵⁵⁵

It seems to us that whether or not damage is material in any given instance will be determined by factors such as the size, shape and physical configuration of the subdivided lots, the extent of the potential damage to those lots and how damage affects use of the lots for the purposes for which they have been subdivided.

In that case, the Court went on to find that:⁵⁵⁶

[T]he probable loss of all of the esplanade reserve immediately in front of the residential lots within 50 years (and likely sooner than that) and the probable loss of half or more of the residential lots themselves within 100 years is material damage to land of the kind contemplated by s 106...

... We consider that damage may be regarded as relevant when it unduly restricts or impinges on the use to which it is intended that subdivided lots will be put. In the case of Lot 15 which is to vest as esplanade reserve, its use for that purpose will become untenable before the expiry of 50 years due to erosion and inundation. We consider that damage which restricts or precludes use of the esplanade reserve for the purpose for which it was vested, can properly be described as both significant and relevant (emphasis added).

The full details of the *Carter Holt Harvey* case are contained in a case summary below.

The finding of the Court that the loss of an esplanade reserve amounted to “material damage” is particularly significant in that it can foreclose the ability of developers to crudely protect

⁵⁵⁴ The previous version of s 106(1)(a) referred to “material damage by erosion, falling debris, subsidence, slippage, or inundation from any source”, rather than “natural hazards”.

⁵⁵⁵ *Carter Holt Harvey*, above n 130, at [127].

⁵⁵⁶ At [128].

residential property by the creation of publicly accessible buffer zones (assuming that the decision maker chooses to decline the consent).

“Sufficient provision” for “legal and physical access”

As discussed earlier, the significance of section 106(1)(c) in requiring that “sufficient provision” be provided for “legal and physical access to each allotment” is that it expands the assessment of the application beyond the development site itself. This means that developers are less able to mitigate coastal hazards through the inclusion of such consent conditions as raised floors or re-locatable buildings. In particular, a lack of reliable access can mean that a proposal to relocate or remove the buildings becomes untenable.⁵⁵⁷ In this respect, concerns about security of access can effectively trump the inclusion of on-site mitigation conditions.

Security of access was a key concern in a number of recent coastal development cases – namely, the *Carter Holt Harvey* decision (which applied section 106), and two decisions relating to plan changes: *Gallagher*⁵⁵⁸ and *Southern Environment Association*.⁵⁵⁹ The *Mahanga* decision concerned a successful application for subdivision consent in a hazardous area, but was ultimately allowed because the access way was unlikely to be affected within the 100 year planning period required by the NZCPS, and an alternative means of access was found to be available.⁵⁶⁰

The ability to decline applications on the issue of insecure access is warranted for a number of reasons. Firstly, the maintenance of access ways is almost always publicly funded. If an access way is only going to service a small number of coastal residents, then the ongoing costs of maintaining the viability of a hazardous residential development are effectively being passed to the wider public. The maintenance of access ways can also involve the erection of hard protection structures, which can have wider ecological consequences or create additional erosion in nearby areas.

Applicants can offer to make a contribution to the cost of maintaining an access way. However, a one-off private contribution is exceedingly unlikely to cover the long-term costs of maintaining an access way at risk of sea-level rise. In the *Carter Holt Harvey* case, an offer of \$200,000 for

⁵⁵⁷ *Carter Holt Harvey*, above n 130, at [142].

⁵⁵⁸ *Gallagher v Tasman DC*, above n 129, at [136].

⁵⁵⁹ *Southern Environmental Association*, above n 302, at [124].

⁵⁶⁰ *Mahanga E Tu*, above n 131, at [81].

needed upgrades to a coastal access way was rejected on the basis that it would lock the local council in for the long-term maintenance costs:⁵⁶¹

Although it is not determinative in our considerations, we observe that approving the subdivision and allowing construction of six further houses on the CHH site, in a situation where CHH has made a cash contribution to upgrade the road, might place the Council in a very difficult position in the future. *The payment of a financial contribution to roading by CHH as part of this subdivision may well create an expectation on the part of future owners of the residential lots that the Council would continue to maintain the road and keep it open, even if it makes no economic sense to do so* (emphasis added).

On the other hand, local councils, even while accepting a contribution in the short term, are not obligated to keep access ways indefinitely. As well as refusing to pay for upgrades, councils also retain the power to decline the necessary consent applications for others to carry out upgrades to the access way. In the *Carter Holt Harvey* case, uncertainty over the sufficiency of future access was also caused in part by clear intimations from the council that they might not grant a resource consent for necessary protective works along a coastal road.⁵⁶²

If road access is foreclosed as being unreliable, then alternative forms of access can be proposed. For example, there are developments that are only accessible by boat. However, the Environment Court in the *Carter Holt Harvey* decision makes it clear that if alternative forms of access are going to be proposed, then they must contain an adequate level of detail. In other words, alternative means of access cannot flippantly be used as a fallback, as they were by the applicants in the *Carter Holt Harvey* decision:⁵⁶³

The possibility of some speculative future but unidentified access possibility does not satisfy us that sufficient provision for legal and physical access to the subdivided allotments is available now or in the future.

Secondly, the other advantage of access ways being singled out for scrutiny is that public safety is brought into focus. While this was not explicitly addressed in the *Carter Holt Harvey* decision, these concerns were at the forefront in both the *Gallagher*⁵⁶⁴ and *Southern Environment Association*⁵⁶⁵ decisions. While section 106(1)(c) was not considered because those decisions

⁵⁶¹ *Carter Holt Harvey*, above n 130, at [136].

⁵⁶² *Carter Holt Harvey*, at [51].

⁵⁶³ At [139].

⁵⁶⁴ *Gallagher v Tasman DC*, above n 129, at [136]: We also recognise that as at the present day the extent of flooding on the Gallagher property probably falls into the inconvenient rather than hazardous category. Dwellings built on the elevated building platforms proposed by the Appellants would almost certainly be well elevated above present day inundation levels. However, it seems apparent that even at present day levels such inundation must have effects on practicality and safety of access..."

⁵⁶⁵ *Southern Environmental Association*, above n 302, at [124]: "We accept that there may be the potential for the effects of climate change on the land to be managed through design. However, that does not take into consideration the possible effects of climate change on the wider area. *It also puts additional houses*

were in relation to plan changes rather than a consent, those two decisions clearly indicate that public safety when accessing hazardous areas is a key concern for the Environment Court.

Example of Application: *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013]⁵⁶⁶

Carter Holt Harvey Ltd (CHH) appealed a decision of the Tasman District Council declining discretionary applications by CHH to the Environment Court. The discretionary applications that CHH applied for consisted of: a subdivision consent to create eight residential lots (amended to six by the time of the hearing), together with reserve lots, a land use consent to erect a dwelling on each residential lot, and a land disturbance consent to carry out earthworks.⁵⁶⁷ The court found it inevitable that these applications be declined,⁵⁶⁸ and was prepared to decline them on account of the court's findings under section 106 of the RMA alone (which is the focus of this summary).⁵⁶⁹ The court held that it would have declined the consents under section 104 and Part 2.⁵⁷⁰

CHH was the owner of the proposed development site situated on the Kina Peninsula in the Tasman District, which it had acquired thirty years prior.⁵⁷¹ At the time of acquisition, the site contained substantial pine plantings, which were since harvested.⁵⁷² In March 2010, CHH lodged its application for subdivision consents to develop eight lots (later amended to six) varying in size from 0.21 ha to 0.65 ha, situated at elevations between 3 and 6 m above Nelson Vertical Datum (NVD).⁵⁷³ Access to both sites on the Kina Peninsula ultimately depended on a section of Kina Peninsula Road that ran between steep coastal cliffs and Kina Beach for about 600 m on a narrow strip of land (approximately 20 m wide).⁵⁷⁴ That section of road has an elevation of approximately 3.5 m above Nelson Vertical Datum 1955 (NVD-55) and is protected by rock armouring along the beach frontage.⁵⁷⁵ About 300 m of the unsealed causeway is highly

and people in a position where access is along a road already subject to heavy seas in high tides and certain weather events (a health and safety consideration too). That road is subject to erosion and in the future could require major physical works to provide for continued access to the two sections" (emphasis added).

⁵⁶⁶ *Carter Holt Harvey*, at [1].

⁵⁶⁷ At [1].

⁵⁶⁸ At [224].

⁵⁶⁹ At [229].

⁵⁷⁰ At [230].

⁵⁷¹ At [11].

⁵⁷² At [11].

⁵⁷³ At [16] and [17].

⁵⁷⁴ At [40].

⁵⁷⁵ At [40].

vulnerable to coastal inundation and erosion. The road had been closed by storms in June 2012, and in storm and/or high tide conditions, waves are known to frequently break over the road.⁵⁷⁶

The court first considered section 106 of the RMA, and then section 104, and Part 2. The court did so because it found that section 106 was not expressed as being subject to Part 2, while section 104 is.⁵⁷⁷ This meant that a consent authority could decline subdivision consent or impose conditions having regard only to the narrow issues identified in section 106 rather than the wider considerations which must be considered under Part 2.⁵⁷⁸ The two aspects of section 106 at issue in this case were subsection (1)(a) – that a consent authority may decline consent for a subdivision if the land in respect of which consent is sought, or any structure upon it, is likely to be subject to material damage by erosion or inundation – and subsection (1)(c): that sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.⁵⁷⁹

Material damage by erosion or inundation

Policy 24 of the New Zealand Coastal Policy Statement 2010 requires identification of coastal hazards, with risks to be assessed for at least the next 100 years.⁵⁸⁰ This assessment must have regard to physical drivers, including sea-level rise.⁵⁸¹ The court saw coastal erosion and inundation of both the development site and access road as significant.⁵⁸² A plan given by one of CHH's coastal witnesses was accepted by the court as the basis of its evaluations.⁵⁸³ The plan indicated predicted erosion lines which were agreed by all witnesses as conservative predictions.⁵⁸⁴ The plan indicated that after 50 years the sea would have completely consumed all of the proposed esplanade reserve in front of the residential plots on the Tasman Bay side and, together with parts of the proposed residential lots themselves, the beach tidal interface would be within the residential boundaries.⁵⁸⁵ After 100 years, erosion and inundation would have consumed approximately half of all proposed residential lots, and in some cases more, and

⁵⁷⁶ At [40].

⁵⁷⁷ At [120].

⁵⁷⁸ At [120].

⁵⁷⁹ At [119].

⁵⁸⁰ At [24].

⁵⁸¹ At [24].

⁵⁸² At [24].

⁵⁸³ At [34].

⁵⁸⁴ At [33].

⁵⁸⁵ At [34].

that the beach tidal interface would be approaching the edge of the residential building platforms.⁵⁸⁶

While “material” is not defined in the RMA, the court found it to mean either “significant or important” or “relevant or pertinent” and that either meaning was appropriate.⁵⁸⁷ On the evidence of the coastal witnesses, the lots created by subdivision would likely be subject to material damage.⁵⁸⁸ About half – and in some cases more than half – of each of the proposed residential lots was likely to be eroded or inundated by the sea within the 100-year period pursuant to the NZCPS. The Court commented that “it is difficult to describe loss to that extent as anything other than *significant*.”⁵⁸⁹ The court also considered that “damage may be regarded as *relevant* when it unduly restricts or impinges on the use to which it is intended that subdivided lots will be put.”⁵⁹⁰ The esplanade reserve would become untenable before the expiry of 50 years due to erosion and inundation.⁵⁹¹ The court stated that “damage which restricts or precludes use of the esplanade reserve for the purpose for which it was vested, can properly be described as both significant and relevant”.⁵⁹²

Whether damage was material would in any case be affected by the size, shape, physical configuration of lots, extent of potential damage and how damage affects the use for the purpose of which the land was subdivided.⁵⁹³ The court had “no hesitation” in finding that the probable loss of all of the esplanade reserves fronting the residential lots within 50 years and the probable loss of half or more of the residential lots themselves within 100 years amounted to material damage to land “of the kind contemplated by s 106”.⁵⁹⁴

CHH proposed to mitigate the risks to the lots from inundation and erosion by identifying minimum heights above sea level for the building platforms and proposed requirements by way of covenant that the buildings on the lots be relocatable and removed by their owners once the

⁵⁸⁶ At [34].

⁵⁸⁷ At [123].

⁵⁸⁸ At [122].

⁵⁸⁹ At [124].

⁵⁹⁰ At [125].

⁵⁹¹ At [125].

⁵⁹² At [125].

⁵⁹³ At [127].

⁵⁹⁴ At [128].

beach tidal interface was within 20 m of the dwelling.⁵⁹⁵ It also proposed to prohibit hard protection structures.⁵⁹⁶

The court found that none of the conditions of consent proposed by CHH would avoid, remedy or mitigate the effects of erosion or inundation on the esplanade reserve or land contained in the residential lots.⁵⁹⁷ It found “to the contrary, the suggested conditions prohibit the protection of that land by hard foreshore structures so that the erosion and inundation process would simply be allowed to consume that part of the esplanade reserve in front of the residential lots, and then the residential lots themselves.”⁵⁹⁸

While the court accepted that conditions as to the minimum height of building platforms above sea level and conditions requiring removal of buildings once the beach tidal interface was within 20 m of them, constitute mitigation, it had reservations as to the adequacy and practicality of these conditions.⁵⁹⁹ It was scathing of the evidence provided by CHH, noting that “nothing in the CHH application or the evidence which we heard indicated to us that any serious consideration had been given to these issues.”⁶⁰⁰ The court also questioned what would happen if the owner – for example, a corporate entity – abandoned the property and left the burden of removal to the council.⁶⁰¹ CHH proposed requiring a \$400,000 bond against each lot which the RMA does contemplate to secure removal of structures, but the court was unconvinced about the security value of the bond required against the land being consumed by the sea.⁶⁰²

The court considered it “unarguable that erosion and inundation will cause material damage to the subdivided lots well within the 100-year time period which the NZCPS requires us to take into account.”⁶⁰³ It accepted that not all damage to the lots would constitute material damage and that, even if it did, the court retained the option of granting consent with conditions to avoid, remedy and mitigate the effects of that damage.⁶⁰⁴ However, it was “satisfied that the

⁵⁹⁵ At [27].

⁵⁹⁶ At [27].

⁵⁹⁷ At [141].

⁵⁹⁸ At [141].

⁵⁹⁹ At [142].

⁶⁰⁰ At [142].

⁶⁰¹ At [143].

⁶⁰² At [144].

⁶⁰³ At [226].

⁶⁰⁴ At [226].

material damage in this case is of such significance that consent to the subdivision ought to be declined on that ground alone.”⁶⁰⁵

The factors leading to this decision were the loss of the esplanade reserve which substantially negated one of the contended benefits of the subdivision, the predicted loss of over half of each of the residential lots, and the high degree of predictability of the need to relocate houses.⁶⁰⁶ The latter two points both called into question the appropriateness of the subdivision.⁶⁰⁷ The Court concluded that this was not a situation where relocation was provided as a “*backup or fall back*” position in a situation where the need for it is uncertain. In this case it is highly likely that buildings erected on the residential lots will have to be relocated and the only issue is, when might that be required?”⁶⁰⁸

Access

The evidence indicated that the causeway was already highly vulnerable to coastal processes.⁶⁰⁹ The court found that there was a high likelihood that road access to the subdivided land would cease to be available “in the reasonably foreseeable and not too distant future.”⁶¹⁰ It was agreed that the causeway required upgrading for present access, including raising the road by 500 m and repairing existing rock protection.⁶¹¹ Beyond that, the parties agreed that a further lateral extension of the protection works up the coast might be required in the future, and the council would not accept on-going liability to keep the road open.⁶¹² On these facts, it was accepted that vehicular access in the future could not be guaranteed.⁶¹³ In response, CHH offered \$200,000 as a one off contribution to upgrading the causeway as a condition of consent.⁶¹⁴ The Court held that, while that figure might possibly have met the cost of currently outstanding upgrades, it would not be sufficient to meet on-going maintenance and upgrade costs.⁶¹⁵

⁶⁰⁵ At [227].

⁶⁰⁶ At [227].

⁶⁰⁷ At [227].

⁶⁰⁸ At [227].

⁶⁰⁹ At [40].

⁶¹⁰ At [59].

⁶¹¹ At [42].

⁶¹² At [41], [46] and [47].

⁶¹³ At [47].

⁶¹⁴ At [48] and [49].

⁶¹⁵ At [49].

The Court also criticised CHH’s approach to access should the road be closed as being too “casual.”⁶¹⁶ CHH contended that there could be alternative access via 4WD across Kina Beach at low tide, or by boat.⁶¹⁷ The Court commented that no practical details were given as to these alternatives (for example regarding time and tide, position or further works required) and that there was no detailed analysis.⁶¹⁸ While the court accepted that some level of access may be available via 4WD, it had substantial reservations about the lack of evidence on the sufficiency of that access.⁶¹⁹ Similar comments were made about the proposition of boat access because it was not discussed in the consent application and no evidence nor information as to the possible effects or requirements of sea access was given.⁶²⁰ The court therefore found that it had insufficient evidence to assess the feasibility and practicality of the alternative options for access belatedly suggested by CHH.⁶²¹

Under section 106(1)(c), the consent authority may decline a subdivision consent if sufficient provision has not been made to legal and physical access to each allotment to be created by the subdivision.⁶²² The determinative issue was whether or not “sufficient provision” had been made for access.⁶²³ “Sufficient” is not defined in the RMA, and the court considered it to mean “enough to meet a need or purpose” or “adequate” or “sufficing.”⁶²⁴ The court held that the existing road access to be insufficient (regarding its earlier findings), and that even if the causeway was upgraded, it was unlikely to provide sufficient access in the future.⁶²⁵ The Court also held that neither of the two alternatives suggested by CHH provided sufficient access.⁶²⁶ The court stated that “the possibility of some speculative future but unidentified access possibility” did not satisfy it that legal and physical access was available “now or in the future.”⁶²⁷ The court stated that it even was prepared to decline consent on the subsection (c) ground alone.⁶²⁸

⁶¹⁶ At [52].

⁶¹⁷ At [52].

⁶¹⁸ At [54].

⁶¹⁹ At [55].

⁶²⁰ At [56] and [57].

⁶²¹ At [59].

⁶²² At [119].

⁶²³ At [129].

⁶²⁴ At [129].

⁶²⁵ At [137].

⁶²⁶ At [138].

⁶²⁷ At [139].

⁶²⁸ At [228].

Although it was not a determinative issue in the court’s considerations, the court also observed that allowing the subdivision and construction of six further houses in a situation where CHH had made a cash contribution to the upgrade of the causeway, “might place the Council in a very difficult position in the future” as it may create an expectation on the part of future owners that the Council would continue to maintain the road, even if it made no economic sense.⁶²⁹

The court held that it would have declined consent on both section 106(1)(a) and (c) as discrete grounds. It also would have declined consent to the subdivision (and other consents) under section 104 and under its Part 2 assessment.⁶³⁰ In its broad, overall assessment, the court concluded that the benefits of the proposal (such as advancing CHH’s economic wellbeing, the social and cultural amenity of tourists and locals holidaying in a coastal environment, and the public reserves and esplanade walkway) were limited in extent and, at worst, illusory.⁶³¹ Allowing the development of a residential subdivision whose practical and physical access was “under present and future threat and the upkeep of which is uneconomic” was not efficient use and development of natural resources.⁶³² The appeal was dismissed and CHH’s applications for consent were denied.⁶³³

⁶²⁹ At [136].

⁶³⁰ At [230].

⁶³¹ At [232].

⁶³² At [234].

⁶³³ At [237] and [238].

Chapter 5: Capacity to ‘accommodate’: the use of consent conditions to mitigate risks

This chapter addresses the range of consent conditions that might be imposed on new development in hazardous coastal areas. It outlines the legal requirements for these measures.

The following topics are considered in this chapter:

- (1) Consent conditions under the RMA
- (2) Relocation or removal of Buildings
- (3) Bonds/securities

Example of application: *Mahanga E Tu Incorporated v Hawkes Bay Regional Council*

- (4) Liability shields and covenants requiring no complaints

When developers apply for resource consents to establish residential development in hazardous coastal areas, they will often seek to mitigate the risks of these proposals through consent conditions that ostensibly limit the adverse effects of the proposal. These consent conditions can include flood-proofing measures to protect the building (eg, raised floors or drainage schemes), setback provisions to create a buffer zone against erosion or inundation, and plans for relocation or removal of buildings. Relocation or removal plans commonly require the setting of a trigger point upon which the property is no longer deemed to be safe for occupation due to the level of risk from natural hazards. Furthermore, relocation or removal conditions will require a detailed strategy for how any buildings are to be transported, and will commonly be backed up by a bond to cover the costs of removal if a future owner refuses to cover these costs. An additional – albeit seemingly rare – consent condition for limiting the future costs to local councils is to include covenants upon the title which limit the ability of future purchasers to sue in negligence or to lobby the council for expensive coastal protection works.

This section will look at how the Environment Court has treated each of these mitigation measures.

1. Consent conditions under the Resource Management Act

Section 108(1) of the RMA confers a wide discretion upon decision-makers to include conditions upon a consent application – namely “any condition that the consent authority considers appropriate”. This section is supplemented with an inclusive list of condition types in Section 108(2).

Historically, the legal validity of consent conditions has only been constrained by the need to comply with ordinary principles of administrative law imposed by common law. These are known as the *Newbury* requirements, which require that a consent condition:⁶³⁴

- Is for a resource management purpose, and not for an ulterior purpose; and
- Fairly and reasonably relates to the proposal which is the subject of the consent; and
- Is not so unreasonable that no reasonable consent authority could have authorised it; and
- Does not involve an unlawful delegation of authority.

In *Waitakere City Council v Estate Homes Ltd* the Supreme Court held that the second requirement (ie, that it fairly and reasonably relates to the proposal) did not require that there be proven a causal connection between a consent condition and an effect upon the property.⁶³⁵ Instead, the Court held that consent conditions were only required to have a “logical connection” with the proposal.⁶³⁶ However, the 2017 amendments to the RMA have restricted the discretion previously available under the *Waitakere* decision by requiring a “direct connection” to a listed aspect of the application. Section 108AA reads:

- (1) A consent authority must not include a condition in a resource consent for an activity unless:
- (a) the applicant for the resource consent agrees to the condition; or
 - (b) the condition is *directly connected* to 1 or both of the following:
 - (i) an adverse effect of the activity on the environment:
 - (ii) an applicable district or regional rule, or a national environmental standard; or
 - (c) the condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent...(emphasis added).

⁶³⁴ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

⁶³⁵ *Waitakere CC*, above n 225, at [64].

⁶³⁶ At [66].

Thus the 2017 amendment has reduced the ability for a council to add consent conditions upon a subdivision; this arguably goes against the needs for flexible and conditional adaptive development. Admittedly, the s 108AA hurdle alone will not likely affect consent authority practice, as most of the common consent conditions for hazardous coastal development will clearly meet this hurdle. Instead, disputes over the inclusion of such conditions are usually factual disputes over the efficacy of such conditions for mitigating adverse effects to a sufficient level to allow a development, rather than disputes over the legal validity of conditions.

Going in the other direction, also in 2017, the RMA was amended to widen the ability for a subdivision consent to be made subject to a condition of protection against natural hazards from any source.⁶³⁷ This better enables consent authorities to take a more restrictive approach to approvals of applications for coastal development, by taking into account a wider range of hazard risks. In conjunction with the increased national attention and guidance being given to avoidance of coastal hazards, this provision arguably makes it more likely that this will be used, at least more than before, to better protect subdivisions from a wider range of future natural hazard risks.

2. Relocation or removal of Buildings

Relocation or removal of buildings allows for the mitigation of hazards by removing the asset from exposure to natural hazards before the risk reaches an unreasonable level. This is partly facilitated by the Building Act 2004, which allows for buildings to be consented to for a limited lifespan under section 113. However, for our purposes, we are concerned with how the Environment Court has treated the issue of relocation and removal.

Our first finding on this issue is that the Environment Court will not allow the details of relocation or removal to be decided at some later date. If an applicant wishes for their consent to include conditions for relocation of the property, then they must provide details on how the building will be removed, and where it would be removed to.

Secondly, we have found that the issue of relocation can also involve issues of access to the property for the purpose of moving any buildings. Depending on the circumstances, this can

⁶³⁷ RMA s 220(1)(d) already enabled a consent authority to impose a condition on a subdivision consent for the protection of land from four specified risks; the 2017 amendment widened it to refer simply to "natural hazards".

require the applicant to obtain the necessary easements in advance for removing the building. For example, in the *Mahanga* decision, the applicants sought to subdivide a section in a hazardous coastal area. The Environment Court deemed that the appropriate course of action was to obtain easements in advance over adjacent properties in the subdivided lot to guarantee ease of removal.⁶³⁸

In other circumstances, removal or relocation is harder to guarantee. In the *Carter Holt Harvey* decision, access to the settlement was only available along a narrow coastal road which required expensive coastal works to be undertaken in order to guarantee ongoing access. The Environment Court found that the applicants could not explain how they could guarantee that the future removal of buildings would remain feasible in the advent of the road being closed. Furthermore, the Court did not accept speculative suggestions – such as helicopter removal – as being adequate without further detail.⁶³⁹

The Environment Court has also questioned the practicality of relocation proposals when the possibility of relocation was used to support an application for a plan change. In the *Fore World* case the applicant applied for a plan change to allow it to undertake development in a hazardous area, and provided the possibility of relocation as a reason for why this ought to be allowed. Siding with the Regional Council, the Court questioned the attractiveness of relocation for potential purchasers and pointed to the numerous practical difficulties posed by relocation:⁶⁴⁰

[W]e share the doubts of Mr Reinen-Hamill, Mr Gavin Ide, the Regional Council's Planner, and Ms Allan about the practicability of the concept of requiring, probably more or less simultaneously, the relocation of possibly scores of houses. *Among the doubts they raised were the issues of finding sufficient suitable and affordable land, possible issues over consents (relocated houses being not universally welcome in newer subdivisions), social expectations and impacts, and the sheer costs and difficulty of relocating. All of those matters would be likely, we agree, to make the possibility fraught with problems and, again, place the Council under enormous pressure to do something. In all, we think the suggestion will raise more issues than it would solve...*

This passage confirms that relocation or removal is not a matter that can be reflexively tacked on to an application. Relocation needs to be carefully thought out and, more often than not, the number of potential difficulties described above should dissuade developers from lightly committing to such a condition.

⁶³⁸ *Mahanga E Tu*, above n 131, at [42].

⁶³⁹ *Carter Holt Harvey*, above n 130, at [142]-[143].

⁶⁴⁰ *Fore World Developments*, above n 274, at [25].

3. Bonds/securities

Even if removal or relocation is included as a mitigating condition, the local authority is still left with the issue of whether subsequent owners can be relied upon to honour these consent conditions, especially if future owners are effectively shell companies.⁶⁴¹ As a result, a removal/relocation condition needs to be paired with some kind of bond or other security to ensure that the council is not left with the cost of carrying out the consent.

The RMA makes explicit provision for bonds as a consent condition.⁶⁴² Therefore, the question is not about whether such conditions are legally valid, but whether the proposed financial arrangements are sufficiently reliable. This will depend on the details of any proposal. In the *Mahanga* decision, the applicants obtained a professional engineer to estimate the cost of removal; the Court, after making provision for future inflation, accepted the bond as a mitigating condition.⁶⁴³

By contrast, in the *Carter Holt Harvey* decision, the Court refused to accept the proposal due to a lack of detail. The applicant had proposed a bond of \$40,000 per lot, but did not appear to give evidence for how that figure was reached, nor how or even when it was to be paid. The Court provided the additional comment that, while section 109 technically allows for the title of the land to be used as a security, “the security value of a bond registered against the title to a parcel of land which is being consumed by the sea and whose buildings have to be removed, seems questionable”.⁶⁴⁴

A further finding is that financial arrangements for protecting the council are more likely to be accepted by the Environment Court if they are simple. In the *Fore World* decision, the applicants seeking a plan change made the argument that the necessary beach nourishment scheme to protect the proposed lots from erosion could be funded by scheme in which each resident

⁶⁴¹ This concern was noted by the Environment Court in *Carter Holt Harvey*, above n 130. In that case the Court expressed considerable concern about a future owner being a shell company that could avoid responsibility, at [143]:

“[T]he requirement for removal raises the question as to what might happen should owners of the residential lots at the relevant time simply decide to abandon the land or not have the means to remove buildings. If the owner of a lot was a corporate entity whose only asset was the land and any structures on it, any future council seeking to enforce removal obligations or recover the cost of the council having to do so could effectively be dealing with a shell.”

⁶⁴² RMA, s 108(2)(b), 108A and 109.

⁶⁴³ *Mahanga E Tu*, above n 131, at [44]-[48].

⁶⁴⁴ *Carter Holt Harvey*, above n 130, at [144].

contributed a set amount per year. The Court, while accepting the feasibility of the plan, questioned its enforceability and noted that the ongoing costs might exceed the projections, leading to calls from residents for the council to pick up the remaining costs.⁶⁴⁵

Example of application: *Mahanga E Tu Incorporated v Hawkes Bay Regional Council* [2014]⁶⁴⁶

In 2008 the applicants sought to subdivide land at Mahanga Beach into five sections and gain resource consents for residential developments on each of those sections. The Wairoa District Council and Hawkes Bay Regional Council granted the subdivision and consents in early 2010.⁶⁴⁷ This decision was appealed to the Environment Court by Mahanga E Tu, an incorporated society with the general objective of protecting and advancing the amenity values of Mahanga and its environment.⁶⁴⁸ The land adjacent to Mahanga Beach is prone to shoreline retreat due to ongoing erosion and has potential for inundation during storm events and tsunamis.⁶⁴⁹ The land proposed for subdivision was affected by coastal hazard zoning in the proposed Regional Coastal Environment Plan.⁶⁵⁰

Two of the proposed sections in the subdivision were especially at risk to coastal hazards and at some future date they would be unfit for residential occupation. In hearing expert evidence on the rates of erosion, the Court observed that “the preparation of accurate long-term predictions for the behaviour of complex natural systems at a very small site is fraught with difficulty.”⁶⁵¹ Despite the discrepancies in the evidence, the Court held that all of the proposed sections could be enjoyed for at least 20 years before reaching the proposed trigger point.⁶⁵² However, because the subdivision could not obviate the inevitable effects of erosion, the Court had to consider whether allowing it would be consistent with the concept of sustainable management.⁶⁵³

Policy 3 of the New Zealand Coastal Policy Statement directs authorities to take a broad precautionary approach to the use and management of the coastal environment. However, the Court gave weight to the finding that the subdivision would not increase the likelihood of

⁶⁴⁵ *Fore World Developments*, above n 274, at [20].

⁶⁴⁶ *Mahanga E Tu*, above n 131.

⁶⁴⁷ *Mahanga E Tu*, at [1].

⁶⁴⁸ At [13].

⁶⁴⁹ At [22].

⁶⁵⁰ At [39].

⁶⁵¹ At [35].

⁶⁵² At [38].

⁶⁵³ At [16].

catastrophic phenomena and the applicants were already well-aware of the risks: “the people involved have express knowledge of that risk and choose to accept it, without significantly expanding the area in which either structures or people will exist.”⁶⁵⁴ The Court also noted Objective 5 of the NZCPS, which aims to reduce the risk of coastal hazards by directing that new developments should be located away from risk-prone areas, or mitigated by measures such as managed retreat.

The Court considered that, even though the development could not be relocated to another area (commenting that “the land is where it is”)⁶⁵⁵, managed retreat was a viable option in the circumstances for mitigating the adverse effects of the proposal. To mitigate the risks associated with erosion, sea-level rise and inundation the Court considered the practicality of relocation. The applicants proposed a condition that buildings on the two sections closest to the sea would be required to relocate when the foreshore came within seven metres of the houses (the trigger point).⁶⁵⁶ The buildings would be constructed in a fashion that was amenable to relocation, and their removal was to be the responsibility of the owner.⁶⁵⁷

The most suitable means of road access to the sections would almost certainly have disappeared by the time the trigger point had been reached.⁶⁵⁸ In order for relocation to occur, access to a nearby road would have to be provided through the proposed adjacent sections, or across a stream (which would require the construction of a bridge and a resource consent to do so).⁶⁵⁹ The applicants accepted that they should make a provision for an easement on the other sections to ensure that access would not become an issue.⁶⁶⁰ The Court considered that with these access issues resolved, the relocation strategy was a “practical proposition”.⁶⁶¹

There was a risk that a future owner of these sections would be reluctant to adhere to the relocation condition, and that the Council would have to undertake the building removal at ratepayer expense. To resolve this, the applicant volunteered for the developer to pay a bond of \$35,000 per house.⁶⁶² The Court noted that the compounding interest on this amount should

⁶⁵⁴ At [51].

⁶⁵⁵ At [51].

⁶⁵⁶ At [39].

⁶⁵⁷ At [39].

⁶⁵⁸ At [40].

⁶⁵⁹ At [40].

⁶⁶⁰ At [42].

⁶⁶¹ At [45].

⁶⁶² At [35].

be ample to account for inflation.⁶⁶³ In any event, if the burden fell on the Council to undertake the relocation, all property rights in the buildings would pass to the Council.⁶⁶⁴ This would presumably incentivise the owner to undertake the relocation themselves, or provide a better assurance for the Council to recover expenses. The Court approved the subdivision under these conditions.

(We query whether this decision would be similarly decided today, in light of the revised law and government guidance, as is discussed above in relation to the *Holt* case. We have not analysed it in detail, as we have done for *Holt*, so this is only a query rather than an argument.)

4. Liability shields and covenants requiring ‘No Complaints’

An additional mechanism for councils to limit their exposure to the future costs of hazardous development is to propose consent conditions that limit or extinguish the ability of current and future successors in title to either seek damages in tort or lobby the council to erect expensive protective structures. These matters were referred to by the Environment Court in the *Holt* decision as “the moral hazard aspect” of allowing development to occur in hazardous areas.⁶⁶⁵ This approach is consistent with the approach of some decisions of the Environment Court in holding that hazardous development should be allowed to proceed on the basis that the RMA allows for the “voluntary assumption of risk”.⁶⁶⁶ By this logic, such conditions are simply a further means of confining the risk to those who assume control of the property in the full knowledge of the potential hazards. This philosophy is captured by the following passage of the *Holt* decision:⁶⁶⁷

A matter not raised directly in the written evidence of the parties but by the Court at the hearing concerned the moral hazard aspect of the case. This is that Mr and Mrs Holt would, if resource consent was granted, build a house and then, because of unforeseen circumstances, sell it to a third party. *That third party might be less well-informed or accepting of the risks after a few smaller floods cut off access to the property and would then start taking political action (lobbying councillors or MPs) or legal action for negligence seeking a stopbank or damages as the case may be. Those are further costs for the community which the ORC is trying to avoid* (emphasis added).

⁶⁶³ At [45]–[46].

⁶⁶⁴ At [47].

⁶⁶⁵ *Otago RC v Dunedin CC*, above n 521, at [76].

⁶⁶⁶ See for example, *Otago RC v Dunedin CC*, above n 521. [“Holt”], and *Hemi*, above n 314. Note that this approach is arguably less supported in the wake of the passing of the 2010 Coastal Policy Statement, as evinced by a number of more recent decisions. Voluntary assumption of risk was still invoked in 2014 in *Mahanga E Tu*, above n 131, but this was without application of *King Salmon* or *Davidson*, and without the 2017 government adaptation or coastal hazards guidance documents.

⁶⁶⁷ *Otago RC v Dunedin CC*, at [76].

It is worth noting that such actions from aggrieved property owners have little to no chance of successfully suing under the current law. As later parts of this report discuss, councils are under no legal duty to protect at-risk property through the erection of coastal protection works, and any action in tort alleging that a council was negligent in granting a resource consent is very unlikely to succeed. Nevertheless, there are sound reasons for councils wanting to lessen or extinguish the possibility of such situations occurring.

Despite there being no legal duty to erect coastal protection structures, experience shows that property owners have been very willing to take legal action in attempt to force councils to erect such structures. Even unsuccessful suits are a drain on councils' time and resources. Even though a successful action in negligence is very unlikely, councils are still fearful of civil liability, as research from Australia bears out.⁶⁶⁸ The fear of councils in New Zealand is likely to be at least that in Australia, if only because of their recent experiences with the "leaky homes saga", which has shown New Zealand courts to be particularly willing to impose civil liability on local authorities. This institutional memory could lead some councils to potentially enter settlements to either cover the losses caused by a hazard materialising, or agree to bear the costs of hazard proofing these properties. Thus, even without legal backing, elected councillors have sometimes been politically unwilling to stand up to well-organised coastal lobby groups who want their properties protected.

Despite the obvious attraction of such consent conditions, there is very little case law addressing the issue of their validity or scope. What is clear is that these consent conditions can only be volunteered by a resource consent applicant. While a good argument can be made for why such conditions serve a resource management purpose – in particular, preventing future costs from being shifted onto the council by developers⁶⁶⁹ – applicants cannot be compelled by a consent authority to accept these conditions as a requirement for obtaining the consent. The reason for this restriction is that, by their nature, such consent conditions restrict the ability of consent holders either to access the courts or to exercise their statutory rights under the RMA to give

⁶⁶⁸ See Australian Government Productivity Commission, above n 99, summarised in Box 2 of this report.

⁶⁶⁹ This is in keeping with provisions of Part 2 of the RMA which focus on gains for the community at large, and especially section 7(b), requiring "the efficient use and development of natural and physical resources". This has also been held to prevent private economic gains when these are at the expense of local communities. Transferring the costs of a risky development onto local government is a clear example of this. See *Carter Holt Harvey*, above n 130, at [234], and *Southern Environmental Association*, above n 302, at [120].

their input into the plan making process. For this reason, such conditions have constitutional implications under both the Bill of Rights Act 1990 and the common law more generally.

In *Christchurch International Airport Ltd v Christchurch City Council* the High Court held that a voluntary consent condition restraining the consent holder from complaining about the noise emanating from the nearby airport was valid because it did not breach section 14 of the Bill of Rights Act 1990 protecting freedom of speech.⁶⁷⁰

The condition of voluntariness for surrendering the right to access a statutory mechanism or seek legal redress was dealt with directly in the subsequent case of *Ports of Auckland Ltd v Auckland City Council*. In that case, the Ports of Auckland contested a decision by Auckland Council to erect apartments in an area that were likely to be subject to significant noise from the ordinary operations of the port. In particular, the Port asserted that they could become subject to a tort action in nuisance if the development occurred. The Council made the suggestion that the development consent could be subject to a condition which forbid the apartment residents from seeking injunctive relief to stop the nuisance. But the Council's proposal was rejected by Justice Baragwanath.⁶⁷¹

[It is not]... an answer to try to impose as a condition under s 105(1)(a) restraining owners and occupiers of the apartments from seeking injunctive relief against the port company. I am of the view that while a Full Court has decided that a party may surrender personal rights...[see *Christchurch International Airport Ltd v Christchurch City Council*] ...neither a council nor this Court may order an unwilling party to surrender, as a condition under s 108, the right as affected party to receive notice of an application under s 93(1)(e), to make submissions under s 96, and to appeal under s 120. Pointers to this conclusion are first that the statute is to be read as a whole, and its provisions as consistent with one another. Secondly, *the principle that a citizen is not lightly to be deprived of access to justice is deep-seated*. In *R v Lord Chancellor, ex parte Witham* [1998] QB 575, the Divisional Court struck down as being unconstitutional and ultra vires fees increased by the Lord Chancellor with the concurrence of the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor which infringed the fundamental right of access to Courts. *That principle applies equally in New Zealand*. There is no jurisdiction under the guise of a condition to protect the port company in that fashion (emphasis added)

Justice Baragwanath's reasoning clearly applies to any consent condition stating that an applicant will not lobby the council for protection works (a statutory right) or seek civil damages

⁶⁷⁰ *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 (HC), at 584, where the Judge said:

"I am of the view that if the person, the subject of the condition/covenant is prepared to consent thereto, it cannot be said that the condition/covenant falls foul of the Bill of Rights Act. The simple reason is that the person concerned has voluntarily given up pro tanto the relevant rights affirmed under the Bill of Rights Act and such rights are not, in my view, rights which should be regarded as incapable of surrender for reasons of public policy. I can see no reason of public policy why someone should not surrender pro tanto his/her rights under s 14 in return for what is considered to be a sufficient advantage to make it appropriate to do so."

⁶⁷¹ *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC), at 612 (emphasis added).

in the courts for damage caused to the property. In particular, Section 27(3) of the Bill of Rights Act 1990 states that:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

The fact that such consent conditions are required to be voluntary does not in itself explain the apparent rarity of such conditions. In the course of researching for this report, only one case was found which addressed such conditions in the context of development in hazardous coastal areas. By contrast, consent conditions providing for “environmental compensation” or “biodiversity offsetting”, despite not being mentioned in the RMA, are common consent conditions even though they can also only be included if they are volunteered. One reading is that such liability shields or no complaints covenants are simply not often volunteered by applicants.⁶⁷² Another reason might be that the issue is not relevant to many applications or that the applicant does not wish to give up such rights. An additional reason may be that, as the *Holt* decision shows, such conditions are not as straightforward as other commonly volunteered conditions, such as “environmental compensation”.

In the *Holt* decision, the Otago Regional Council appealed against the granting of a consent by the Dunedin City Council for a “pole house”.⁶⁷³ The unusual design was due to the proposed location of the house in a wetland area, one meter above sea-level, and adjacent to an estuary. This meant that the proposed house would be subject to a multitude of flood risks: from the wetland in heavy rain, from the river, and from the sea in the event of a tsunami, and/or storm surge – for which there was evidence of past occurrences.⁶⁷⁴ Despite the development of the site being classified as a non-complying activity, the Environment Court found that allowing the activity would not be contrary to the objectives and policies of the relevant Plan. This was because both the regional and district council Plans were found to have an implicit policy of allowing applicants to accept risk.⁶⁷⁵ For this reason, the Court was prepared to find that the development could be allowed on the basis that the applicants were voluntarily accepting the risk.

⁶⁷² Note that in the *Holt* decision, it was the Court that raised the issue. See *Otago RC v Dunedin CC*, above n 521, at [76]. None of this is to suggest that consents conditions forbidding the erection of private protective structures are not commonplace. Such conditions can clearly be compelled.

⁶⁷³ *Otago RC v Dunedin CC*, above n 521, at [36].

⁶⁷⁴ At [16].

⁶⁷⁵ At [54]. Note these Plan provisions have since changed; see Iorns and Dicken, above n 541.

But the Court in *Holt* also requested submissions on the “moral hazard” issue wherein future owners might seek compensation from the council or might lobby for protective works to be carried out.⁶⁷⁶ The inclusion of such conditions was ultimately part of the Court’s decision to allow the consent because these conditions were deemed to accord with the risk assumption policy in the regional and district plans. However, the difficulty of formulating such conditions is evident in both in the submissions received by the Court and the solution ultimately reached. At the core of the problem was the fact that such a consent condition had to bind both the Holts *and* any successors in title; such a condition could not be attached to the land as an ordinary covenant.

The first suggestion by the Court was for the consent to be made personal to the Holt family. After the hearing the Holts informed the Court that they were not prepared to volunteer that the consent be personal. This was because their bank refused to grant a mortgage for a house on the basis of a personal consent, therein rendering the security worthless.⁶⁷⁷ A second suggestion by Counsel for the Holts was that a deed could be registered against the land title as a covenant under sections 108(2)(d) and 109 of the RMA. However, the Court held that the section could not be used in this way given that the conditions sought personally pertained to Holts and successors in title, rather than the land itself.⁶⁷⁸

The solution ultimately adopted was for the Holts to sign a deed in favour of the both councils, stating that they accepted the risk inherent in the development and would not seek public works to protect their property or seek damages in negligence. This same deed would then be signed by any future purchasers of the property. The applicants, while still concerned about their ability to acquire a mortgage, appear to have agreed to volunteer this condition on the basis that it was vital for obtaining the consent for a non-complying activity in an area subject to very high risk. The Court stated that the contents of the deed were “powerful matters in favour of the applicants, especially since it reduces the adverse precedent effects of the decision.”⁶⁷⁹

Specifically, the Court suggested – and the Holts ultimately agreed – to sign a deed that the Holts and any future purchasers acknowledge that:⁶⁸⁰

⁶⁷⁶ *Otago RC v Dunedin CC*, above n 521, at [76].

⁶⁷⁷ At [77].

⁶⁷⁸ At [78]. See RMA, s 108(2)(d): “in respect of any resource consent (other than a subdivision consent), a condition requiring that a covenant be entered into, in favour of the consent authority, in respect of the performance of any condition of the resource consent (*being a condition which relates to the use of land to which the consent relates*)” (emphasis added).

⁶⁷⁹ At [81].

⁶⁸⁰ At [81].

- [T]hey understand and accept the probabilities of flooding from the various sources (listed in this decision), the scale of the flooding and its potential costs to them and their family and visitors, both monetarily and personally; and
 - they will not complain about the hazards; and
 - they will not sue the DCC in negligence for issuing the resource consent; and
 - *they will obtain a similar covenant from any purchaser of the land (and if not will indemnify the Council against any losses)*
- and provide an ancillary deed in favour of the ORC acknowledging they will not seek flood protection works...(emphasis added)

The specific mechanism ultimately adopted was a covenant requiring that any on-seller must get the prospective purchaser to commit to the covenant. The efficacy of such a condition is not known and is potentially uncertain. Rive and Weeks have questioned whether these consent conditions are actually enforceable.⁶⁸¹

For a number of reasons, the use of volunteered covenants to protect councils against requests for coastal protection works and from liability in negligence are likely to remain rare if sought under the current statutory regime. The *Holt* case is the only example we found of a liability shield against negligence and, in many ways, the *Holt* case should be seen as unique on its facts. Few applicants are going to feel compelled to volunteer such a condition – i.e., requiring a deed to be signed before title can change. Furthermore, few banks would be willing to make loans on such conditions.

Another reason for the unlikelihood of the approach shown in *Holt* being invoked widely is that the “voluntary assumption of risk” doctrine is less dominant than it formerly was due to the passing of the 2010 NZ Coastal Policy Statement. The NZCPS prefers avoiding hazardous coastal development, so compliance with the NZCPS is likely to have required councils to remove those aspects of their plans that implicitly supported the voluntary assumption of risk in this area (as has happened to the plans relevant to the *Holt* case, as discussed above in relation to revisiting the *Holt* case). The NZCPS also provides a clearer mandate for classifying residential development in hazardous coastal areas as a prohibited activity, rather than a non-complying one. With this and the 2017 government guidance, we are unlikely to get more approvals of *Holt*-type applications.

⁶⁸¹ Rive and Weeks, above n 120, at 9.7.4.

A final reason is that the objective of informing future purchasers about the house being subject to natural hazards is arguably already performed by existing requirements for hazardous development under the Building Act 2004 that require that buildings subject to natural hazards have a notation on the title describing the nature of the hazards.⁶⁸² This further reduces the possibility of any future purchaser being able to credibly claim that they were unaware of the risks affecting the property. These provisions of the Building Act 2004 are backed up by section 392 that exempts building authorities from civil liability for any damage caused by any natural hazards that are listed on the title to property in accordance with sections 71-74 (as long as there is no bad faith on the part of the building authority).

The broader issue of councils seeking greater clarity over their potential legal liability or over any other obligations with respect to coastal protection works is a ripe area for law reform proposals. Some form of explicit liability shield akin to that of the Building Act 2004 might assist RMA decision-makers and planners to make less fearful decisions.

In relation to requests from landowners for coastal protection works, whether private or publicly funded, a statutory mechanism for their outright exclusion is unlikely to be appropriate. However, some principles or guidelines could be established such as that individual assumption of risk lessens the weight of any request for coastal protection works. Such guidelines may also assist communities undertaking collaborative decision-making procedures, of the type suggested in the Ministry for the Environment *Guidance*. Such procedures will require community groups to weigh up a range of options including coastal protection works suitable for their communities. The existence of guiding principles may assist some of the more difficult decisions. Coastal protection works are considered in detail in the next chapter.

⁶⁸² Building Act 2004, ss 71-74.

Chapter 6: Capacity to ‘protect’: the use of Coastal Protection Works

This chapter addresses the use of Coastal Protection Works (CPW or Works) in hazardous coastal areas. It outlines the legal requirements for such Works, legal aspects of establishment and maintenance, and civil liability for their maintenance.

The following topics are considered in this chapter:

- (1) The temptation to use coastal protection works: short term gains, long-term harms
- (2) Types of coastal protection works: the hard-soft continuum
- (3) Legal responsibilities for the establishment and maintenance
 - (a) Common Law obligations of the Crown
 - (b) Statutory framework
- (4) Coastal protection works in the Environment Court
- (5) Civil Liability for the maintenance and monitoring of coastal protection works

Example of application: *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*

1. The temptation to use coastal protection works: short term gains, long-term harms

Second only to the cost of a large-scale managed retreat policy, Coastal Protection Works are the most expensive response to the problem of coastal hazards threatening residential property. As discussed below, a core problem with hazardous coastal development is the belief that, once residential development is given a consent, it confers property rights that will exist in perpetuity unless full compensation is offered. The flaw in this belief is the implicit assumption that the environment cannot change over time, therein rendering the property unsuitable for continued occupation. CPW in their crudest forms (e.g., rock walls and concrete structures) preserve this belief in the perpetuity of property rights because, at great long-term cost, they prevent the coastal environment from changing in the short to medium term. However, in the long-term

these structures will rarely be financially viable. As the Parliamentary Commissioner for the Environment has noted:⁶⁸³

In places around the country, seawalls are being built or strengthened, and beaches are being ‘armoured’ with banks of large rocks. While each of these hard defences may not cost a lot, collectively the costs will mount. A piecemeal reactive response will become increasingly expensive and, as the sea continues to rise, maintenance and replacement will be needed. At some point, most hard defences will be abandoned.

Because of this, the use of hard defences as CPW ought to be avoided. Despite this, the demand for CPW will arise where development has already occurred in an area exposed to coastal hazards. The reality is that an enormous amount of development in New Zealand already exists in hazardous coastal areas. It is therefore not politically or practically possible to completely avoid using CPW in the future.

Another reason that CPW cannot be avoided is the fact that it is already in widespread use. The challenges posed by coastal erosion and coastal flooding are not new⁶⁸⁴ and, in the recent past, many settlements in New Zealand were established in hazard prone areas with major investment from central government to establish flood defences to ‘control the hazard’ as a long-term solution.⁶⁸⁵ Indeed, New Zealand already has a significant amount of experience dealing with the problems created by erecting CPW. Importantly, the need to avoid development in areas exposed to erosion and to avoid the use of hard protection works was included in the first New Zealand Coastal Policy Statement from 1994 – notably before sea-level rise and climate change had become dominant issues in coastal planning.⁶⁸⁶

⁶⁸³ Commissioner for the Environment, *Certainty and Uncertainty*, above n 343, at p 79.

⁶⁸⁴ At p 38:

“Councils have long been dealing with some of the consequences of erosion. Carparks, access ramps, and other public amenities have been relocated, and sections of some roads have been lost. Breakwaters and groynes have been built as defences and the odd building has fallen into the sea.”

⁶⁸⁵ Glavovic and others, above n 54, at 682.

⁶⁸⁶ The 1994 NZCPS includes two policy provisions to discourage the use of coastal protection works:

Policy 3.4.5

New subdivision use and development should be so located and designed that the need for hazard protection works is avoided.

Policy 3.4.6

Where existing subdivision, use or development is threatened by a coastal hazard, coastal protection works should be permitted only where they are the best practicable option for the future. The abandonment or relocation of existing structures should be considered among the options. Where coastal protection works are the best practicable option, they should be located and designed so as to avoid adverse environmental effects to the extent practicable.

Despite general acceptance of the maladaptive nature of hard protections, multiple examples can be given of policy reversals in particular locations. For example, in 2008 a rock wall was eventually erected in Waihi, with costs split between the beneficiaries and the local council. However, this was after a plan had been passed for managed retreat (instead of CPW), a successful court case defending that plan, support from the regional council, and widespread documented opposition to hard defences – a survey conducted by the regional council found that only 15% of residents surveyed supported hard defences.⁶⁸⁷ Furthermore, these eventual consents for the rock wall were only passed with the permission of the Minister of Conservation, who approved them as a temporary measure subject to review in 2020.⁶⁸⁸ This very clearly shows that, even when a clear policy preference is stated for not approving hard protection structures, and even when this policy is supported by the law as being permissible, different levels of government can be pressured to allow these maladaptive measures to be established, provided that they are seen as temporary.

The challenge posed by climate change and sea-level rise means that these problems will become more widespread and more severe. Moreover, these new threats will be faced most acutely in those same areas – such as Gisborne – which have faced the challenge of erosion and coastal flooding since their establishment and which have already employed a variety of coastal protection methods. For this reason, this report will look at the legal and practical problems faced by these low-lying coastal communities already employing CPW in order to adduce some lessons for addressing a problem that is destined to become more widespread over the next century. These cases provide some insight into the legal issues associated with local government deciding whether to upgrade existing CPW or to disestablish coastal protections in pursuit of a managed retreat policy. This chapter will also look at the Environment Court’s general treatment of proposed CPWs, concerns about future calls for CPW if hazardous development is allowed, and the potential civil liability faced by local government when CPW fails to prevent hazards from eventuating.

For the purpose of this report, our primary focus is upon hard protection structures. Hard defences are most controversial of CPW (because of their adverse effects); yet hard-defences are likely to be requested in those areas which have allowed the most maladaptive

⁶⁸⁷ Bronwyn Hayward, “Nowhere Far From the Sea”, above n 10, at 53-55.

⁶⁸⁸ At 55.

development, despite the 2010 NZCPS singling out “hard protection structures” as the key type of CPW to be avoided.⁶⁸⁹

2. Types of coastal protection works: the hard-soft continuum

The term “coastal protection works” has been selected for use in this report because it is broad enough to refer to all human interventions intended to protect some portion of the coastal environment from erosion or flooding. It must be noted that, while erosion and coastal flooding may often occur together, they are readily distinguishable as types of hazard and may therefore attract different solutions. Nevertheless, a common term is needed to capture the full range of activities, in part because the ultimate goal is the same (preventing coastal hazards), and in part because legal questions can arise around who has responsibility for coastal hazard prevention (regardless of the mechanism used), including whether CPW measures can be compelled under statute.

Table – Coastal Protection Options (Source: Ministry for the Environment *Coastal hazards and climate change: Guidance for Local Government*)⁶⁹⁰

Coastal protection techniques	Description	Application
Hard protection structures – sea walls, rock revetments, rip rap, back-stop walls (usually buried)	Longshore solid artificial structures	<ul style="list-style-type: none"> Intended to armour existing coastal alignments. Apply at current mean high water spring tide or further into private properties. Often associated with gradual loss of intertidal beach in front of the structure (less so if located further landward) and often create edge erosion at the ends of the structures.
Special purpose designs – sea dykes, groynes	Artificial hard structures at angle to the shore	<ul style="list-style-type: none"> Intended to trap beach and coastal sediments moving longshore and build out and strengthen existing beaches (but often results in sediment deficit and erosion in areas further down-drift along the shore).
Artificial reefs and submerged breakwaters	Off-shore sub-surface protection	<ul style="list-style-type: none"> Usually designed so waves break at or near the offshore structure and reduce coastal erosion in the wave shadow – may also form a salient, where the beach behind the structure accretes.
Wetland restoration, dune restoration, coastal planting	Enhancement of existing natural coastal features	<ul style="list-style-type: none"> Strengthens natural coastal defences. Requires room to move with the coast.
Beach replenishment	Import of sediment to maintain beach and coast	<ul style="list-style-type: none"> Strengthens natural coastal defences. Requires nearby source of suitable material (size, grade and colour). Allows existing coastal processes to continue. Needs commitment to future replenishment phases (or after a major storm).

An easy way to understand CPW options is to see them on a continuum of hard to soft forms of engineering. At the softest end of the spectrum are interventions such as wetland restoration,

⁶⁸⁹ See Policy 25(e) and Policy 27.

⁶⁹⁰ MfE, *Guidance*, above n 3, at 233.

dune restoration, and coastal planting.⁶⁹¹ What these interventions have in common is that they are intended to enhance or preserve existing natural defences. In the middle of the engineering spectrum are beach replenishment schemes. At the other end of the spectrum are various “hard protection” structures, which are distinguished by where they are placed within the coastal zone. Structures that are designed to alter wave patterns to lessen erosion, such as artificial reefs and submerged breakwaters, are placed out at sea, while structures intended to capture sediment and therein foster accretion are placed closer to shore. The most well-known of all hard protection structures are solid, artificial structures, such as sea walls, rock revetments, rip rap, and back-stop walls. The glossary to the New Zealand Coastal Policy Statement 2010 defines “hard protection” as follows:

Hard Protection

Includes a seawall, rock revetment, groyne, breakwater, stopbank, structure retaining wall or comparable structure or modification to the seabed, foreshore or coastal land that has the primary purpose or effect of protecting an activity from a coastal hazard, including erosion.

Hard-protection works are the most controversial method of achieving coastal protection, due to their cost, to the potential for them to disrupt natural coastal processes such as sediment flow (and thus potential to erode other areas), to the way that they potentially restrict access to the coast, to their impact upon the natural beauty of coastal areas, and due to the perception that they only benefit of a small set of private interests. Further, cheaper structures, such as wooden seawalls, may be liable to rapid deterioration during storms, leading to a major loss of amenity, and/or a threat to public safety.⁶⁹²

As the NZCPS recognises, occasionally hard protection structures are needed:⁶⁹³

“hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations.”

However, as the DoC guidance on coastal hazards notes, this provision is:⁶⁹⁴

⁶⁹¹ The number of interventions falling under this head is potentially expanding as new research is conducted. In *Mangrove Protection Society v Bay of Plenty Regional Council* [2016] NZEnvC 239, at [32]-[35], the applicant sought to challenge a proposal which would lead to a loss of mangroves by producing expert evidence that mangroves both prevented erosion and could mitigate the effects of sea-level rise by elevating the sea-floor. While the Environment Court accepted that mangroves “can provide or may provide such protections”, they did not consider that the evidence was of sufficient relevance to the facts of the application.

⁶⁹² *Bay of Plenty Regional Council & Ors v Western Bay of Plenty District Council* (2002) 8 ERLNZ 97 (EC), at [62]. In that case, a timber seawall had deteriorated and made the beach both “unsightly” and “dangerous”.

⁶⁹³ NZCPS, Policy 27(1)(c).

⁶⁹⁴ MfE, *Guidance*, above n 3, at 67.

"strongly focused on major infrastructure - not local infrastructure or private development. It particularly applies to infrastructure such as national energy and transport networks, including the National Grid, State Highways, railways, and commercial ports and airports".

Generally, the NZCPS explicitly promotes the use of natural defences as an alternative to building hard protection structures,⁶⁹⁵ and in particular requires that authorities:⁶⁹⁶

"Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards."

Indeed, in respect of residential development, the NZCPS discourages hard protection structures, pointing to the need to recognise and consider "the environmental and social costs of permitting hard protection structures to protect private property".⁶⁹⁷ Thus, it is not expected to be appropriate for new residential developments to be depending on CPW.

A particularly extreme example of the unforeseen costs that can accrue from rapid erosion of surrounding areas is provided by the case of *Van Dyke v Tasman District Council*.⁶⁹⁸ In that case, the Tasman unitary authority had installed a groyne largely for the purposes of sediment control for a shipping channel; unfortunately, that had caused rapid erosion to the beach in front of the house of applicant (a trust), through stopping the natural flow of sediment to that beach. The applicant successfully contended that the erosion was progressing so quickly that it had begun to threaten the house. Before the installation of the groyne, the high tide was approximately 55 meters from the house. Erosion had caused the high tide to now be a mere 25 meters from the house, and appeared to be continuing to advance.⁶⁹⁹ The applicant successfully attained an enforcement order for the groyne to be removed and for emergency works to be implemented to replenish the shoreline.⁷⁰⁰ The total cost of these works amounted to \$638,000 for the removal of the groyne,⁷⁰¹ and \$457,439 for the maintenance of the shoreline.⁷⁰² Both of these totals were significantly more than the initial estimates.

⁶⁹⁵ NZCPS, Policy 25(e).

⁶⁹⁶ NZCPS, Policy 26(1).

⁶⁹⁷ NZCPS Policy 27(1)(d). This is discussed in the DoC *Guidance*, above n 3, at 68.

⁶⁹⁸ *Van Dyke (as trustees of the B and M Van Dyke Family trust) v Tasman District Council* [2014] NZEnvC 1.

⁶⁹⁹ At [13].

⁷⁰⁰ At [18].

⁷⁰¹ At [24].

⁷⁰² At [31].

3. Legal responsibilities for establishment and maintenance of coastal protection works

(a) Common Law obligations of the Crown

Historically, the Crown was subject to prerogative duties to “preserve the realm from inroads from the sea”.⁷⁰³ In the case of *Faulkner v Gisborne District Council*, the applicants challenged the legality of a managed retreat policy which both disestablished coastal protection works and imposed tough restrictions on the establishment of private works to protect property. Specifically, they argued that the Crown either had a prerogative duty to protect coastal property through the establishment and maintenance of works, and/or that the common law enshrined a right of property owners to protect their land from coastal hazards, and that these duties had been unaffected by the passing of the Resource Management Act.⁷⁰⁴ Whilst praising the applicant’s submissions for their “scholarship and comprehensiveness”,⁷⁰⁵ and finding that “the common law duty and right are applicable in New Zealand, unless affected by a New Zealand statute”, the High Court ultimately concluded that that the regime of the Resource Management Act now covered the field.⁷⁰⁶

The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it...

...The effect of all this is simply that, where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly, a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection work proposed by the residents must be subject to that procedure...

... The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources.

Moreover, the High Court also found that neither duty of the Crown or a common law right of private protection would have helped the applicants. With respect to the duty upon the Crown, the Court commented:⁷⁰⁷

It would be wrong to frame the duty in terms of an absolute, positive duty on the Crown to construct and maintain sea walls, if such construction and maintenance be not in the wider public

⁷⁰³ *Faulkner v Gisborne DC*, above n 63, at 625.

⁷⁰⁴ At 625.

⁷⁰⁵ At 625.

⁷⁰⁶ At 632.

⁷⁰⁷ At 628.

interest (for example, if it would cause greater damage to other areas of the coastline, or if it were geographically impracticable).

With respect to a common law right of private protection against coastal hazards the Court held that:⁷⁰⁸

It is also questionable whether the common law today would recognise the right of property owners to protect their land to the extent that the appellants require, given that it is no longer taken for granted that the natural process of erosion is necessarily an evil or mischief to be avoided wherever possible.

It has been argued that there may be an additional source of protection under the common law where land is protected from the sea by a natural flood defence. Specifically, while there is no legal obligation to actively maintain such natural barriers, it is nevertheless unlawful for steps to be taken which result in the removal of these natural barriers.⁷⁰⁹ However, as with the previously discussed duties under the common law, it is highly likely that the Resource Management Act has superseded any duty on the Crown. In any case, Policy 26 of the 2010 NZCPS encourages the use of natural defences where possible and, by implication, this strongly suggests that natural barriers are to be protected to a level above and beyond this common law duty.

Finally, it ought to be noted that, while these older duties have been superseded by statute, newer tortious duties in negligence and nuisance to adequately repair and/or inspect coastal protection works may still be available.⁷¹⁰

(b) Statutory framework

Responsibility for regulating coastal protection works is spread across multiple levels of government and is potentially subject to seven different statutes which address flooding and coastal hazards more generally. Those statutes are:

- Resource Management Act 1991 (including the NZCPS);
- Building Act 2004;

⁷⁰⁸ *Faulkner v Gisborne DC*, above n 63, at 634.

⁷⁰⁹ Emma Bean, Chad Staddon and Thomas Appleby “Holding Back the Tide: An Exploration of the Possible Legal Basis for a Claim of a Right to be Protected from Flooding” (2016) 25 *Journal of Water* 61 at 68.

⁷¹⁰ See for instance *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC) in which the local authority was found to owe a duty of care with respect to adequately maintaining existing flood defence structures for which the plaintiff had paid special local government rates. This finding was upheld in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2013] NZCA 79, although the plaintiff was found to have failed to establish causation, resulting in his claim being dismissed. *Easton* is discussed in more detail below, notes 760-780 and accompanying text.

- Local Government Act 2002;⁷¹¹
- Soil Conservation and Rivers Control Act 1941
- Land Drainage Act 1908;
- Rivers Board Act 1908; and
- Civil Defence Emergency Management Act 2002.

The dispersion of regulatory power across so many statutes has been subject to criticism for the legal uncertainty it causes, with some employing different risk standards and with many standards largely repealed and absorbed into the Resource Management Act.⁷¹² The 2017 Ministry for the Environment *Guidance* specifically singles out the Building Act 2004 for potentially allowing coastal protection works ‘on site’ (i.e., on the property in which the building is situated) in a way that could be inconsistent with the 2010 NZCPS.⁷¹³ However, while all of these statutes may be relevant for flood protection and some for erosion, for our purposes we focus on the Resource Management Act and the Soil Conservation and Rivers Control Act.

Under the Resource Management Act, primary responsibility for flood management and regulation of the coast is given to regional councils. Under section 30(1)(c) and (d) of the Resource Management Act, regional councils are tasked with regulating activities in the coastal environment and the use of land in order to ensure the “avoidance or mitigation” of natural hazards.⁷¹⁴ Hard defences can be regulated through the mandatory regional coastal plan that is created in conjunction with input from the Minister of Conservation.⁷¹⁵ The Minister of Conservation’s call-in power to determine applications for “restricted coastal activities” – that could cover coastal protection works – was repealed in 2009.⁷¹⁶

Private coastal protection works on land bordering the coastal marine area can also regulated by a territorial authority. In particular, this would allow for private protection to be regulated, including for such works to be allowed. However, given that district plans must now give effect to the 2010 NZCPS, the validity of any rule allowing private works would be severely curtailed. If any private works are lawfully established pursuant to a prior district plan, for example, and otherwise protected as an existing use under section 10 or 10B, a regional plan could change the

⁷¹¹ See Local Government Act 2002, Sch 10, cl 2(2)(d), which requires local authorities to make provision for “flood protection and control works” in its statutorily mandated “long-term plans”.

⁷¹² MfE, *Meeting the challenges of future flooding*, above n 421, at 35-39.

⁷¹³ MfE, *Guidance*, above n 3, at 40.

⁷¹⁴ Regional councils may delegate these hazard management functions to territorial authorities: RMA, s 33.

⁷¹⁵ RMA, s 64.

⁷¹⁶ Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 90.

permitted land use and thus potentially override the district plan (using section 20A). This could require a consent to be applied for, or for the works to be disestablished, depending on the regional plan provision.

The other statute potentially regulating coastal protection works is the Soil Conservation and Rivers Control Act 1941 (herein SCRCa). The powers of the Catchment Boards initially established under the old Act have now been transferred to regional councils under Schedule 8, pt 1 of the Resource Management Act. While still valid, section 10A of SCRCa states that “nothing in this Act shall derogate from the provisions of... the Resource Management Act 1991”. This has been interpreted as requiring that a resource consent be applied for, even for activities in pursuance of the objectives under SCRCa.⁷¹⁷ Section 126 of SCRCa states that “[it] shall be a function of every Catchment Board to minimise and prevent damage within its district by floods and erosion”, and that “[e]ach Board shall have all such powers, rights, and privileges as may reasonably be necessary or expedient to enable it to carry out its functions, and in particular each Board shall have power to construct, reconstruct, alter, repair, and maintain all such works”.

We can presume that these powers apply to the establishment of coastal protection works, rather than just river flood protection works for controlling rivers. In the case of *Faulkner v Gisborne District Council*, the Planning Tribunal and the High Court did not question the application of the SCRCa regime to coastal protection works.⁷¹⁸ However, it ought to be noted that this could be questioned for a number of reasons:

- section 126 does not describe activities that are applicable to coastal protection;⁷¹⁹

⁷¹⁷ *Gisborne District Council & Ors v Faulkner & Anor* Planning Tribunal A 82/94, 13 October 1994, at 11.

⁷¹⁸ *Faulkner v Gisborne DC*, above n 63.

⁷¹⁹ Section 126(2) states that the powers conferred on Catchment Boards are those that are “necessary or expedient for—

- (a) controlling or regulating the flow of water towards and into watercourses:
- (b) controlling or regulating the flow of water in and from watercourses:
- (c) preventing or lessening any likelihood of the overflow or breaking of the banks of any watercourse:
- (d) preventing or lessening any damage which may be occasioned by any such overflow or breaking of the banks:
- (e) *preventing or lessening erosion or the likelihood of erosion*:
- (f) promoting soil conservation.” (emphasis added).

It is notable that none of these, with the possible exception of erosion, appears to relate to mitigating coastal hazards.

- the Act does not contain the word “coast” and only mentions the word “sea” in relation rivers;
- the key term “watercourse” does not readily apply to the sea;⁷²⁰ and
- references to “tidal waters” and “tidal lands” in the interpretation section are no longer paired with any non-repealed section under the Act.

Specifically, the older provision for “works on tidal waters” was repealed by the passing of the Resource Management Act.⁷²¹ On the other hand, section 2(1A) states that “[f]or the purposes of the definition of the term Catchment Board in subsection (1), a territorial authority shall be deemed to have jurisdiction over any part of the territorial sea adjacent to its territorial authority district which is not within a catchment district.” Even if this does establish a basis for regional councils to regulate coastal hazards, it is unclear whether SCRCA is necessary for regulating the establishment of new coastal protection works – these may be allowed under the Resource Management Act and the Local Government Act 2002. Furthermore, if SCRCA does not govern the establishment of new coastal protection works, then the liability provisions under section 148 would not apply. This is important, because section 148 was key to the finding in the *Easton* case that the regional council owed a duty of care in negligence to adequately maintain flood defences on a river.⁷²²

Even assuming that the SCRCA applies to coastal protection works, it is unlikely to avail any applicant seeking to compel local government to either establish, upgrade, or otherwise continue coastal protection works for their benefit. This is because the duties and powers are all framed as being discretionary and upheld by the High Court as such.⁷²³

[I]t must be emphasised that although erosion prevention is undoubtedly one of the purposes of the Act, there is nothing in the Act stating that the erection ...and maintenance of sea walls or other protective barriers is mandatory, wherever land is affected by erosion...The empowering provisions are framed in necessarily discretionary terms (see s126, 133). Clearly, there must be scope for the exercise of professional judgment and for even a policy of “managed retreat” where appropriate.

All of these findings suggest that, while some obligations for operational maintenance may be governed by SCRCA, the consenting regime of the Resource Management Act is the main source of guidance for the establishment and/or upgrading of coastal defence works. For our purposes,

⁷²⁰ See the interpretation section at s 2(1), which states that a “water course includes every river, stream, passage, and channel on or under the ground, whether natural or not, through which water flows, whether continuously or intermittently”.

⁷²¹ See the repealed s 168 entitled “Board not to construct works on tidal waters without Governor-General’s sanction”.

⁷²² *Easton Agriculture* (HC) above n 710.

⁷²³ *Faulkner v Gisborne DC*, above n 63, at 628-629.

the significance of SCRCA comes from the fact that it may provide the basis for a duty of care in negligence for operational maintenance of protective structures (discussed in (5), below).

4. Coastal protection works in the Environment Court

The Environment Court has stated on multiple occasions that it does not have the authority to compel a regional or district council to erect any coastal protection works.⁷²⁴ This not only applies to establishment of new coastal protection works, but also extends to petitions from applicants for councils to implement alternative types of coastal protection work. To quote the Environment Court in one of the appeals over coastal defences at Waihi beach:⁷²⁵

It has been said often enough that this Court is not vested with authority to commit a council to the financial obligation and responsibility of undertaking a public work, nor to determine how a council's funds should be allocated in the face of other priorities beyond the Court's knowledge or concern. We therefore apprehend that, however attracted we are to the Society's plea for the timber wall to be reinstated and maintained, a decision to pursue that course must rest with the District Council.

However, the Court does have a role in determining whether a proposal is in compliance with the Act. In this sense, the Environment Court acts as a principled veto on any proposal for coastal protection works.

Front of mind in any current application are the provisions of the 2010 NZCPS which seek to discourage the use of hard protection structures; in particular, Policy 27 provides:

Policy 27 Strategies for protecting significant existing development from coastal hazard risk

- (1) In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes:
 - (a) promoting and identifying long-term sustainable risk reduction approaches including the relocation or removal of existing development or structures at risk;
 - (b) identifying the consequences of potential strategic options relative to the option of 'do-nothing';

⁷²⁴ *Bay of Plenty RC v Western Bay of Plenty DC*, above n 692, at [66]; *Mason & Ors v Bay of Plenty Regional Council & Anor* A98-07 EnvC Auckland, Nov 30 2007 at [69]-[70]. See also *Thacker v Christchurch CC*, above n 496, at [24], where the Court commented that "it is not our function to review the manner in which the City Council carries out its river control responsibilities. We certainly have no jurisdiction to comment on or interfere with those responsibilities by directing them to carry out that work in the manner suggested by [the applicants]".

⁷²⁵ At [66].

- (c) recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations;
 - (d) recognising and considering the environmental and social costs of permitting hard protection structures to protect private property; and
 - (e) identifying and planning for transition mechanisms and timeframes for moving to more sustainable approaches.
- (2) In evaluating options under (1):
- (a) focus on approaches to risk management that reduce the need for hard protection structures and similar engineering interventions;
 - (b) take into account the nature of the coastal hazard risk and how it might change over at least a 100-year timeframe, including the expected effects of climate change; and
 - (c) evaluate the likely costs and benefits of any proposed coastal hazard risk reduction options.
- (3) Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.
- (4) Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.

It is clear from Policy 27 that hard-protection structures, while discouraged, are not entirely foreclosed. Policy 27 also encourages initiatives to shift coastal protection strategies away from the use of coastal protection structures, even if they are seen as necessary in the short term. This aim is supported by Policy 25(e) which aims to “discourage hard protection structures and promote the use of alternatives to them, including natural defences”. However, as the subsequent analysis of decisions in the Environment Court shows, Policy 27 partly codifies the prior practice of the Court. Notably, Policy 27 does not contain a strong provision to discourage development behind coastal defences which increase the value of existing assets. This is despite the fact that submissions were made during the consultation that advocated for such a measure.⁷²⁶ Some protection is provided by Policy 25(a), which implores decision makers to “avoid” increasing the potential “economic harm” from coastal hazards.

Prior decisions of the Environment Court are in keeping with Policy 27 in that they accept the necessity of using coastal protection works to maintain existing development. One reason for doing so is the fact that a lot of development occurred in a prior era and cannot be readily abandoned even if such development would not now be deemed appropriate. However,

⁷²⁶ Simpson Grierson, *Councils’ Ability to Limit Development in Natural Hazard Areas* (2018), above n 11, at 81-82.

previous cases have tended to address the issue of an existing coastal defence structure detracting from the natural character of the area. The Environment Court in one such case endorsed the following comment by one of the expert witnesses:⁷²⁷

Times change and legislation changes... much of the existing built environment was established many decades ago, before the principles of coastal erosion were as well understood as they are now, and before the RMA was enacted. The principles of maintaining and enhancing natural character are hard to apply to an environment where there are well established physical resources present.

When faced with such situations, the Court has commented that “the preservation of the natural character of the coastal environment is not an end in itself, but subordinate to the primary purpose of sustainable management”.⁷²⁸ In particular, the court has noted that sustainable management entails “promoting sustainable management of both natural and physical resources”; this in turn includes “sustaining the potential of those resources to meet future generational needs”, which includes the protection of existing development in highly desired areas.⁷²⁹ To quote the Court in one of the decisions concerning the partial renewal of coastal defence structures along Waihi Beach:⁷³⁰

While restoration of the natural coastal environment is an important objective generally speaking, that has to be balanced in this case with the issue of protecting the built infrastructure that exists along this beachfront on a footing consistent with the RMA’s purpose of promoting the sustainable management of natural and physical resources. The resources in the latter sense include significant coastal-oriented development and associated on-site layouts for residential use and enjoyment. That state of affairs has come about over time under lawful sanction. And with it there has been an enduringly obvious form of protective seawall in existence for a considerable period as a feature of the beach, well known both to beachfront property owners and others of the local community.

It is questionable whether this approach would be so readily entertained under the current NZCPS. However, in that Waihi Beach case, the proposal eventually accepted as “appropriate” was for a wall of reduced length and of better design.⁷³¹ This suggests that the future approach of the Environment Court could be to further limit the scale of any ‘upgrades’ to existing protection structures, potentially requiring them to decrease in scale.

The approach of the Court during the Waihi seawall saga is also illuminating in that, as a condition of its approval, the council would need to investigate long-term solutions to the problem of coastal erosion in the area, and therefore only view the existing protective structures as an interim measure.⁷³² While this is a helpful strategy for developing alternatives to the use

⁷²⁷ *Mason v Bay of Plenty RC*, above n 724, at [81].

⁷²⁸ *Bay of Plenty RC v Western Bay of Plenty DC*, above n 692, at [68].

⁷²⁹ At [42].

⁷³⁰ *Mason*, above n 724, at [73].

⁷³¹ At [78].

⁷³² At [84].

of hard defences, it simultaneously locks the local council into ongoing expenditure. In their favour, conditions which require alternatives to hard protection to be explored as a pre-condition of allowing hard defences could be one means of justifying the renewal of hard defences under the NZCPS.

Another situation in which the coastal defence structures can be “locked in” as part of the built environment is where an unbroken chain of private defence structures has been erected along a significant portion of the coast. In the *Sustainable Ventures* case,⁷³³ the applicant had applied for bundle of consents to establish a series of high-value holiday apartments, and had requested that its existing rock wall be allowed to be enlarged as a buffer against the uncertain future effects of sea-level rise. The council decided to allow the consent for the construction of the apartments but subject to an alternative “coast care” regime, by which natural barriers would be strengthened as an alternative to the expansion of the rock wall. The Environment Court found that this was ultra vires because it was contrary to the proposal made by *Sustainable Ventures*. However, the Court also noted that the inclusion of the coast care condition should be invalid on the basis that neighbouring property owners, who may have supported the publicly notified rock-wall proposal, were likely to have done so on the basis that the rock-wall “holds the line” along the coast.⁷³⁴ To quote the Court:⁷³⁵

There are even more significant issues which arise when considering the altered character or effects/impacts of the Coast Care Conditions as opposed to the SVL proposal. Those altered effects or impacts have particular implications for other properties along the Pakawau Coast....

...The SVL proposal to maintain and eventually upgrade the existing rock wall effectively *holds the line* of the coast along the line of the existing rock wall at the front of SVL’s land. The rock wall generally aligns with the line of other protection works which have been undertaken by property owners along the Pakawau coastline...

The existence of those other protection works was one of the factors which led to SVL adopting the rock wall option...

...The coast care proposal is likely to lead to a retreat of the existing coastline ..

Such an outcome has significant implications for other property owners along the Pakawau sea frontage. It is apparent that the efficacy of other protection structures along the Pakawau coastline could be compromised if the hard protection provided by a rock wall along the SVL frontage was replaced by the soft protection of a dune system.

The application of this finding may be limited by the technical issue – i.e., the inclusion of different conditions than those applied for. Yet it poses the possibility that the imposition of a

⁷³³ *Sustainable Ventures Ltd v Tasman District Council* [2012] NZEnvC 235.

⁷³⁴ At [39].

⁷³⁵ At [38]-[41].

soft-engineering program in one location could be challenged on the grounds that it significantly affected neighbouring properties.

A further point to note on the disestablishment of private defences of the kind described in the *Sustainable Ventures* case is that, if such measures were brought in via a plan change were likely to result in land becoming subject to rapid erosion, then a case could potentially be brought under section 85 to attest that the new plan rendered the land “incapable of reasonable use”. By contrast, a gradual disestablishment of public defence structures would be unlikely to meet this threshold.⁷³⁶

Related to the built environment is the quantum of the existing investment or of any proposed investment. Section 104(2A) states that a consent authority “must have regard to the value of the investment of the existing consent holder”. This is therefore of particular significance in situations such as that described in the *Sustainable Ventures* case, in which a large investment is being protected by a private defence structure. Applicants with high value investments will likely want to retain control over their defence structures so that they are not beholden to the uncertainties which can surround the continuation/renewal of public defence structures.⁷³⁷ When a renewal of a consent is applied for, applicants are also likely to argue that more rigorous hard protection is warranted on the basis that the high value of existing or proposed development is such that more strenuous protections are needed to offset the uncertainties created by climate change. In other words, a precautionary approach may be argued in favour of allowing hard protection structures. This type of argument was made in the *Sustainable Ventures* case, where it may have carried some weight given that the consent was eventually approved.⁷³⁸ By contrast, this argument was rejected in the *Fore World* case, in which a plan change was sought to allow for new residential development in a hazardous coastal area, subject to erosion protections through a beach nourishment scheme.⁷³⁹

Finally, when deciding whether to allow a coastal protection scheme, the Environment Court looks at what is likely to occur in practice, rather than assuming that proposals can be taken at face value. First, even when proposals are made for privately funded coastal protections, the

⁷³⁶ See, for example, *Mullins v Auckland CC*, above n 271, and accompanying text.

⁷³⁷ See for instance *Gallagher v Tasman DC*, above n 129, at [155], where the Court commented on the uncertainty surrounding future flooding and erosion on the property due to possibility of a revetment in the area being removed in 30 years.

⁷³⁸ *Sustainable Ventures*, above n 733, at [13].

⁷³⁹ *Fore World Developments*, above n 274, at [18].

Environment Court will subject the funding arrangements to considerable scrutiny. For example, in the *Fore World* case, a beach nourishment program was rejected in part because the funding proposal was deemed to be risky, due to a potential shortfall in costs, and would be potentially unenforceable if participants failed to contribute.⁷⁴⁰ Second, the Court has noted that contributions to the maintenance of public walls, such as those protecting access ways, may also create expectations that the council ought to *do something*. A good example is the *Carter Holt Harvey* case, in which the applicant offered \$200,000 to upgrade the narrow public access way to an otherwise isolated coastal area. The Court commented that:⁷⁴¹

Although it is not determinative in our considerations, we observe that approving the subdivision and allowing construction of six further houses on the CHH site, in a situation where CHH has made a cash contribution to upgrade the road, might place the Council in a very difficult position in the future. The payment of a financial contribution to roading by CHH as part of this subdivision may well create an expectation on the part of future owners of the residential lots that the Council would continue to maintain the road and keep it open, even if it makes no economic sense to do so.

This indicates that the Court will actively seek to avoid situations in which residents in hazardous coastal areas are likely to seek protection from the Council. A likely reason for giving such weight to this issue is the fact that, in practice, political actors in local government and/or sympathetic planners are likely to give in to the passionate cries for help from homeowners. In the *Holt* decision, the Court went so far as to require the applicants to sign a deed stating that the consent holder, and any future purchaser, would not lobby their council for coastal protection works.⁷⁴² Given the accounts from Bronwyn Hayward⁷⁴³ and Mick Strack⁷⁴⁴ detailing how effective coastal lobby groups can be in persuading local government to allow or even publicly fund protection works, this concern on the part of the Environment Court is not misplaced.

In the alternative, granting consent for residential development in hazardous areas, even with conditions forbidding coastal defence works, may lead to illegal efforts on the part of property owners to protect their homes. This is a phenomenon that has been documented in multiple cases,⁷⁴⁵ and we should assume that there will be more instances in the future. In addition to

⁷⁴⁰ *Fore World Developments*, above n 274, at [20].

⁷⁴¹ *Carter Holt Harvey*, above n 130, at [136].

⁷⁴² *Otago RC v Dunedin CC*, above n 521.

⁷⁴³ Bronwyn Hayward, “Nowhere Far From the Sea”, above n 10.

⁷⁴⁴ Mick Strack, “Property Loss due to coastal erosion”, above n 60.

⁷⁴⁵ See *Bay of Plenty RC v Western Bay of Plenty DC*, above n 692, at [19]. *Gisborne DC v Faulkner (Planning Tribunal)*, above n 717. See also *Ohawini Bay Ltd v Whangarei District Council* A 68-06 EnvC Auckland, May 31 2006. In that case, a coastal homeowner was prosecuted for placing a wall of cement blocks along the beach facing edge of their property. He attempted to claim that this did not meet the definition of a coastal protection work, as defined under the relevant plan.

the problem of having to prosecute such persons, we ought to also consider that illegal seawalls are likely to have significant effects on the amenity of an area. For example, a wall formed from used tires is considered less attractive than one from natural stone and boulders.⁷⁴⁶ Such make-shift structures are also likely to be extremely unsafe, especially during and after major storms.⁷⁴⁷ Moreover, the council is likely to be tasked with the meeting the costs of the clean-up and/or undertaking any prosecution.

The Environment Court is aware of potential consequences of private homeowners attempting to erect their own coastal protective structures. In the *Carter Holt Harvey* decision, the applicant sought to strengthen their proposal's compliance with Policy 25(e) of NZCPS by including a consent condition which prevented the use of any hard defence structures by future landowners. The Court observed that, while in keeping with the NZCPS, this assurance was unlikely to end well:

We accept that the CHH proposal to prohibit hard protection structures on the residential allotments by way of covenant accords with Policy 25(e). However, we refer to the evidence of Mr Verstappen on this issue. He has some 20 years of experience in the Tasman District and Region. It was his observation, having encountered similar situations throughout Tasman, that in the face of erosion and inundation "the almost universal human response is to fight and defend and preserve, not retreat and relocate".

Mr Verstappen testified as to the propensity for landowners to establish hard engineering defences to erosion and inundation, whether they were consented or not. He gave examples of this. As a matter of law, we do not think that we can assume that future landowners on the CHH land will act in defiance in the terms of consent conditions by erecting hard structures to protect their land. However, Mr Verstappen's evidence raised real issues about the practicality of the no hard structures condition and the likelihood of conflict between future landowners seeking to protect their land and the Council seeking to enforce the conditions of any subdivision consent.

This discussion about the Environment Court's desire to avoid the problems posed by requests for coastal protection works shows that, once the full long-term costs of coastal protection works are made clear, hazardous land that may previously have been allowed to be developed may now be effectively off limits unless it contains a relocation condition. Furthermore, it also makes clear that, while prohibitions on coastal protection measures may be acceptable in theory, especially at the start of consent, it often proves to cause great pains in practice. Therefore, in effectively banning coastal protection works for new development, the NZCPS also heightens the restrictions on new development more generally because the unacknowledged 'backup option' of employing coastal protection work is now presumed to be foreclosed.

⁷⁴⁶ A tyre wall was documented in *Bay of Plenty RC v Western Bay of Plenty DC*, above n 692, at [16].

⁷⁴⁷ *Bay of Plenty RC v Western Bay of Plenty DC*, above n 692, at [62].

5. Civil Liability for the maintenance and monitoring of coastal protection works

An additional risk in erecting of coastal protection works, especially hard defences, is the potential civil liability that accompanies them. On the one hand, it is clear that a negligence claim founded upon a failure to construct flood defences or undertake significant upgrades could never be sustained. This is for several reasons. The first is that negligence law does not ordinarily confer liability for pure omissions.⁷⁴⁸ The second is that the establishment of coastal defences is likely to be a discretionary action rather than a statutory obligation, and is likely to be a political decision involving the allocation of public resources.⁷⁴⁹

On the other hand, liability could readily attach to a failure to maintain or monitor defence works, in part because of the reliance placed in the local authority, the control that the authority exerts over the threat,⁷⁵⁰ and the fact that defence structures are often funded through special rates, thereby creating an identifiable class of persons in a quasi-contractual relationship. Relevantly, the Local Government Act 2002 holds that the maintenance of flood defences is non-delegable in contract, meaning that local authorities cannot shield themselves from the negligence of their contractors.⁷⁵¹

Whether a defendant council is a regional or territorial authority is also important to their liability to maintain coastal protection works. This is because regional councils are subject to the Soil Conservation and Rivers Control Act 1941 that contains special provisions limiting the types of civil claims that can be brought for damage caused through the discharging of their erosion and flood protection function under section 126. The relevant liability provision states:

148 Liability for damages arising from neglect

- (1) No Board shall be liable for injury to any land or other property caused without negligence of the Board by the accidental overflowing of any watercourse, or by the sudden breaking of any bank, dam, sluice, or reservoir made or maintained by the Board.
- (2) If the owner or occupier of any land or other property gives notice in writing to any Board warning it that any dam, sluice, or reservoir made or maintained by the Board is weak, and requiring it to strengthen or repair the same, and the Board within a reasonable time after

⁷⁴⁸ See *Stovin v Wise* [1996] UKHL 15, [1996] AC 923, [1996] 3 All ER 801.

⁷⁴⁹ See Justine Bell-James and Anna Huggins, "Compliance with statutory directives and the negligence liability of public authorities: climate change and coastal development" (2017) 34 EPLJ 398, at 409.

⁷⁵⁰ Jan McDonald "A risk climate for decision-making: The liability of development authorities for climate change impacts" (2007) 24 EPLJ 405, at 413.

⁷⁵¹ Local Government Act 2002, sch 7, cl 32(7).

the delivery of the notice fails to take proper and reasonable precautions efficiently to strengthen or repair the dam, sluice, or reservoir, then the amount of any damages sustained through that failure shall be made good by the Board.

This section has been interpreted by the Courts as barring any civil claim other than actions in negligence.⁷⁵² However, as a corollary to this ouster of other civil actions, such as nuisance, the Courts have also determined that the statutory scheme must also support a duty of care being owed for actions carried out pursuant to the Act. For this reason (amongst others), the High Court in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* held that a duty of care was owed by the local authority to maintain and monitor existing flood defences.⁷⁵³ Given that the SCRCA regime has been held to be applicable to coastal defence works,⁷⁵⁴ we should assume that a duty of care is owed for the maintenance and monitoring coastal protection works in sufficiently analogous situations to the *Easton* case. The finding of a duty in the *Easton* case was supported by a finding that that maintenance and monitoring were operational matters because the majority of the flood protection budget was reliably put towards these matters, and that 80% of the flood protection budget had been raised from a special levee which the plaintiffs had paid.⁷⁵⁵

However, while a duty can be recognised for the maintenance and monitoring of defence structures, proving that negligence is the cause of the loss has been difficult for plaintiffs. This is because local authority defendants can readily assert that the damage would have been sustained, even without negligence, because of the magnitude of the flooding or other event.⁷⁵⁶ Perhaps for this reason, there has reportedly been very little litigation over flood events in New Zealand.⁷⁵⁷ But even the mere threat of civil litigation could negatively influence the decisions of councils, especially if the council is pursuing a managed retreat strategy in an area currently protected by ailing hard defences. This issue is likely to be compounded if councils begin to be regularly threatened by class action lawsuits, as is currently occurring in the aftermath of the

⁷⁵² *Easton Agriculture* (HC), above n 710, at [106].

⁷⁵³ *Easton Agriculture* (HC), at [132].

⁷⁵⁴ *Faulkner v Gisborne DC*, above n 63, and *Gisborne DC v Faulkner (Planning Tribunal)*, above n 717.

⁷⁵⁵ *Easton Agriculture* (HC), at [133]-[141].

⁷⁵⁶ See, *Atlas Properties Ltd v. Kapiti Coast District Council* CA30/02, 20 June 2002. In that case, the plaintiff failed to prove that a failure to upgrade a culvert would have prevented the damage from occurring to his property. See also *Easton Agriculture* (HC), above n 710, at [224], discussed in more detail below, notes 760-780 and accompanying text.

⁷⁵⁷ Jeremy Finn "Floods" in Jeremy Finn and Elizabeth Toomey (eds) *Legal Responses to Natural Disasters* (Thompson Reuters, Wellington, 2015) 77 at 5.2.

Edgumbe floods.⁷⁵⁸ It could also be compounded if private insurers begin suing local authorities on behalf of their clients for flood damage.⁷⁵⁹

Example of application: *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*⁷⁶⁰

In February 2004 the Manawatu river was subject to a 1-in-110-year flood, the third largest on record since records began in the 19th century.⁷⁶¹ The Regional Council's flood protection measures, originally established between 1959-1965, had been designed to withstand a 1-in-100 year flooding event.⁷⁶² There was a "catastrophic" stopbank failure that was subsequently found by a specialist committee to have been caused by the proximity of a bridge that formed part of a major highway.⁷⁶³ The breach of the stopbank caused the flooding of an estimated 2000 hectares of adjacent cropland.⁷⁶⁴ The two plaintiffs attested that the flooding had caused them a total of \$2.5 million worth of damage.⁷⁶⁵

The plaintiffs advanced their case on four grounds: negligence, private nuisance, *Rylands v Fletcher* liability, and breach of statutory duty.⁷⁶⁶ These claims were determined by the Court in three parts: whether liability on any grounds was excluded by section 148(1) of the Soil Conservation and Rivers Control Act 1941 (SCRCA); whether a duty of care was owed in negligence; and whether the other elements (breach and causation) could be made out.

On the first issue, the Court found that the Regional Council was a "board" for purposes of the SCRCA regime, and therefore subject to the liability provisions, most notably, section 148.⁷⁶⁷ The Court found that the statutory duties owed by catchment boards under the SCRCA regime had been passed to regional councils, and that the flood protection works at issue were clearly subject to the Act.⁷⁶⁸ However, the Court found that the wording of section 148 barred or ousted

⁷⁵⁸ Matt Shand, "Leaky homes lawyer looks to join Edgumbe legal class action" (20 July 2017) Stuff <www.stuff.co.nz>.

⁷⁵⁹ Upon inquiries made by Sean Brennan, the Insurance Council of New Zealand has stated that they are unaware of any subrogated claim being made against a local authority for flooding. See Sean Brennan "Local Authority Liability: Where Should Loss Fall?" (2015) 46 VUWLR 85 at 107.

⁷⁶⁰ *Easton Agriculture* (HC), above n 710.

⁷⁶¹ At [1] and [36].

⁷⁶² At [10]-[11].

⁷⁶³ At [61], [65].

⁷⁶⁴ At [61], [71].

⁷⁶⁵ At [86].

⁷⁶⁶ At [78].

⁷⁶⁷ At [102].

⁷⁶⁸ At [104].

any civil claims from being brought other than negligence,⁷⁶⁹ and therein concluded that liability in the case would be dependent upon proof of negligence.⁷⁷⁰

On the second issue, the Court found that a duty of care was owed to plaintiffs. In particular, the Court found that section 148(1) ought to support the existence of a duty of care in negligence, noting that “it would be a remarkable consequence if s 148 were to have the effect of excluding causes of action other than negligence, but that negligence itself could not then arise”.⁷⁷¹

The plaintiffs argued for a duty of care on the basis of multiple alleged failures, including a failure to evaluate the condition of the stopbank during a review of the entire flood protection scheme 6 years earlier, a failure to conduct hydraulic modelling of the waterway, and “failing to generally maintain to design standard and/or monitor the condition of the stopbank under the bridge”.⁷⁷² The first two of these were found to be excluded on the basis that they were outside of the statutory limitation period for bringing a civil claim.⁷⁷³ The Court thus held that the proposed duty to be assessed was solely one of “monitoring and maintaining” the stopbanks.⁷⁷⁴

The plaintiffs submitted that a duty of maintenance and monitoring ought to be recognised because: first, the council had a statutory duty to protect and maintain water ways within its control; second, the water ways were funded by special rates, creating an almost contractual relationship and making the plaintiffs part of a clearly defined class of persons; third, that reliance had been placed in the Council to carry out its duty with the company; and, fourth, that a failure to monitor and maintain critical areas of the flood protection scheme could result in significant damage being caused to adjacent landowners.⁷⁷⁵

In response, the Regional Council submitted that recognising the duty had major policy implications – notably, opening the floodgates to negligence claims after any flooding event⁷⁷⁶ – and that it was inaccurate to categorise the monitoring and maintenance of the flood

⁷⁶⁹ *Easton Agriculture* (HC), above n 710, at [106].

⁷⁷⁰ At [121].

⁷⁷¹ At [132].

⁷⁷² At [79].

⁷⁷³ At [123].

⁷⁷⁴ At [125].

⁷⁷⁵ At [126].

⁷⁷⁶ At [128].

protection scheme as merely operational, given that funding for the scheme was a political question.⁷⁷⁷

The Court accepted the submissions of the plaintiffs, finding that:

1. a duty was supported by the Act;
2. maintenance and monitoring were operational matters given that the majority of the flood protection budget was reliably put towards these matters, and given that the 80% of the flood protection budget raised from a special levy that the plaintiffs both paid; and
3. The damage was entirely foreseeable.⁷⁷⁸

However, while both a duty of care and a breach were found, the Court ultimately found that the plaintiffs could not establish that the failure to maintain and monitor the bridge had caused the failure of the stop bank.⁷⁷⁹ The issue of causation was revisited by the Court of Appeal, who ultimately affirmed the findings of the High Court without revisiting the issue of whether a duty was owed.⁷⁸⁰

In summary, an action in negligence against a council is possible in respect of a duty to maintain flood and coastal hazard protection works. That duty of care may be owed to ratepayers who are protected by such works. However, the issue is likely to turn on proof of causation of the damage: whether it was due to a breach of duty or it would have happened anyway, perhaps because of the size of the natural hazard event (e.g. amount of rain or strength of storm, et cetera).

⁷⁷⁷ *Easton Agriculture* (HC), above n 710, at [130].

⁷⁷⁸ At [133]-[141].

⁷⁷⁹ At [224].

⁷⁸⁰ *Easton Agriculture* (CA), above n 710.

Chapter 7: Capacity to ‘Retreat’: legal barriers and enablers to managed retreat

This chapter addresses managed retreat in detail: the difficulties in using it within the current legal rules and ways that it may be able to be undertaken. The following matters are included:

Introduction

- (1) Possibilities for getting around the protections for existing use rights:
 - (a) Argument 1: existing residential use rights could be modified under a Regional Plan
 Example of application: Re-zoning in the aftermath of the Matatā flooding
 - (b) Argument 2: Consent conditions could be reviewed under section 128
- (2) The use of Acquisition Instruments
- (3) Canterbury Earthquake Recovery Act 2011
- (4) Applying the *Quake Outcasts* decision to residential development in the hazardous coastal areas

Introduction

Over the past decade, a number of central government initiatives have gradually addressed the prevention of additional hazardous development.⁷⁸¹ While additional directives could be passed – such as a national environmental standard on sea-level rise – the prevention of additional hazardous development is no longer the most pressing issue. Rather, the focus now needs to turn to addressing the maladaptive development that has already occurred.

It is possible to do nothing and let individual property owners bear the losses. However, this will create hazards – such as from floating debris and energy connections – if houses and other structures are not removed in advance of their uninhabitability. It is better to plan and manage relocation, even if it will raise the issue of who pays for it. This is currently not provided for at a national level.⁷⁸² If local councils attempt to manage relocation, whether before or after hazard risks eventuate, there will be differences of opinion about what can and should be done, and

⁷⁸¹ See NZCPS 2010, and MfE, *Guidance*, above n 3.

⁷⁸² For example, for a discussion of the (lack of) EQC coverage, see Vanessa James, Catherine Iorns and Jesse Watts, *The Extent of EQC’s liability for damage associated with sea-level rise* (Deep South National Science Challenge, Research Report, June 2019).

calls by homeowners for compensation. Dealing with all of this at the local level carries fiscal, legal and political risks for councils.

The legal and political obstacles to addressing existing maladaptive development are far greater than those faced in preventing further development. This is because the current planning paradigm treats existing uses and resource consents for residential development as akin to private property. It does this by granting use rights and consequent abilities to “rebuild” or reestablish in perpetuity to be surrendered only upon the payment of compensation by the state. It does not conventionally allow for existing use rights to be revoked even when changes in the surrounding environment fundamentally alter the nature of the current use. The legal and political obstacles arise primarily because we have to rely upon existing legal and institutional frameworks – most notably the Local Government Act 2002 and Resource Management Act 1991 – to implement climate change adaptation, when the powers necessary are not included. (One alternative could be to pass a stand-alone statute to vest greater power in the hands of central government to implement a climate adaptation strategy, including clear powers of acquisition to implement a policy of managed retreat.⁷⁸³)

Under the Resource Management Act, residential development which is established pursuant to the district plan or was lawfully established prior to the passing of a district plan is allowed to occur indefinitely, regardless of any future changes in the district plan, or even if a national environmental standard is passed. However, in contravention of this general doctrine, the Resource Management Act does allow for existing use rights to be revoked if they become contrary to a rule in a regional plan. This theoretically provides a mechanism for implementing a policy of managed retreat from hazardous areas. However, the obstacles to relying on this mechanism are considerable.

There is genuine legal uncertainty around this power to revoke an existing use. The only example of a regional council attempting to revoke existing permissions for a residential development is that in Matatā (discussed below). While the regional council has a legal duty to regulate land uses in order to avoid or mitigate natural hazards, it is not entirely clear that the courts would interpret this duty as allowing for a plan change to prohibit residential development in an existing residential area. This would presumably effectively revoke resource consent approvals for existing residences, for example, or alter permissions for other uses previously permitted by

⁷⁸³ Rive and Weeks, above n 120, at 9.5.

a district plan. It is not clear this is even allowed in principle, let alone whether the answer depends on the provisions of the particular plans in question.

Even if regional councils are found to have this power, there is no guarantee that they would choose to exercise it; for example, it might be too expensive to compensate homeowners (eg under s 85). This then raises the equally complicated legal issue of whether central government could draft national level instruments under the RMA to compel regional councils to exercise this power. As the discussion in Matatā shows, this is politically as well as legally difficult to solve.

Even if a national level RMA instrument could be devised, we should question whether this strategy should actually be pursued. It is an indirect way of achieving managed retreat; central government may be better addressing this themselves rather than requiring regional councils to do it, especially in light of funding issues, should compensation be required. Moreover, passing national level documents under the RMA can be more arduous than passing new legislation to address these specific issues. Finally, if central government acted against the wishes of regional councils, such an action would adversely affect the relationship between central and local government.

In light of these difficulties, it is likely to be best for a policy of managed retreat to be pursued nationally through the passing of clear legislation. This could involve amendments to the RMA, or it could involve the establishment of a central agency with expanded powers of acquisition. A promising mechanism uncovered in the research for this report is the potential for lease-back arrangements, wherein the land is purchased and leased back to residents subject to conditions which require the land to be abandoned once sea-level rise reaches a pre-specified level.

1. Possibilities for getting around the protections for existing use rights

A managed retreat policy by definition involves an eventual abandonment of land that is currently used for residential purposes. This therefore requires central or local government to remove the existing permissions that allow for residential use. Existing use rights for residential uses are protected by section 123 of the Act (which states that, unless otherwise specified in the consent, a land use consent and/or a subdivision consent are granted for an “unlimited” period of time) and by sections 10, 10A, and 10B (which provide protections for specified lawfully established uses after the changing of district plans and national environmental standards), and 20A (which provides protections for lawful uses after the changing of regional plans).

This chapter will examine two limited and arguably potential legal means of implementing a policy of managed retreat under the current confines of the RMA: the regulation of residential property through the regional plan, and the ability to review resource consent conditions.

(a) Method 1: modify existing residential use rights in a regional plan

Different rules apply to the continuation of lawfully established land uses at the district level than at the regional level. At the district level, development rights permitted by consent or by rule continue in perpetuity from the date of establishment, with the right to continue the activity if its effects are the same or similar in character, intensity and scale as before the changed rule. However, at the regional level, activities which become non-complying or prohibited by a regional plan can be forced to cease. In this way, the regional council is able to regulate activities that would otherwise be enabled to continue by virtue of existing use rights. The question is whether these powers apply to residential development. The detailed provisions follow.

Section 10 of the RMA protects some existing uses of land, even if the use contravenes a rule in a district plan. Conditions on this protection are that the use was lawfully established, that the effects of the current use are similar in character, intensity, and scale, and that the activity has not been discontinued for a period of 12 months. Section 10 thus appears to treat existing uses of land in manner that resembles the classic conception of real property rights: as an entitlement to inhabit in perpetuity. Section 9(1) also provides that activities allowed under section 10 are allowed to continue even when contrary to a national environmental standard. For this reason, national environmental standards cannot be used to revoke existing use rights for residential development.

However, section 10(4) also states that the protections under section 10 do not apply to uses of land that are controlled under section 30(1)(c), which allows the regional council to control land uses for “the avoidance or mitigation of natural hazards”. Section 10(5) also states that “nothing in this section limits section 20A”, which addresses existing use rights under a regional plan. Section 10B directly addresses the issue of buildings established under district plans, but states at 10B(4) that sections 10(4) and (5) also apply to it. As discussed earlier, the Environment Court has found that regional councils have the authority under their functions in section 30 to regulate natural hazards affecting land in coastal areas, including the creation of building lines to prevent residential land becoming subject to coastal erosion.⁷⁸⁴ However, the Court in

⁷⁸⁴ *Franks v Canterbury*, above n 185, at 110-113.

McKinlay noted that a regional council cannot be said to have jurisdiction over the use of land for the avoidance or mitigation of natural hazards if they have not passed rules pursuant to that function. Therefore, in the absence of a regional plan or an applicable regional rule, the protections under section 10 apply, therein protecting the existing use rights.⁷⁸⁵

The next key question is therefore the extent to which existing use rights are protected under section 20A. Under section 20A(2) of the Act, where a regional plan changes a pre-existing activity to now require a resource consent, the activity may continue for a period of 6 months provided that it was lawfully established, that its effects remain similar in character, intensity, and scale, and if a resource consent is applied for within 6 months of the new rule becoming operative. Whether the activity is allowed to continue is dependent upon the outcome of the consent application. In the *McKinlay* case, it was held that there is no overlap between section 10 and section 20A; if the regional plan covers the field, then the protections within section 20A are the ones that apply.⁷⁸⁶ If all of this is accepted, then regional councils appear to have an ability to regulate existing residential use rights through changes to activity status and requiring a new resource consent or through classifying an existing activity as prohibited.

Example of Application: Re-zoning in the aftermath of the Matatā flooding

On 18 May 2005 severe rainfall caused a debris flow in the Awatarariki Stream at Matatā. 124 mm of rain over a 90-minute period caused a one-in-100 to one-in-1000-year flood event.⁷⁸⁷ The flow travelled at a velocity of 15-30 kilometres per hour and deposited an estimated 700,000+ cubic meters of debris into the Matatā lagoon.⁷⁸⁸ 538 people were evacuated,⁷⁸⁹ 27 houses were destroyed, and the flow caused \$20 million in damage.⁷⁹⁰

Insurance for Awatarariki Fanhead properties is now either costly or impossible to obtain.⁷⁹¹ That inability to obtain insurance has led to uncertainty. After the flow, local residents stayed, in the belief that the risk would be mitigated.⁷⁹² However, engineering solutions - to prevent

⁷⁸⁵ *McKinlay v Timaru District Council* [2001] NZRMA 569, (2001) 7 ELRNZ 116 (EC) at [13].

⁷⁸⁶ *McKinlay v Timaru DC*, above n 785, at [13].

⁷⁸⁷ K Spree, *Community Recovery after the 2005 Matata Disaster: Long-term Psychological and Social Impacts* (GNS Science Report 2008/12, March 2008), at 1.

⁷⁸⁸ Whakatāne District Council, *Indicative Business Case - Debris Flow Risk: A Way Forward for the Awatarariki Fanhead*: (A11284434, August 2017), at 2-3.

⁷⁸⁹ Spree, above n 787, at 1.

⁷⁹⁰ Whakatāne District Council, above n 788, at 3.

⁷⁹¹ Whakatāne District Council, at 40.

⁷⁹² Checkpoint, "Anger as Dozens of Matatā Properties Need to be Abandoned" (4 July 2017) Radio New Zealand <www.rnz.co.nz>.

debris from travelling downstream similarly in a future flood - were found to be infeasible. In 2017, the Whakatāne District Council decided to choose the option of retreat for the land-owners living on the Awatarariki Fanhead. The Council saw a need for investment to allow owners within a high risk area to retreat from the risk of loss of life, and to provide certainty to property owners about the future use.⁷⁹³ In May 2017, the Council decided to initiate a change to the district plan to remove current residential zoning and prevent any further development, and discussed with the Bay of Plenty Regional Council the need to compel residents to leave the area.⁷⁹⁴

The District Council planned to buy the 34 sections in the area at a cost of \$14.2 million, obtaining contributions from regional and central government.⁷⁹⁵ The compensation to the property owners was assessed at 2016 valuations, as if there was no flood risk and thus no diminution in value.

In an evaluation report prepared under s 32 of the Resource Management Act 1991, consultants Boffa Miskell found that, while the risk of debris flow is not a coastal hazard, the Awatarariki Fanhead is also susceptible to coastal hazards including from sea-level rise; therefore the proposed restrictions on the use of land would be consistent with the New Zealand Coastal Policy Statement 2010 and with its requirement to reduce the adverse effects from coastal hazards.⁷⁹⁶

In June 2018, the Bay of Plenty Regional Council proposed Plan Change 17 to the Regional Natural Resources Plan; the plan change would insert the rule NH R71 which would prohibit the use of land for a residential activity on any listed Awatarariki Fanhead property from March 2021.⁷⁹⁷

This is the first time that the RMA has been used to extinguish property rights in this way, and it is scheduled to go before a panel of independent hearing commissioners for a decision. If the change to the Regional Plan is approved, this will signal to other councils around New Zealand

⁷⁹³ Whakatāne District Council, at 5.

⁷⁹⁴ Checkpoint, above n 792.

⁷⁹⁵ Robin Martin "Council: \$14.2m to buy homes at risk from Matatā Debris Flows" (14 September 2017) Radio New Zealand <www.rnz.co.nz>.

⁷⁹⁶ Boffa Miskell, Planning provisions for debris flow risk management on the Awatarariki fanhead, Matatā (Section 32 Evaluation Report Prepared for Whakatāne District Council, June 2018), at 10.

⁷⁹⁷ Bay of Plenty Regional Council, *Plan Change 17 (Natural Hazards) to the Regional Natural Resources Plan: Management of Debris Flow hazards on the Awatarariki Fanhead at Matatā* (June 2018).

that regional councils have the power to prohibit residential uses on land that is at risk of coastal hazards in order to remove existing residential activities.⁷⁹⁸

Testing the argument for regulating existing use rights under section 20A

In the *McKinlay* case it was held that there is no overlap between section 10 and section 20A, and that if the regional plan covered the field, then the protections within section 20A were the ones that apply.⁷⁹⁹ In the *Francks* case it was held that a regional council was able to create a setback/building line in a regional plan to prevent coastal land from being developed due to the risk of erosion from sea-level rise.⁸⁰⁰ Taking these two cases in combination, regional plans appear to provide a basis for revoking existing use rights for residential property at risk of natural hazards in the coastal area.

However, for the following reasons, caution ought to be exercised before any significant reliance is placed on this argument. First, it needs to be stressed that the prevention of new residential development (namely, construction and future use) and the removal of existing residential development are likely to be treated as two different powers. There has been no documented case of a regional council using this argument to remove existing residential use rights until 2018 when the Bay of Plenty Regional Council accepted a private plan change from Whakatane District Council which sought to prohibit any continued use of specified Awatarariki Fanhead property for residential uses, due to the land in question being exposed to severe risks from debris flows.⁸⁰¹ Consequently, there are no court cases addressing whether section 20A extends to the removal of existing lawfully established residential development. The only case concerns an obiter comment suggesting that a regional plan could prevent reconstruction.

Second, instinctively this seems like a highly unusual power for Parliament to have conferred upon regional councils, given their other functions. The standard understanding of the division of responsibility between regional and territorial authorities is that territorial authorities are primarily responsible for decisions about residential development. This is most evident in the

⁷⁹⁸ For a more detailed discussion of this Matatā example, including duties in relation to protection of Māori interests, see Catherine Iorns, *Treaty of Waitangi*, above n 2, at 130-140.

⁷⁹⁹ *McKinlay v Timaru DC*, above n 785, at [13].

⁸⁰⁰ *Franks v Canterbury DC*, above n 185, at 110-113.

⁸⁰¹ Plan Change 17, above n 797.

fact that subdivision consents are granted by territorial or unitary authorities, because the control of subdivisions is listed as a function of territorial authorities, but not of regional councils.⁸⁰² Section 31 states that a territorial authority has as one of its functions:

[T]he establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district...

There is no comparable function conferred upon regional councils. By contrast, the functions of regional councils are focused much more upon managing natural resources – in particular, activities in the coastal area and waterways. Consents granted in respect of natural resources – such as discharge consents or water permits – serve a very different purpose than consents granted for residential development. Managing natural resources, which can be finite or fragile, requires the regulator to be able to quickly respond to new scientific evidence which could find that current permits are not sustainable. For this reason, it would not make sense for regional councils to grant resource consents in perpetuity for the vast bulk of the activities that it regulates. This is arguably the chief rationale for the power that regional councils have under section 20A to revoke existing consents that do not comply with a new regional plan. Importantly, this rationale does not readily extend to existing residential uses. It thus may be argued that the alleged power does not fit with the statutory purpose. These arguments suggest that regional councils should not have the function of regulating residential uses of land beyond controlling the initial land use decisions on where development could occur.

The main case that suggests that a regional council may be able to regulate existing uses of land for residential purposes is the *McKinlay* case in the Environment Court.⁸⁰³ However, this issue was largely hypothetical. In *McKinlay*, an existing residential property had been zoned by the district council as being a prohibited activity because of its presence within a flood plain. The council alleged that this would prevent the reconstruction of the property if it was flooded or otherwise destroyed. The property owners contested this, arguing that their property should be allowed to be reconstructed in accordance with the protections for existing use rights in section 10. The regional council joined the appeal as an interested party. The court discussed the relationship between section 10 and section 20A, and suggested that there was no overlap between section 10 and section 20A – if the regional plan covers the field, then the protections within section 20A are the ones that apply.⁸⁰⁴ However, the court in *McKinlay* found that the

⁸⁰² RMA, s 30-31.

⁸⁰³ *McKinlay*, above n 785.

⁸⁰⁴ At [13].

regional council had not yet passed any applicable rules.⁸⁰⁵ For that reason, section 10 was found to apply, although the judge made the comment that “[t]he situation might be different if there was a relevant proposed regional plan”.⁸⁰⁶ For our purposes, this should be treated as an obiter comment. Furthermore, this reading was restricted to the prevention of reconstruction, rather than applying to the removal of existing residential uses of land.

For these reasons, there is still significant legal uncertainty around the scope of section 20A to revoke existing use rights. Under *McKinlay*, the most that can be said is that section 20A may prevent reconstruction, which could still be a useful tool for lowering the value of hazardous land and therein enabling managed retreat. On the other hand, it is only one case, and the issue of existing use rights under section 20A was not material to the outcome.

Finally, even assuming that such a reading of 20A was accepted, there is no guarantee that regional councils would implement a managed retreat policy. This would then raise the issue of whether central government could pass national level documents that compelled the regional council to implement a managed retreat policy. Beyond the political liabilities of doing so, most notably the deterioration of the relationship between central and local government, it ought to be asked whether such a convoluted strategy really ought to be pursued instead of simply passing new legislation.

Note also that this analysis does not address the issue of compensation. It would be inconsistent if a district council is obliged to compensate a homeowner for revocation of a resource consent in an attempt to mitigate loss and damage from coastal hazards, while a regional council does not have to compensate for effectively the same thing. Yet, conversely, if the council did nothing and the sea effectively takes away the ability for the homeowner to reside there, then no compensation is payable for that loss.

Thus, in conclusion, it must be stressed that there is room for interpretation of a regional council’s powers and, despite the power to rezone residential uses being apparent on the face of the sections, the Courts may favour a reading - such as one based on statutory purpose - that does not confer such extraordinary powers on regional councils. One alternative possibility is that the power to revoke consents ought to be exercised through more specific sections, such as section 86 which grants regional and territorial councils the power to purchase land under

⁸⁰⁵ *McKinlay*, above n 785, at [13].

⁸⁰⁶ At [22].

the Public Works Act 1981 for the purpose of bringing non-complying and prohibited activities to an end.

(b) Argument 2: Consent conditions could be reviewed under section 128

Section 128 is entitled “[c]ircumstances when consent conditions can be reviewed”. The list of circumstances includes many scenarios that we would expect, such as when review conditions are included in a resource consent, or when regional rules have set new upper or lower limits for coastal, water, or discharge permits. However, a number of other scenarios are listed which may be of assistance to restricting residential consents in hazard-prone coastal areas. The relevant provisions are:

128 Circumstances when consent conditions can be reviewed

A consent authority may, in accordance with section 129, serve notice on a consent holder of its intention to review the conditions of a resource consent—

...

(ba) in the case of a coastal, water, or discharge permit, or a land use consent granted by a regional council, when relevant national environmental standards or national planning standards have been made; or

(bb) in the case of a land use consent, in relation to a relevant regional rule; or

(c) if the information made available to the consent authority by the applicant for the consent for the purposes of the application contained inaccuracies which materially influenced the decision made on the application and the effects of the exercise of the consent are such that it is necessary to apply more appropriate conditions.

Subsection (c) could be used as a basis for reviewing conditions of a consent where a developer has provided inaccurate information about the natural hazards existing on the property. However, future coastal hazard risks are likely to be better known to a council than to a developer, especially if the Ministry for the Environment Guidelines are adhered to, such that councils obtain the relevant scientific information and predictions of such future hazards. Section 128(1)(c) is thus of less interest than the other subsections and is not focused on further.

Subsections (ba) and (bb) were added by the 2017 Resource Management Act amendments and provide the most promising argument for reviewing residential consents in hazardous coastal areas. Subsection (ba) provides for the possibility of review where a land use activity is enabled

by a consent from the regional council. While most residential consenting is done by local authorities, this section could apply to the erection of private coastal defences. It could also provide for a review of these regional consents if a national standard was passed affecting coastal defence structures.

Subsection (bb), in particular, does not specify that a resource consent being reviewed needs to have been issued by a regional council. Because subsection (ba) explicitly mentions regional councils as the grantor of the consent, it could be fair to assume that subsection (bb) applies to land use consents at the district or territorial level. This reading also mirrors the pattern in sections 9, 10, 10B and 20A, wherein national environmental standards apply to existing use rights lawfully established at the regional level, but do not apply to existing uses established at the district level. It is also consistent with the way that regional rules, through the alternative regime of section 20A, can trump protections for uses lawfully established at the district level.

The next question is how wide this power of review is. Firstly, as with the previous argument about section 20A, there is still an open question about whether a regional plan can make rules in respect of existing residential property such that it could compel immediate action (eg, removal or mitigation upgrades), rather than just action when construction is to occur (eg, when the house is destroyed and needs reconstructing). Case law on section 128 indicates that the power to review does not include a power to cancel, to introduce new conditions, or to modify existing conditions to the point that they effectively prevent the activity for which the consent was granted from occurring (ie, modified conditions cannot make the original use unviable).⁸⁰⁷ In *Barrett v Wellington City Council*, the Court rejected the argument that section 128(1)(c) allowed for reconsidering the grant of a resource consent.⁸⁰⁸ We should therefore presume that, if subsection (c) does not allow for cancellation even though inaccuracies have been found in an application, then it is infeasible that the other circumstances listed could be used to cancel a consent.

This suggests that this power could not be used to remove buildings entirely, as that would amount to a cancellation, but could be used to add or enhance existing mitigation measures.

⁸⁰⁷ These three limitations were established in *Medical Officer of Health v Canterbury Regional Council* [1995] NZRMA 49, and later affirmed in *Minister of Conservation v Tasman District Council* [2004] BCL 426 (HC).

⁸⁰⁸ *Barrett v Wellington City Council* [2000] NZRMA 481, [2000] BCL 641 (HC) at [23], where Chisholm J comments that “[m]y interpretation is that s 128(1)(c) was intended to confer a limited power for a consent authority to review the conditions of a resource consent but that it was not intended to open the door to cancellation of the consent itself.”

Further, if a new condition is unable to be added, there is unlikely to be much scope for all the measures necessary. For example, if there is no relocation condition, then one could not be added.

If development already has relocation adaptive consent conditions, then a review might determine that the trigger point or threshold for relocation ought to be set more conservatively. If, however, less strenuous mitigation conditions are included, then there may be the potential for enhancing these through a section 128(1)(bb) review. There is the possibility of enhanced requirements for coastal defences, presumably the enhancement of natural defences. Another possibility is the upgrading of robust drainage systems. It seems unlikely that a consent condition could require a floor to be raised, given that such a condition could usurp powers under the Building Act 2004. Nor could new charges be added to the consent conditions to establish a pool of money for the eventual removal of the property, such as when it becomes condemned due to the realisation of the coastal hazard risk; but existing charges could possibly be reviewed for this purpose.

What should be clear from this discussion is the fact that this area of the law has not yet been properly tested. No cases were found concerning a review of consent conditions for residential development in a hazardous coastal area. Moreover, to our knowledge, the new subsection (1)(bb) has not yet been interpreted in any cases. For a section that would potentially create significant new powers to affect residential property, the new section leaves a lot of questions about how it would work. These questions include whether existing case-law on section 128 is still applicable to the new amendments and to the new urgencies posed by climate change and the need for adaptation to it. We suggest that the use of possible consent conditions for managed retreat from coastal hazard areas is an important topic for future research.

2. The use of acquisition instruments

It is possible for a council to refuse to purchase any properties, such as on the basis that it is too expensive. Yet actual or threatened acquisition is seen as – and could become – a core component of any genuine strategy of managed retreat. It is quite properly viewed as the last resort after land use planning strategies have failed to produce adaptive results with respect to existing property. However, because the current planning paradigm contains such strong protections for existing development, acquisition – whether voluntary or compulsory – needs to at least be considered.⁸⁰⁹ As Boston and Lawrence have noted:⁸¹⁰

In the absence of a well-designed, principled and consistent system of compensation, there will be political pressures for governments to implement costly engineering ‘solutions’ to protect vulnerable properties.

It thus needs to be addressed in this report in the context of potential council liabilities.

Acquisition is justifiably viewed as controversial for a number of reasons. The most apparent is the enormous monetary cost to the government in purchasing property – especially if it is at market value prior to the occurrence of any loss-reducing event. While this is what has been proposed for Matatā, this applies only to houses; it would likely be too expensive to do this nationwide.⁸¹¹ In Australia some large-scale efforts to voluntarily purchase property have been abandoned due to cost.⁸¹²

A secondary but equally important cost is the loss suffered by homeowners and communities if they are forced to leave their homes and localities.⁸¹³ Both of these issues require the government to undertake careful planning. This will include whether and how to fund the purchase of maladaptive properties at socially acceptable prices and to acquire land for resettlement,⁸¹⁴ as well as deciding upon the appropriate process(es) to make sure that the

⁸⁰⁹ Julia Harker “Housing Built Upon Sand: Advancing Managed Retreat in New Zealand” (2016) 3 AJEM 66, at 81.

⁸¹⁰ Boston and Lawrence, above n 20, at 24.

⁸¹¹ Of course, if councils do nothing, then market values will reduce, as insurance is withdrawn and the properties become subject to increased flooding, for example. See the examples of Haumoana and Matatā. For more case studies, see Catherine Iorns, *Case Studies on Compensation after Natural Disasters* (Deep South National Science Challenge, Working Paper, September 2018).

⁸¹² McIntosh and others, above n 24, at 4.5.2.

⁸¹³ Boston and Lawrence, above n 20, at 8.

⁸¹⁴ Boston and Lawrence, at 10.

acquisition is handled in a way that achieves maximum community buy-in and cooperation. Notably, there is scant research available on the relocation of at-risk communities.⁸¹⁵

A further issue related to acquisition is the potential for moral hazard. This is most commonly associated with state insurance schemes which potentially incentivise risky development. A frequently-cited example is the American system of flood insurance, which incentivises maladaptive development in at-risk areas, even extending to the reconstruction of residential property with the exact same risk profile as existed prior to the disaster striking.⁸¹⁶ These same concerns exist with respect to acquisition, to the extent that it functions as a form of de facto compensation. While such schemes may be ad hoc or otherwise restricted to certain hazards, such actions can create political expectations: firstly, that compensation is owed and, secondly, that previous instances of state assistance ought to be matched in quantity.

It needs to be pointed out that land acquisition instruments include but are not restricted to the compulsory acquisition of land title. Compulsory acquisition can also include schemes to lease back land that is purchased to the former owners, subject to new planning conditions or covenants that provide for eventual retreat, or adaptive retrofitting; and include schemes that designate the land as being subject to future acquisition, which therein require the owners to sell the property to the state, if and when they chose to sell.⁸¹⁷ These examples show that there is a range of options available under the rubric of acquisition. Furthermore, these options can be expanded by the use of voluntary instruments, such as land swaps and transferable development rights.⁸¹⁸

In New Zealand, the general power of the state to acquire property is conferred by the Public Works Act 1981. With respect to the powers of central government, the property must be purchased for a government work intended for ‘any public purpose’.⁸¹⁹ In the case of local authorities this is limited to ‘local works’ for which the territorial authority has responsibility.⁸²⁰ Julia Harker argues that this empowers both branches of government to purchase land for the purpose of establishing set back reserves in the coastal marine area.⁸²¹ However, Harker notes

⁸¹⁵ Glavovic and others, above n 54, at 698.

⁸¹⁶ Mark Stallworthy “Sustainability, Coastal Erosion and Climate Change: An Environmental Justice Analysis” (2006) 18 JEL 357 at 368-369.

⁸¹⁷ Macintosh and others, above n 24, at 4.4.

⁸¹⁸ At 4.5.

⁸¹⁹ Public Works Act 1981, ss 4A and 16.

⁸²⁰ Public Works Act 1981, s 16.

⁸²¹ Harker, above n 809, at 81-82.

that the main hindrance pursuing any set back policy is the fact that the Public Works Act requires “full compensation” for any property acquired,⁸²² which amounts to current market value.⁸²³ She notes that requirements for compensation at market value do not easily allow for discounts due to pending hazards. This is because, as she notes, information instruments and hazard warnings have not been found to affect property values to a significant degree.⁸²⁴ This clearly only operates up to a point, as is illustrated by the reduction in value for properties in Haumoana and Matatā now that the hazards have started eventuating. The Public Works Act acquisition may thus become a more attractive option to councils as a last resort, once property values have significantly decreased due to the realisation of such hazards.

However, it is not clear that the Public Works Act process is applicable in situations where there was no proposed set-back reserve, for example. The current expectation for something being a 'public works' depends on the use of the land being purchased. It is thus thought that there is no power of councils to purchase land simply to avoid the natural hazards. As was noted in respect of the Matatā plan change:⁸²⁵

"WDC [Whakatane District Council] has no legislative powers to compulsorily acquire land to enable retreat from high risk hazard areas. Current legislative powers only enable compulsory acquisition of land for public works and for heritage sites".

This is something that would need further investigation and clarification, and possibly legislative change if it was thought appropriate for councils to have this power.

3. Canterbury Earthquake Recovery Act 2011

As the previous section shows, the default rules of compulsory acquisition provided by the Public Works Act 1981 are likely unsuited to the execution of any large-scale managed retreat policy, certainly in advance when values remain high. However, there is no constitutional limitation upon the creation of a statutory regime to implement a policy of managed retreat through the conferral of coercive powers. Unlike the United States and to a lesser extent Australia, there is no constitutional right to compensation in New Zealand. In New Zealand the major legal limitations upon the exercise of such powers are a product of judicial decisions in interpreting the statute and the level of scrutiny applied to administrative decisions made under the statute.

⁸²² Public Works Act 1981, s 60.

⁸²³ Public Works Act 1981, s 62(1)(b).

⁸²⁴ Harker, above n 809, at 82-83.

⁸²⁵ Boffa Miskell, above n 796, at 4.5.

In this regard, the most important statute for providing insight into the potential judicial treatment of a managed retreat statute is the Canterbury Earthquake Recovery Act 2011. Jonathan Boston even suggests that the model provided by the statute might be appropriate for the implementation of large-scale adaptation policies by central government.⁸²⁶ There are, of course, some key differences between a managed retreat instrument and the scheme established by the Canterbury Earthquake Recover Authority (CERA). One of the most obvious is that a managed retreat policy is ideally pursuing a preventative strategy before the occurrence of any disaster (or slow-moving disaster), whereas CERA was a reactive agency intended to make decisions in the aftermath of a major disaster. CERA thus avoids several of the key policy problems associated with a managed retreat policy: that the property that will be subject to acquisition has already lost value on account of the disaster, which makes the cost of large scale acquisition more affordable, and the necessity of conferring expanded powers is amply demonstrated and accepted by the occurrence of the disaster.

Despite this difference, there is a broad similarity in that, as with the establishment of the ‘Red Zone’ in Christchurch, a managed retreat policy is attempting to roll back the expansion of development into areas that are now deemed dangerous or otherwise inappropriate due to current or future hazards. In that respect, an analysis of the judicial treatment of the Canterbury Earthquake Recovery Act 2011 – and of the execution of the Red Zone policy, in particular – is worth undertaking.

Although our main interest in the Canterbury Earthquake Recovery Act 2011 is the powers of acquisition it conferred, it is also worth noting that additional powers were conferred upon CERA to override the RMA and set new environmental plans for the city, as well as force owners of adjoining properties to act in each other’s interests in order to execute the plan.⁸²⁷ In the case of the former, this is essentially an expansion of the powers of central government to influence local government decision-making through the removal of the ordinary RMA safeguards, such as Schedule 1 planning consultation requirements and appeal to the Environment Court.

The Canterbury Earthquake Recovery Act 2011 conferred an expanded set of powers to acquire land compared to the Public Works Act 1981. It allowed for CERA to make offers to “purchase or otherwise acquire, hold, sell, exchange, mortgage, lease and dispose of land” without being

⁸²⁶ Boston and Lawrence, above n 20, at 15.

⁸²⁷ Canterbury Earthquake Recovery Act 2011, ss 27, 52.

subject to the offer back provisions of the Public Works Act.⁸²⁸ It also allowed CERA to compulsorily purchase land for reasons that were far broader than the limited grounds under the Public Works Act.⁸²⁹ The Act also allowed CERA to order the demolition of buildings, even if not themselves dangerous.⁸³⁰

The Canterbury Earthquake Recovery Act 2011 broadly matched the existing provisions of the Public Works Act with respect to compensation. Compensation was to be awarded for the demolition of non-dangerous buildings,⁸³¹ where damage has been caused to adjacent buildings because of an order for demolition,⁸³² and where land is otherwise compulsorily acquired.⁸³³ The formula for calculating compensation was “current market value”; as far as possible, this was to be calculated in accordance with the provisions of the Public Works Act.⁸³⁴ Various other forms of loss other than the title of the land – such as the loss of consents, or loss caused by a regulatory change – were excluded by section 61. Finally, appeal rights under the Act were restricted to the quantum of compensation rather than the decision to compulsorily acquire.⁸³⁵

The creation of the Red Zone

The creation of the Red Zone was an integral part of a broader set of urgent zoning decisions made by Cabinet in 2011 several months after the major February earthquake. The decision to “red-zone” amounted to a decision to undo the development that had occurred in those areas. The evidence relied upon in deciding upon the boundaries of the red zone is beyond the scope of this paper. What is of concern to us is how the offers were made within the framework discussed above.

In June 2011 a report was presented to Cabinet recommending that the following offers be made. Insured residential properties were to be offered the choice of two options. The first was

⁸²⁸ Canterbury Earthquake Recovery Act 2011, s 53(1); see Public Works Act 1981 ss40-42. Note though that offers could be made which incorporated the PWA buyback provisions. See Canterbury Earthquake Recovery Act 2011, s 58.

⁸²⁹ Elizabeth Toomey “Canterbury Earthquake Recovery Act 2011: Land and Resource Management Issues” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Responses to Natural Disasters* (Thompson Reuters, Wellington, 2015) 227, at 11.6.3. See also the expansive purpose statement in the Canterbury Earthquake Recovery Act 2011, s 3.

⁸³⁰ Canterbury Earthquake Recovery Act 2011, s 38.

⁸³¹ Section 40.

⁸³² Section 41.

⁸³³ Section 60.

⁸³⁴ Section 64(3).

⁸³⁵ Canterbury Earthquake Recovery Act 2011, s 69(1)(a).

for the Crown to purchase the property at the 2007 capital rating valuation, with an assignment to the Crown of insurance-related claims – eg, both EQC and private insurance. The second was exactly the same, but with the option of residents pursuing claims against their private insurer for the damage caused. When these offers were formally made to insured Red Zone residents in August 2011, they were accompanied by a statement alerting the resident that, while these were voluntary offers, the option for the Crown to compulsorily purchase at current depleted market valuations still existed. Furthermore, it was made clear that, while it may be a possibility for residents to remain in their houses, local council resources and services would gradually be phased out, and insurance would likely be unavailable due to how hazard-prone the area was now deemed to be.⁸³⁶ Toomey notes that insured residents initially chose to pursue their private insurers through the second option, until insurers became increasingly obstructionist with respect to making pay-outs.⁸³⁷

Uninsured or uninsurable properties (such as bare land) were to be offered a buyout at 50% of the 2007 capital rating valuation. The 50% offer made to uninsured properties was based on a desire to reflect the risk that was taken by these residents in not deciding to insure, while still providing some means for these residents to move on given that their land was often only worth 10% of its pre-earthquake valuation. This need to make an offer was most pressing in the case of those who owned bare land that could not be insured, and those persons whose land had not suffered significant damage during the earthquake. These offers were formally made in September 2012.⁸³⁸ As a result of receiving these lower offers, two organisations were formed by uninsured parties to contest the legality of these decisions via judicial review.

In 2015 this litigation reached the Supreme Court in the *Quake Outcasts & Fowler Development Ltd v Canterbury Earthquake Authority*.⁸³⁹ The case broadly addressed two issues: the first was the legality of the decision to establish the Red Zone; the second was the legality of the decision to make offers to uninsured persons based on 50% of the 2007 value of the property. A 3:2 decision was produced in favour of the *Quake Outcasts* plaintiffs on both of these issues.

On the first issue of zoning, the Supreme Court held that the Act covered the field, therein disallowing the use of the state's "third source powers" (ie, the powers ordinarily conferred

⁸³⁶ Toomey "Canterbury Earthquake Recovery Act 2011", above n 829, at 11.8.1.

⁸³⁷ At 11.9.1(3).

⁸³⁸ Toomey, above n 829, at 11.8.2.

⁸³⁹ *Quake Outcasts v Canterbury* (SC), above n 15.

upon a natural person).⁸⁴⁰ The Supreme Court also rejected the argument that government was merely providing information to the public,⁸⁴¹ or that the creation of the Red Zone was a funding decision and thus could not be addressed by the Court.⁸⁴² Because the Act was deemed to cover the field, the decision to create zones in Christchurch – and thus create the Red Zone – needed to follow one of the plan-making mechanisms under the Act. The Court held that the faster Recovery Plan process could have been used given the urgency involved, but this would still have required CERA to undertake the minimal consultation requirements under section 20 of the Act, in addition to other safeguarding processes.⁸⁴³ To quote the Court:⁸⁴⁴

That the Act's role is exclusive is also shown by the safeguards in relation to the use of the powers in the Act, which are particularly important because many of the powers in the Act are highly coercive. It cannot have been intended that the safeguards in the Act could be circumvented by acting outside of the Act.

The Supreme Court's approach mandating the use of a Recovery Plan for the establishment of the Red Zone differed from the finding of the Court of Appeal. The Court of Appeal held that the Recovery Plan provisions did not evince a clear parliamentary intention for an action such as the establishment of the Red Zone to occur through this statutory mechanism.⁸⁴⁵ Rather, the Court of Appeal found that the establishment of the Red Zone was an action of information provision, carried out by the Minister rather than CERA, and thus did not require statutory authorisation.⁸⁴⁶ Furthermore, because the creation of the Red Zone was characterised as information provision, the Court of Appeal also held that the establishment of the Red Zone did not interfere with the property rights of the affected parties, and thus was a lawful exercise of the government's third source of power.⁸⁴⁷ Alternatively, the Court held that section 30 of the Act would authorise the chief executive of CERA to disseminate this information.⁸⁴⁸

On the second issue of the 50% offers the Supreme Court held that, while the insurance status of the parties was not an irrational consideration or an irrelevant factor, it was nevertheless wrong to treat this fact as determinative in making the final decision because the moral hazard concerns were not as dire as the reasoning behind the decision to make a 50% offer implied.⁸⁴⁹

⁸⁴⁰ *Quake Outcasts v Canterbury* (SC), above n 15, at [111].

⁸⁴¹ At [106].

⁸⁴² At [143].

⁸⁴³ At [137].

⁸⁴⁴ At [127].

⁸⁴⁵ *Fowler Development Ltd v Canterbury Earthquake Authority* [2014] NZCA 588, at [122].

⁸⁴⁶ *Fowler Development*, at [108].

⁸⁴⁷ At [108].

⁸⁴⁸ At [131].

⁸⁴⁹ *Quake Outcasts v Canterbury* (SC), above n 11, at [167].

[By contrast, the Court of Appeal found that the distinction between insured and uninsured was rational, and thus did not constitute a reviewable error.⁸⁵⁰ However, the Court of Appeal nevertheless found that the recovery objectives of the Act were mandatory considerations that were not taken into account when making the 50% offers, and that in itself made the decision unlawful.⁸⁵¹]

On the issue of remedies, the Supreme Court held that the decision to establish the Red Zone outside of the Recovery Plan process, while unlawful, would not benefit from being revisited because of the amount of time that had passed.⁸⁵² On the other hand, the Court ordered CERA to reconsider the decision to make 50% offers to the owners of uninsured and uninsurable land in September 2012.⁸⁵³ After this decision of the Court, the parties to the hearing are reported to have received much more generous offers, with the owners of uninsurable land receiving 100% pay-outs.⁸⁵⁴

4. Applying the *Quake Outcasts* decision to coastal residential property

The legacy of the Canterbury Earthquake Recovery Act and the *Quake Outcasts* saga are likely to affect any future managed retreat policy for at risk coastal property in two ways. First, the offers that were made to Red Zone properties are likely to set a political precedent both in favour of awarding compensation and of awarding compensation for the full value of the properties affected. Secondly, the decision of the Supreme Court may have some precedential value when it comes to the process of making offers to residential property owners – namely, making differential offers depending on particular characteristics of the residents.⁸⁵⁵

From the perspective of any government looking to enact a managed retreat policy, the lesson of the Canterbury Earthquake Recovery Act is that a system for distributing loss and the criteria used to award compensation all need to be carefully thought through ahead of time.⁸⁵⁶ The experience in Canterbury suggests that a managed retreat strategy pursued in the absence of a

⁸⁵⁰ *Fowler Development v Canterbury (CA)*, at [150].

⁸⁵¹ At [153].

⁸⁵² *Quake Outcasts v Canterbury (SC)*, at [204].

⁸⁵³ At [205].

⁸⁵⁴ Boston and Lawrence, above n 20, at 35-36.

⁸⁵⁵ At 36.

⁸⁵⁶ Elizabeth Toomey, Jeremy Finn and Henry Holderess “Paying Out the Victims After a Natural Disaster: the Earthquake Commission, Private Insurance and Red-Zone Payouts After the Canterbury (New Zealand) Earthquakes” [2016] National Emergency Response 20 at 26.

clear statutory framework can cause major legal troubles for the government, as evidenced by the *Quake Outcasts* case.

In the coastal context, the issue of making distinctions between residents with respect to offers they receive will be more fraught than in the case of the Red Zone offers. A key issue is whether courts will find it legally permissible to discriminate against residents who can be held to have voluntarily assumed the risk inherent in purchasing low lying coastal property. These distinctions will be of political relevance as well. Boston and Lawrence comment on this issue of justice involving two group archetypes:

The first involves wealthy families who have recently purchased expensive coastal properties in the full knowledge (based on advice from the local council and relevant experts) that these properties are at a significant risk of being inundated by a rising sea level within several decades. The second involves poor families who purchased modest homes several decades ago in a low-lying area of a city with no expectation that these properties might subsequently be at risk of sea-level rise. Yet they have recently been advised that their properties could be inundated within several decades and that it will be increasingly difficult and costly for them to obtain insurance. They also face a large reduction in the market value of their property, if, in fact, they can find any buyers. Some may lose their entire equity or even be left with a net debt (i.e. depending on the size of their mortgage). Without public compensation, such families have little prospect of buying other properties in safer locations.

It is clear that it will be politically unfeasible to leave residents to fend for themselves when they have been in an area for generations, and implicitly relied on prevailing risk management practices at the time of purchase. These persons cannot be said to have voluntarily accepted the risk. On this basis, these persons ought to be assisted by some form of national cost sharing. The question is: what principled formula can be used to distinguish these “deserving” residents from those that we deem to be more culpable.

In reality, the two archetypes presented represent a complicated continuum. For instance, long-time residents can make reckless development choices, and recent arrivals may not be very wealthy. Therefore, any distinction in treatment of payments to coastal homeowners needs to have a firm and objective basis. If there is one lesson from the *Quake Outcasts* decision it is that distinctions on offers pursuant to a managed retreat policy will not be protected by judicial deference; they will need a firm rational basis that has been balanced against competing considerations. In the *Quake Outcasts* decision, the moral hazard consideration was extensively analysed and deemed to be an insufficient justification for the differential offers.

One objective basis for making such distinctions is whether a formal notification was provided to the resident prior to purchasing the property, or prior to choosing to intensify development on the site. An obvious example of this could be a notation on the title, such as those which are

issued to hazardous developments under section 72 of the Building Act 2004. The problem with extending such a policy to LIMs or other optional information instruments, is that this would incentivise wilful blindness on the part of future purchasers and reward imprudence on the part of current residents who did not request a LIM. A retroactive system may be particularly difficult to implement beyond setting a single date before which greater compensation is paid and after which discounts occur. Any future/prospective system of notification which affected the level of compensation available would therefore likely need to be compulsory and heavily standardised across the country, and would need to not create any expectation of compensation.

Any prospective strategy of managed retreat in the coastal area would need to include a variety of adaptation instruments, and offers would need to be backed up by warnings about the consequences of choosing not to accept the Crown's preferred option. For example, an offer could be made for the Council to buy the land and to lease it back to the homeowner, with a contingency trigger for abandoning the property to the Crown once sea-level rise or another hazard reached a pre-specified level. Conditions on removal could be imposed on the homeowner or on the government (central or local). The consequences of choosing not to accept a leaseback provision could include: restrictions on reconstruction past a certain date or contingency event; a notification about the need to retro-fit the property by a certain date; and/or provisions that only allowed the land to be sold to the Crown at a significant discount upon a certain level of sea-level rise being reached. If included upon the title, each of these mechanisms could provide a means of incrementally warning any future purchaser of the financial risks that they were assuming under a set of rules, rather than relying solely upon council provision of information about natural hazards, which to date have not been shown to significantly affect market values in coastal areas until the hazards eventuate.⁸⁵⁷ These incremental warnings could also have the effect of gradually reducing public sympathy for future purchasers, and therein avoiding the political pressure to provide compensation. However, if these warnings are to be believed, then they will need to be backed up by the clear provision of these coercive powers in statute, and cannot be left to local councils to pursue through district and regional plans. An additional consequence of such warnings is that they will affect the ability of purchasers to raise capital and purchase insurance. This would have the effect of lowering the value of the property by limiting the availability of loans.

⁸⁵⁷ See W John Hopkins "The First Victim - Administrative Law and Natural Disasters" [2016] NZLR 189.

Unlike the compulsory acquisition policy pursued in the Red Zone, managed retreat in the coastal area can be done more incrementally. It can also be done in a way that is more likely to be procedurally sound than the decisions made about the Red Zone, which were made under some urgency. Some suggested lessons of the *Quake Outcasts* litigation thus include that, while governments may pass emergency and recovery statutes that bypass the principles of good administration by conflating ongoing “disasters” for “emergencies” that require process to be abandoned,⁸⁵⁸ these statutes will not be readily interpreted in a way that allows government to act as it pleases merely because the government deems disaster recovery to be a matter of high policy. The principles of good administration, including public consultation, are as important in the recovery stage of a disaster as they are in the ordinary course of governmental decision making, if not more so.⁸⁵⁹

A wider issue is whether the finding of the Supreme Court was due to the particular working of the Canterbury Earthquake Recovery Act, with its provisions for consultation and mandatory relevant considerations, or whether this reflects a broader preference on the part of the judiciary for scrutinising decisions that touch upon such issues – namely, protecting property rights, and protecting proper processes. Bower and Page, in their analysis of the *Quake Outcasts* decision in the High Court, suggest that the Court was particularly concerned with the practical impact of these decisions upon property owners, including the financial position of the red-zoned parties. The Court also appeared to endorse an expanded notion of property rights founded on connection to a community, rather than just seeing property as an economic commodity.⁸⁶⁰

All of this suggests that any managed retreat policy pursued in the coastal area is likely to be heavily scrutinised if proper consultation is not carried out. Furthermore, as the Supreme Court decision makes clear, zoning decisions cannot be passed off as mere “information provision” – i.e., it is not a tentative plan but is a decision with real consequences for those affected. On the one hand, scrutiny may be more likely because of the lack of imminence affecting the emergence of climate hazards when compared to the situation after the Christchurch Earthquake. On the other hand, because a managed retreat policy is likely to be incremental and/or staged, the

⁸⁵⁸ Hopkins, at 191 and 209.

⁸⁵⁹ At 210.

⁸⁶⁰ John Page and Ann Brower “Earthquakes, Red Zones and Property Rights: The Quake Outcasts case” (2014) 26 NZULR 132, at 135-140.

consequences of any policy will be able to be planned. This may lower the level of judicial scrutiny applied.

The other matter raised by the *Quake Outcasts* decision was the ability to make distinctions between residents when making differentiated offers. If compensation is paid pursuant to a lease-back scheme, then distinctions between owners will need to have either a firm factual basis or a firm basis in statute. A discount based on the inclusion of a hazard notation on the title may not provide a sufficient basis if the notation was the result of a particular local authority policy. Likewise, the inclusion of a hazard in a LIM report or the current height of the property above sea-level may not provide a proper basis for making a distinction. On the other hand, a hazard notation pursuant to section 72 of the Building Act 2004 might provide such a basis. Likewise, stating that compensation will decrease after a particular date might have a rational basis if applied to property throughout the whole country below a certain height above sea-level. Compensation paid upon the lease-back could also decrease at a faster rate for properties closer to sea level.

In any case, the safest option is obviously to enshrine these criteria within statute. But in the absence of an unequivocal statutory authorisation, all offers will need to have a firm factual foundation that mitigates the adverse consequences to any owner who falls outside of the explicit rationale of the standard terms. For instance, a property that had been expensively retrofitted to mitigate a flood risk would need to be treated differently to a property that was the same distance from the sea but had not been retrofitted.

In the end, the precedent set by the *Quake Outcasts* decision is that there will be a trade-off in making offers. On the one hand, a set of standard offers can alleviate the administrative burden and the problems of fairness or bias created by making individualised offers (or undergoing negotiation for an offer). On the other hand, these standardised offers must not be so crude as to gloss over material distinctions between properties; where this occurs, the courts can scrutinise the reasons behind the distinction and can potentially invalidate the offer. However, if sufficient empirical and analytic research is undertaken, a court will be less able to invalidate the offer.

Part Three:

Other matters

Chapter 8: Information instruments

Chapter 9: Tortious liability

Chapter 8: Information Instruments

This short chapter discusses the use of information instruments in order to provide relevant coastal hazard information to current and future homeowners. It focuses on the New Zealand Land Information Memoranda (LIM) and discusses three potential legal actions that could be taken against a council for the contents of a LIM report. It does not consider liability for a project information memorandum under the Building Act 2004; that could be the subject of further research.

Chapter contents:

(1) Scope and rationale for information instruments

(2) Land Information Memoranda (LIM) Reports

Example of Application: *Weir v Kapiti Coast District Council*

(3) Civil Liability

1. Scope and rationale for information instruments

Information instruments can be categorised according to two salient features. The first is whether the provision of information is mandated by a statutory duty, by a common law obligation to provide information, or is provided informally by local government.⁸⁶¹ The second factor is whether the information is more general in nature, describing a particular area, or more targeted, describing the hazards affecting a particular property.⁸⁶² According to these two methods of categorisation, educational campaigns about the general risks of climate change are a type of information provision. However, for the purposes of this report, we are focused on formal mechanisms of information provision.

Foerester et al identify three formal mechanisms for providing hazard information. The first is the inclusion of climate hazards on planning certificates issued to potential buyers. This mechanism could include the inclusion of hazard information in standardised real estate

⁸⁶¹ Macintosh and others, above n 26, at 4.2.

⁸⁶² Philippa England "Climate change and coastal settlements: the story so far" [2012] Australian Environmental Review 343, at 344.

contracts.⁸⁶³ The second method is the inclusion of notations upon the title of the property. The major advantage of this mechanism over the use of planning certificates is that this information is both mandatory and publicly accessible; it thus enters into a potential purchaser's considerations at an earlier and less stressful stage of the purchasing process, and is cheaper for local government on account of information not needing to be recompiled.⁸⁶⁴ Finally, zones and overlays can also constitute a form of information provision if they are used to provide information about the hazards pertaining to particular areas rather than specifying land use controls.⁸⁶⁵

There are numerous perceived benefits of using information instruments to pursue a climate adaptation agenda. The two most obvious are that they are non-intrusive and cheap compared with other adaptation measures.⁸⁶⁶ Paul Govind argues that the non-intrusive character of these instruments makes them ideal for gradually mainstreaming climate adaptation.⁸⁶⁷ A second benefit is that information provision allows the state to assert that risk was readily assumed by the plaintiff, and therein lessen any future liabilities in tort.⁸⁶⁸

A third argued benefit is that information instruments are consistent with a liberal economic vision, wherein private entities and individuals are left to make rational decisions about their appetite for risk, with the state only intervening to plug the information deficit in the market.⁸⁶⁹ This requires the state to fund the commission of scientific research and disseminate these findings. As a result of this congruence with mainstream economic assumptions, information provision has been endorsed by mainstream organisations in Australia such as the Productivity Commission, the National Coastal Climate Change Commission, and the Council of Australian Governments Select Committee on Climate Change, and in New Zealand by the Insurance Council of New Zealand.⁸⁷⁰

These positive assumptions are likely to be misplaced. In particular, the suggestion that information instruments enable private actors to make more risk-conscious decisions is not

⁸⁶³ MacIntosh and others, above n 26, at 4.2.1.

⁸⁶⁴ At 4.2.2.

⁸⁶⁵ At 4.2.3.

⁸⁶⁶ Foerster and others, above n 24, at 483.

⁸⁶⁷ Paul Govind, above n 23, at 106.

⁸⁶⁸ Macintosh and others, at 4.2.

⁸⁶⁹ Foerster and others, at 483.

⁸⁷⁰ See Foerster and others, at 483. More generally see Philippa England, above n 862. For a New Zealand example, see Insurance Council of New Zealand, above n 21, at 13.

supported by empirical evidence. Julia Harker cites reports from both the Ministry for the Environment and the Earthquake Commission suggesting that the information provision has failed to affect purchaser decisions in any significant way as evinced by the persistence of high property prices in hazardous areas.⁸⁷¹ A notable gap in the system is that such information instruments have not been applied to rental agreements; thus renters are unlikely to be aware of natural hazards affecting the dwelling they are renting.⁸⁷² This exposes tenants to short term risks such as flood, and limits the effect of information provision on the value of property intended for the rental market.

A further misassumption is that information instruments are non-intrusive. Objectively this may be true, but affected households have not perceived information instruments as being benign. Various state and local government measures to introduce compulsory information mechanisms have sparked political backlash in Australia, especially when these mechanisms have mandated the public listing of site-specific hazards.⁸⁷³ A similar backlash has occurred in New Zealand, as illustrated in the 2013 case of *Weir v Kapiti Coast District Council*, discussed in the following section. An additional consequence of this backlash is the significant potential for liability that can accompany information mechanisms, if the information is found to be inaccurate by either the vendor or the purchaser.

2. Land Information Memoranda (LIM) Reports

LIM reports are one of the most commonly used mechanisms of information provision in New Zealand. They are site-specific reports produced by territorial authorities, based upon the information about a property that a territorial authority has within its possession.⁸⁷⁴ The purpose of LIM reports is best viewed as being two-fold: they provide a specific means of conveying site-specific information including about natural hazards to potential purchasers of land,⁸⁷⁵ plus they provide councils with an easy means of distributing information about property

⁸⁷¹ Julia Harker, above n 809, at 78 and 82-83.

⁸⁷² Kate Scanlen, above n 55, at 294.

⁸⁷³ Philippa England, above n 862, at 345.

⁸⁷⁴ Note that regional authorities are not mentioned in section which regulates the provision on LIMs. See Local Government Official Information and Meetings Act 1987, s 44A.

⁸⁷⁵ While not compulsory, some purchasers of residential property will insist upon attaining a LIM report before agreeing to purchase. In response, real estate agents acting on behalf of a vendor may request a LIM report in advance of an auction or other sales arrangement to reduce the likelihood of delays being incurred by the purchaser insisting upon conditions related to the LIM report being added to the sale and

including natural hazards (without having to go through the process of amending a district plan, for example).⁸⁷⁶ LIMs are thus closely linked to the duties upon regional and territorial authorities to research and gather information about natural hazards within their geographical area.⁸⁷⁷ In turn, these information-gathering obligations are a corollary of the hazard management functions attendant upon regional and territorial authorities.⁸⁷⁸ Local government cannot discharge its obligations to sustainably manage the environment without the necessary information to create plans and policies. However, prior to such plans being enacted, a council may possess information that is relevant to potential purchasers about a particular property that it can share via a LIM report.

The provision of LIM reports is a particular type of information provision under the Local Government Official Information and Meetings Act 1987 (LGOIMA). The Act is best understood as the local government companion to the Official Information Act 1982. The LGOIMA provides the right for any person to request official information held by a local authority under section 10, subject to a number of withholding grounds in section 7. The Act also provides local authorities with immunity from civil and criminal liability for information released under parts 2-4 of the Act. However, this immunity does not extend to the provision of LIM reports, which are covered under part 6 of the Act. Local authorities are thus subject to liability in both tort and judicial review if they provide a sufficiently inaccurate LIM report. Councils can thus be sued by property owners, developers and vendors for including information that is deemed to overstate the risks from natural hazards, whilst also being at legal risk from purchasers alleging that natural hazards were omitted or understated. For this reason, LIM reports are considered to be council's biggest exposure to liability.⁸⁷⁹ However, while it is technically true that councils are able to be sued for both understating and overstating natural hazards, the ability to successfully claim damages in tort may be overstated. Nevertheless, the mere existence of such liability can alter the behaviour of local government officials, and the potential chilling effect should not be understated.

purchase agreement. See WSA Saunders and JE Mathieson, *Out On a LIM: The role of Land Information Memorandum in natural hazard management* (GNS Science, Miscellaneous Series 95, October 2016), at 5.0.

⁸⁷⁶ Saunders and Mathieson, at 2.3.

⁸⁷⁷ See RMA, s 35.

⁸⁷⁸ See RMA, s 30-31.

⁸⁷⁹ Saunders and Mathieson, at v.

Content of LIM reports

Stated very simply, the LGOIMA requires territorial authorities to provide all information that is known to it about a given piece of land within 10 working days, with the exception of information that is apparent from the district plan. The territorial authority also has the discretion to include information that it deems to be relevant. The precise legal requirements for the content of LIMs are contained within section 44A of the LGOIMA. The relevant subsections are:

44A Land information memorandum

- (1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum in relation to matters affecting any land in the district of the authority.
- (2) The matters which shall be included in that memorandum are—
 - (a) information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that—
 - (i) is known to the territorial authority; but
 - (ii) is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the Resource Management Act 1991:
....
- (3) In addition to the information provided for under subsection (2), a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.
- (4) An application for a land information memorandum shall be in writing and shall be accompanied by any charge fixed by the territorial authority in relation thereto.
- (5) In the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness, as at the date of its issue, of any information included in it pursuant to subsection (2).
- (6) Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) or to refuse to provide a land information memorandum where this has been requested.

“Special feature or characteristic of the land concerned”

Subsection (2)(a) states that “each special characteristic of the land concerned” is to be included in the LIM, and provides a non-exhaustive list of natural hazards, which is broad enough to include risks emanating from climate change and sea-level rise. The courts interpreting this section have found that whether a feature of the land is significant enough to constitute a

“special feature or characteristic” is largely at the judgement of the decision maker. For example:⁸⁸⁰

[W]hether the potential for erosion (amongst other things) is a special feature of the land in question... is inevitably going to require a judgement call on the part of some official.

The Court held that such discretion was necessary given the volume of LIM applications and the tight timeframes needed to process them.⁸⁸¹

In *Trustees of the THP Trust*, the High Court commented that the meaning of “land” should be limited to the physical features of the land itself, and not the buildings.⁸⁸²

Meaning of “potential”

The Court in *Weir v Kapiti Coast District Council* held that the requirement to include “potential” risks simply meant that hazardous events for which there was a reasonable objective possibility ought to be included, including worst case scenarios (eg, maximum levels of inundation from sea-level rise).⁸⁸³

How site specific does the information have to be?

In *Weir v Kapiti Coast District Council* the decision at issue was the inclusion of information within a LIM report about the impact of potential sea-level rise on the Kapiti Coast. The information in the report concerned the impact on the coastline generally, rather than detailing the impact of sea-level rise on individual properties. The court held that the information was sufficiently site-specific because it was “unquestionably about potential erosion as a special feature or characteristic of all coastal land along the Kapiti Coast, and therefore of every individual property fitting that description”.⁸⁸⁴ It justified this reading of the statute on the basis that the council would otherwise be unable to warn purchasers about a “global phenomenon” if it was required to undertake a very expensive site by site analysis.⁸⁸⁵

⁸⁸⁰ *Weir v Kapiti Coast District Council* [2013] NZHC 3522, at [33].

⁸⁸¹ At [33].

⁸⁸² *Trustees of the THP Trust v Auckland Central* [2014] HC 435, at [106].

⁸⁸³ *Weir*, at [49]-[52].

⁸⁸⁴ At [58].

⁸⁸⁵ At [58].

Information “known to the council” and the level of information to be provided

The obligation of disclosure does not extend to all information possessed by the territorial authority, provided that a proper inquiry is undertaken and that the applicant is fairly and properly informed about the relevant features or characteristics of the land.⁸⁸⁶ However:

- this does not extend to searching for information held by third parties,
- does not include the views of council employees that have not been adopted by the council,⁸⁸⁷
- does not include listing potential changes in council policy,⁸⁸⁸ and
- in practice, does not include resource consents insured by regional councils, resource consent conditions, compliance with resource consents, district plan information, or leaky building information (unless the building has been subject to a Weathertight Home Resolution Service claim).⁸⁸⁹

The fact that councils do not have to reveal intended changes in policy is particularly significant for the disestablishment of flood defences, or for other coastal protection works. It means that a plaintiff cannot currently sue in negligence claiming that they were induced into purchasing a property because of a failure to disclose a pending disestablishment agenda/policy on the LIM report, for example. Note, however, that negligence law is decided on the basis of court cases and can change over time. If the court considers it better that a council be held responsible for losses suffered by a complainant in such a situation then it may find liability under negligence.

Territorial authorities also have a broad discretion as to how they present the information that is known to them.⁸⁹⁰ This information may be able to be provided in full, or it may be voluminous

⁸⁸⁶ *Resource Planning and Management Ltd v Marlborough District Council (Resource Planning)* HC Blenheim CIV 2001-485-814 10 October 2003, at [166]-[168].

⁸⁸⁷ *Resource Planning and Management Ltd*, at [171].

⁸⁸⁸ *Resource Planning and Management Ltd*, at [170], where the France J held that:

“[T]he plaintiffs could not have advanced an argument that the defendant had an obligation to disclose in the LIMs its intention to include Lot 2 within an Overlay. As a matter of law, that would fail on the basis of *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331. In that case, the Court said that the local body officer had no duty of care to try and forecast the local body's response to an application for a specific departure. If that is the case, then there cannot be a duty of care to try to forecast possible planning changes such as the ultimate imposition of the Overlay.”

⁸⁸⁹ Saunders and Mathieson, above n 875, at 2.2.

⁸⁹⁰ *Weir*, above n 880, at [68].

and require summation due to significant costs involved in providing such information in its entirety. There is no prescribed method for how such information is to be summarised, provided that the summation is sufficiently accurate. The obligation on the Council to ensure the accuracy of information is heightened when the information could have a significant financial impact on the owners of the properties affected.⁸⁹¹ Finally, matters that are the subject of expert contention and/or scientific uncertainty ought to be identified as such.⁸⁹²

Example of application: *Weir v Kapiti Coast District Council* [2013]

This case provides an example of landowners taking legal action against their local council in relation to information included, or excluded, in a Land Information Memorandum (LIM). It illustrates how coastal communities are learning to cope with climate change-related coastal hazards, such as coastal erosion and inundation, and the difficulty in predicting the local effects and rates of occurrence at the level of individual properties. This case also highlights the tension between the role of local government in seeking to adapt to coastal hazards and the political pressures imposed on them by property owners.

The *Weir* judgment concerns the information about possible future changes to the Kapiti coastline and whether such information should be included in a LIM report. Mr. Weir sought judicial review of the decision by the Kapiti Coast District Council (KCDC) to provide particular information in the LIM report about possible coastal erosion over the next 50 and 100 years. Judicial review is not a claim for monetary awards but was brought to force the council to remove the information that had been placed on the LIM.

In 2005, the KCDC commissioned Dr. Robert Shand, an applied coastal scientist, to conduct a coastal hazard erosion assessment covering the District's 38 kilometres of open coastline. He produced two reports, the second of which was required by the New Zealand Coast Policy Statement which came into effect in 2010. The second report ('the Report'), issued in August 2012, instigated the Council's consideration of whether they were legally bound to include the findings of the Report in the LIMs of properties likely to be affected by the coastal hazard erosion identified in the Report. LIMs were introduced to the Local Government Information Act 1987 (LGOIMA) through a 2003 Amendment with an intention to "empower purchasers" by "giving them access to information that could affect price, land suitability or even saleability" and of

⁸⁹¹ *Weir*, above n 880, at [69].

⁸⁹² At [70].

which the information is not expressly attainable through the operative District Plan.⁸⁹³ With this purpose in mind, s 44A(2)(a) LGOIMA prescribes (some of) the information to be included in a LIM:

(2) The matters which shall be included in that memorandum are—

(a) information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that—

(i) is known to the territorial authority; but

(ii) is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the.

KCDC considered that the information provided in Dr Shand’s Report constituted information that s 44A(2)(a) intends to legally oblige territorial authorities to include.

The KCDC decided to include on the LIMs of 1,800 coastal properties a map graphic containing three coastal erosion hazard prediction lines that the Council themselves had derived from findings of the Report. The lines predicted, in a “deterministic” rather than probabilistic manner,⁸⁹⁴ the possible extent of incursion of the coastline at 50 years and 100 years from present day. The three lines were calculated using this information and included in the LIM reports for relevant properties: a 50-year line which took into account coastal protection works operated by the Regional Council; an unmanaged 50-year line where no coastal protection works exist or are not maintained; and an unmanaged “very worst case scenario” 100-year line.⁸⁹⁵

Although the map graphics were simple and “eye catching” on their own,⁸⁹⁶ they formed the first two pages of a five-page information document which included a further three pages of written information designed to explain the Report and the lines on the maps. The first two pages containing the map graphics showed the unmanaged 50- and 100-year lines across the title in question. These were derived, by the Council, from the findings of the Report. The three pages of written information confirmed that the lines were “very worst-case scenarios” and are local in scale as opposed to site-specific. The information also includes confirmation that no account has been taken for private coastal structures, nor accretion. It also notes that a 100-

⁸⁹³ *Weir*, above n 880, at [30].

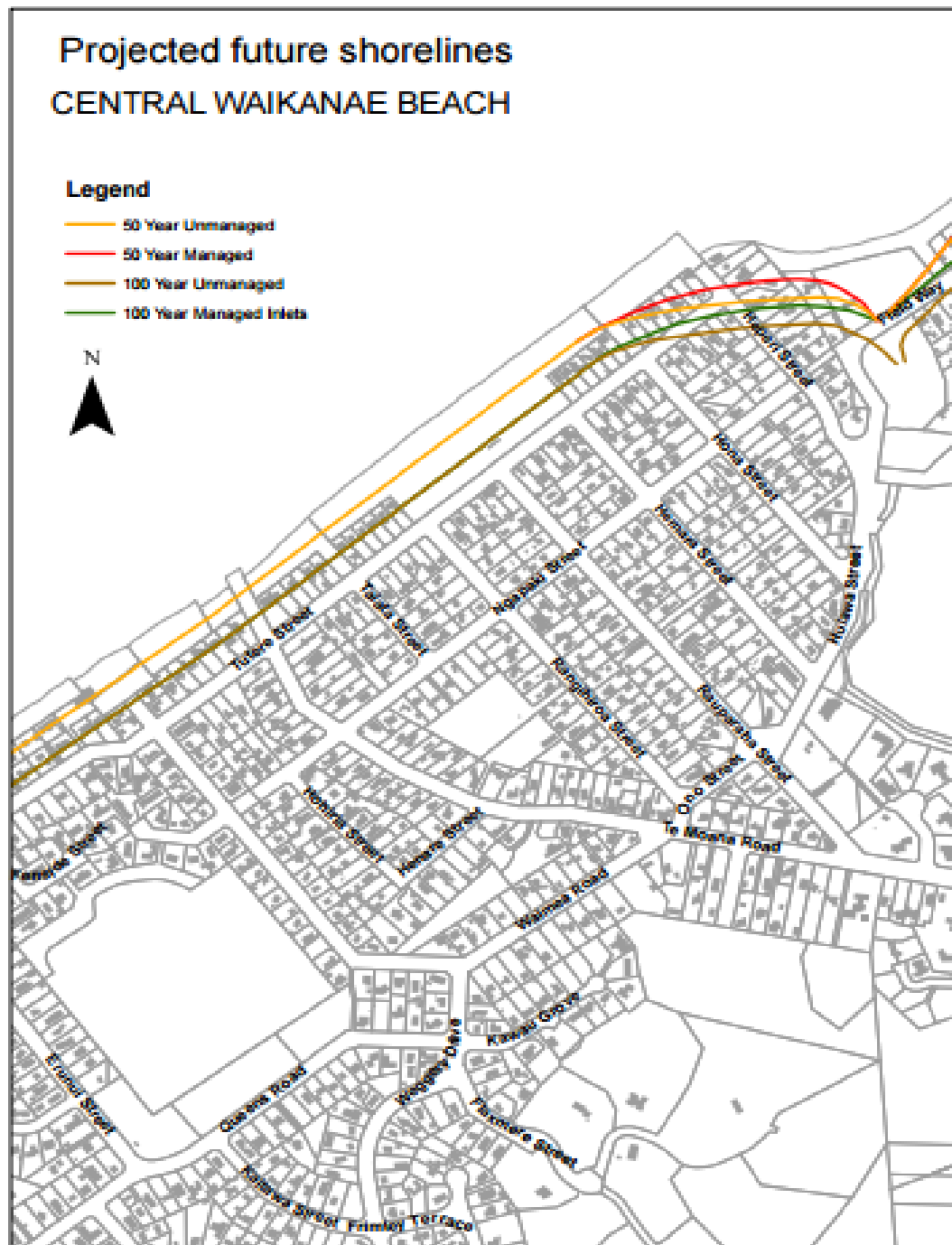
⁸⁹⁴ At [7].

⁸⁹⁵ At [7] and [71].

⁸⁹⁶ At [17].

year sea-level rise of 0.9m is adopted in the Report and that the Council will take a precautionary approach to any uncertainties in predictive modelling.

Map graphic of the *Weir* prediction lines⁸⁹⁷



⁸⁹⁷ Coastal Systems, “Kapiti Erosion Hazards” <www.coastalsystems.co.nz>.

Mr. Weir, who owned property on the coastline, was particularly worried about the ramifications of the Council's determination that they were obliged to include the findings of the Report in LIM reports for the district. The predictive incursion lines bisected the property of Mr. Weir, so its inclusion in the LIM for his property would be detrimental to Mr. Weir in the form of a loss in value and marketability of his property. However, contrary to the erosion prediction lines, Mr. Weir's property appeared in fact to be benefitting from accretion. Therefore, he challenged the decision to include information from the Report in the LIM for his property. Other residents joined him, challenging the inclusion of the findings in their LIMs.

The *Weir* judgment is concerned primarily with the decision of the KCDC and their accompanying conclusion that they had a legal obligation under s44A(2)(a). Justice Williams suggests that paragraph (a) is "altogether different" to the other paragraphs, (b)-(h). Where documents fall under paragraphs (b)-(h), it will "always be a straightforward matter to determine whether they fit the particular description".⁸⁹⁸ The Court considered paragraph (a) and its components. Namely, did the information relate to "potential" erosion, did the information relate to a feature or characteristic of the applicant's land, and is the information "known" to KCDC?⁸⁹⁹ Williams J suggested that such questions would "inevitably require a judgement call on the part of some official. The necessity for judgement...very much distinguishes paragraph (a) from the others".⁹⁰⁰

After thorough consideration of s 44A(2)(a), his Honour concluded that the Report satisfied the aforementioned questions and therefore some reference to the information contained in the Report ought to be included in the LIM of affected properties.⁹⁰¹ However, Williams J noted that this was "not the end of the matter" as there remained a question as to how the Report ought to be represented in the LIM. To this end, the Council "has a very broad discretion" when determining how to present any relevant information in a LIM.⁹⁰² The legal requirements are that the information contained is "accurate, states the position fairly, and must not mislead".⁹⁰³ The particular implications of the prediction lines, and other findings of the Report and the potential impact that the inclusion of such information could have on the value and marketability of coastal properties heightens any obligation of accuracy and fairness.⁹⁰⁴ These

⁸⁹⁸ *Weir*, above n 880, at [32]-[33].

⁸⁹⁹ At [42].

⁹⁰⁰ At [32]-[33].

⁹⁰¹ At [65]-[66].

⁹⁰² At [68].

⁹⁰³ At [68].

⁹⁰⁴ At [69].

particular findings accentuate the particular effect that LIM reports have on the behaviour of local authorities as they are subject to great levels of exposure to liability.

Unfortunately, in this case, the information provided in the LIM report by KCDC was found to violate the legal requirements stated. Williams J was struck by “the stark simplicity of the *prediction lines*” contained in diagrams on the LIM.⁹⁰⁵ Particularly, the map graphic lacked the inclusion of many of the “important conditions and assumptions contained in the Report”.⁹⁰⁶ Such conditions and assumptions included the “deterministic” nature of the lines and the precautionary basis through which they were calculated: they identified only single “very worst case scenarios” under the 50- and 100-year timelines. While it is understood that current scientific knowledge is unable to predict the accretion locale and rates, Williams J noted that these scientific challenges ought to be referenced in the LIM report in order to “ensure the fair balance” in the LIM.⁹⁰⁷ Further suggestion was noted by Williams J as to the inclusion of script along the lines of the map graphics.⁹⁰⁸ Wording to the effect of “very worst case scenario at 100 years, and an equivalent on the 50-year line”. This would help to ensure that the graphic has the clarity required, thus, aiding potential purchasers who are attempting to understand the lines.

The attached five-page explanation also failed the legal requirements: it was characterized by his Honour as “densely written” and “hardly an exemplar of clear communication” of the important points raised in the Report.⁹⁰⁹ It is suggested that “sharpening and reducing the detail in the written text” is needed to make the LIM fit the requirements.⁹¹⁰ Clear and comprehensive information ought to be provided for the benefit of the purchasers and property owners seeking to understand the lines. Further, the legal requirement to acknowledge that the prediction lines remain untested was also mentioned by Williams J.⁹¹¹ The Council had indicated its intent to incorporate the prediction lines into the new District Plan.⁹¹² The prediction lines and the overall science of the Report ought to be fully tested in the context of a subsequent plan review process. Until this happens, Council maintain the obligation to inform purchasers that the lines are, “at this stage, draft only”.⁹¹³

⁹⁰⁵ At [70].

⁹⁰⁶ At [70].

⁹⁰⁷ At [71].

⁹⁰⁸ At [71].

⁹⁰⁹ At [70].

⁹¹⁰ At [71].

⁹¹¹ At [71].

⁹¹² At [8].

⁹¹³ At [71].

Although Williams J notes that his judgment will not give direction as to precisely how the Report should be rendered, the general comments made make this case nationally relevant in regard to the presentation of information in a LIM report, especially in regard to the inclusion of scientific information. It remains vital that Councils understand the basis on which they will need to inform people of underlying science, and that they remain aware of the challenges that may be faced when uncertain science can be used as a ground for litigation.

The particular relevance of this case is that it provides councillors and property owners alike with useful guidance as to the use of LIM reports and their contents. Particularly useful for Councils is the significance of the limit placed on the discretion to place generic coastal erosion hazard information on a LIM without further explanation.

It is noted that, six years later, the Kapiti Coast District Council has not yet put revised sea-level rise hazard information on the relevant LIMs, reportedly because of the community sensitivity.

3. Civil liability

There are three potential legal actions that could be taken against a council for the content of a LIM report: suing in negligence, suing for breach of statutory duty, and judicial review. The most important of these is negligence, given that breach of statutory duty is treated today as addressing the same legal and factual issues as a negligence inquiry. Judicial review cannot produce monetary awards for applicants, only a direction from the court to reconsider the decision at issue. The matters for consideration would be those already discussed when interpreting section 44A.

An action in negligence for negligent misstatement, requires four elements to be established: firstly, that a *duty of care* was owed; secondly, that there was a *breach* of the standard of care that could reasonably be expected under the duty of care; thirdly, that a loss was *caused* by the breach; and, fourthly, proof of *damages*.

In *Marlborough District Council v Altimarloch Joint Venture* the Supreme Court definitively ruled that councils owe a duty of care in the preparation of LIM reports. This finding was due to the proximity between requestors and the council, the fact that there is “reasonable and foreseeable reliance” on the LIM as a written statement, and due to the fact that Parliament

was deemed to have intended for requestors to be able to rely on the content of LIMs.⁹¹⁴ To quote:⁹¹⁵

[I]t is plain from subs (5) of s 44A that Parliament recognised, indeed was emphasising, that those obtaining LIMs from territorial authorities were entitled to rely on the accuracy of at least the subs(2) contents of the LIM... The subsection is apt to encourage general reliance on the accuracy of information required to be supplied in LIMs. That is a significant indicator, within the section itself, that as a matter of policy those relying on LIMs should not be denied the duty of care that proximity considerations suggest should exist.

However, despite finding that a duty of care existed, the Court was divided on whether a breach of this duty had caused the harm alleged. This should make clear that, even though liability is possible in negligence, it may not be upheld. Proving causation means proving not only that there was actual reliance upon a LIM leading to the purchase of a property, but also that such reliance was reasonable. This is not a given. For instance, if it can be shown that the LIM report was not read, or that the plaintiff had better information at their disposal, then reliance will not be established.⁹¹⁶

⁹¹⁴ *Marlborough District Council v Altmarloch Joint Venture Ltd* [2012] NZSC 11, at [85]-[88].

⁹¹⁵ At [87].

⁹¹⁶ *Trustees of the THP Trust*, above n 882, at [116]-[118]

Chapter 9: Tortious liability for RMA consenting

It has been argued by Australian legal commentators that the reversal of climate adaptation policy, as occurred in Queensland, could lead to potential negligence claims against public authorities on the basis that the prior policy established the scientific basis for sea-level rise within the planning authority.⁹¹⁷ A similar argument was made for statutory directives for consent authorities to “consider” the impacts of climate change. Specifically, it was argued that “considering” climate change creates an awareness of the hazard, therein making the decision susceptible to future challenge in negligence for failing to prevent the consent from being granted.⁹¹⁸

While the Environment Court has mentioned the risk of liability in negligence for allowing hazardous coastal development to occur,⁹¹⁹ it is doubtful that a consent applicant or their successor in title could sue in New Zealand for planning decisions made under the RMA. The Courts have evidenced a strong general reluctance to impose a duty of care upon public authorities when exercising quasi-legislative or quasi-judicial functions.⁹²⁰ Under this approach, liability can only exist for administrative decisions that do not involve discretionary judgements. This thus protects plan-makers and consent authorities, provided the consent authority exercises discretion.

Local government in New Zealand is rightfully fearful of liability because of the recent “leaky homes” saga. The economic rationale for plaintiffs to seek redress from local government is readily understandable:⁹²¹

Local authorities are attractive defendants. It is often said that they have “deep pockets”. Also, they do not, generally speaking, cease to exist in the way that intended defendant companies can.

The exposure of local government has been enabled by the gradual expansion of liability by the New Zealand Courts for negligently issuing building permits or for otherwise being negligent in inspecting houses under construction. This notable departure from English tort law has been

⁹¹⁷ Justine Bell and Mark Baker-Jones “Retreat from retreat – the backward evolution of sea-level rise policy in Australia, and the implications for local relationships” (2014) 19 LGLJ 23.

⁹¹⁸ Bell-James and Huggins, above n 749.

⁹¹⁹ *Otago RC v Dunedin CC*, above n 521, at [76].

⁹²⁰ Palmer, *Local authorities law*, above n 195, at 3.3.11.

⁹²¹ *Monticello Holdings Ltd v Selwyn District Council* [2015] NZHC 1674, [2016] 2 NZLR 148, at [62].

justified by the special reliance that New Zealand home owners have placed in local government to protect them from defective buildings.⁹²² Recently, the Supreme Court held that the duty of care originally represented in the *Hamlin* decision also applies to commercial properties.⁹²³

A duty of care has also been recognised as existing under the regime of the Building Act for the granting of consents which are exposed to natural hazards. In the case of *Smaill v Buller District Council*, the High Court held that the Buller District Council had been negligent in issuing building consents under section 36 of the Building Act 1991, when it knew or ought to have known that the site was exposed to a significant risk of rockfall.⁹²⁴ This statutory provision has been recreated under section 71 of the Building Act 2004. The Court in the *Smaill* case held that a tortious duty was permissible under this section of the Act because it was drafted as a directive to do something, rather than conferring discretion over whether to grant a consent.⁹²⁵ The precedent set by *Smaill* is probably the one that local governments should be most worried about, given that section 71 defines “natural hazards” as including “erosion (including coastal erosion, bank erosion, and sheet erosion)”, and “inundation (including flooding, overland flow, storm surge, tidal effects, and ponding).” There is therefore ample room for a negligence claim if a plaintiff can show that these hazards were negligently inspected, leading to the issuance of a consent.

However, what needs to borne in mind is that all of these instances of a duty being found are premised on the relationship created between plaintiffs and councils by the Building Act 2004 and its predecessors.⁹²⁶ In contrast, planning decisions are almost always made pursuant to discretionary powers under the Resource Management Act 1991. The Courts in New Zealand have been extremely reluctant to find that any tortious duties are owed under the RMA. A recent line of Court decisions, tracing back to the *Morrison* case,⁹²⁷ shows that while there *may* be a

⁹²² *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (CA & PC), at 524, and 527 per Richardson J, where he pronounces that:

“[u]ltimately we have to follow the course which in our judgment best meets the needs of this society. Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care to home-owners in issuing building permits and inspecting houses under construction for compliance with the bylaws.”

⁹²³ *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297.

⁹²⁴ *Smaill v Buller District Council* [1998] 1 NZLR 190 (HC).

⁹²⁵ At 212.

⁹²⁶ *Monticello Holdings*, above n 921, at [69].

⁹²⁷ *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA).

proximate relationship between applicants and consent authorities, strong policy considerations point against the imposition of a duty of care for any duties under the RMA.

In the *Morrison* decision, the plaintiff argued that the Council owed it a duty of care when interpreting its own district plan for the purpose of advising would-be consent applicants.⁹²⁸ The Court of Appeal held that, while there was the necessary degree of proximity on the specific facts,⁹²⁹ such a duty could not be entertained for three reasons of policy.⁹³⁰ The first was that the Council was entrusted by the statutory scheme with exercising judgment when interpreting the District Plan. The Court held that questions of interpretation were “hardly susceptible to an application of a negligence standard”:⁹³¹

Questions of construction tend to raise policy considerations which are difficult enough to assess in determining whether the construction was erroneous in law. It would be even more difficult to the point of being scarcely justiciable if the Court were also asked to rule whether the misconstruction was negligent.

The Court also commented that to impose a negligence standard – perhaps through a *Wednesbury* unreasonableness test – would “allow an award of what in essence would be administrative law damages although such damages are not available in administrative law proceedings”.⁹³²

The second policy reason given in *Morrison* was that the Town Planning Act already provided a statutory remedy for reviewing the decision of any local council through the specialist Planning Tribunal:⁹³³

It is in the public interest that challenges to the integrity of the district scheme and decision making under it be taken by appeal to the tribunal and end there or by limited appeal from the tribunal to the Courts. To superimpose a private law duty of care in relation to the construction of scheme provisions would cut across that statutory regime.

The third reason given was the ‘floodgates’ concern in allowing a duty of care to apply to interpretive matters:⁹³⁴

⁹²⁸ In *Morrison*, above n 927, the consent applicant had been misadvised by a council planner about the particular requirements for a residential proposal, and in reliance upon that information, had spent considerable amounts of money preparing an application that was subsequently denied. Shortly after the refusal of the planning authority to grant the consent, the council further tightened the rules pertaining to the subject of the application, therein making the project significantly less feasible.

⁹²⁹ *Morrison*, above n 927, at 336.

⁹³⁰ At 337-338.

⁹³¹ At 338.

⁹³² At 338.

⁹³³ At 338.

⁹³⁴ At 338.

It would be difficult to justify not extending the duty category to decisions on the construction of other legislation or private law documents likely to affect other persons. In short, the proposed duty category would potentially be hugely expansive, carrying significant and unacceptably indeterminate consequences for the public interest.

These three policy reasons against recognising a duty of care for Council workers applying the Resource Management Act were reaffirmed a decade later in the *Bella Vista* case.⁹³⁵ In that decision the plaintiff, relying on advice from an officer at the council, applied for a consent on a non-notified basis. While the consent was ultimately approved, the decision of the planning authority to issue the decision on a non-notified basis was successfully judicially reviewed by the neighbours of the plaintiff. However, rather than contest the judicial review or reapply for the consents on a notified basis, the plaintiffs decided to sue the council for negligence in their conduct of the consenting process. The plaintiff argued that a duty of care ought to be recognised under the RMA because the purpose statement at section 5 emphasises the “economic wellbeing of communities” and that this ought to extend to a duty to “not do anything which unjustifiably imperils the economic interests of an applicant (or subsequent purchaser) in making a decision to grant a resource consent”.⁹³⁶

This argument for a narrow recognition of economic factors based on Section 5 of the RMA was rejected by the Court of Appeal. They noted that any argument for a duty based on a power under the RMA would need to show that such a duty was not inconsistent with section 5 as the overarching purpose of the Act:⁹³⁷

I am satisfied that the proper conceptualisation of the statutory duty in the present case is that a consent authority must act within its power to issue consents in conformity with the purpose of the Act, namely the promotion of the sustainable management of natural and physical resources: s 5(1). In assessing sustainable management, a consent authority is directed to consider the need of communities to provide for their social, economic and cultural wellbeing as well as environmental protection: s 5(2). This direction does not mean that consent authorities are necessarily to be liable for an individual’s economic loss. The Privy Council in *McGuire v Hastings District Council* [2002] 1 NZLR 477 at [21] held that the true interpretation of s 5 does not allow the definition of sustainable management to be broken up into its component parts. The underlying purpose of the consent process is to provide a system whereby proposed activities can be assessed in terms of their impact on the environment and their sustainability. It does not require an assessment of the economic wellbeing of individual applicants, or subsequent purchasers.

The Court of Appeal, relying on *Morrison*, held that no duty should be found. The Court relied on the fact that the error of the Council was due in part to a poor quality of the information provided in preliminary discussions about the application, and the fact that the plaintiffs

⁹³⁵ *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33, [2007] 3 NZLR 429.

⁹³⁶ At [22].

⁹³⁷ At [25], per Robertson J.

specifically asked for the application to be processed on a non-notified basis – a gamble that ultimately did not pay off. The Court found that the duty proposed would limit the willingness of Council staff to engage with applicants about their applications:⁹³⁸

Even in the restricted form now advanced before us, the duty of care advocated by the appellants would have a distinctly chilling effect on RMA applications before any council. An authority must be able to rely on the information which is provided to it.... To impose a duty of care, which would necessitate every authority going behind the information placed before it, would create an intolerable burden ...[t]he imposition of the duty contended for would make such informal dialogue and/or assistance and/or rejigging between council officers and applicants practically impossible. It is inevitable that staff of consenting authorities would be fearful of leaving themselves open to attack. Forcing them to operate in a defensive mode would not be in the public interest.

The Court also noted that there were a number of alternative remedies available to applicants, such as seeking damages against the professionals who assisted them with their RMA applications, or simply applying for the consents again on a notified basis.⁹³⁹

The issue of whether a consent authority owes a duty to refuse a resource consent if it knows or ought to have known about a hazard on the property was directly addressed in the *Monticello Holdings* case.⁹⁴⁰ *Monticello Holdings* had purchased land for a residential subdivision, only to find out that a portion of the land had formerly been used as landfill. Notably, they found this out after subdivision consents had been issued. The Court concluded that the application for a resource consent did not create sufficient proximity to found a duty of care. It reached this conclusion on the basis that, despite paying a fee for a service (a normal indication of proximity), the consent authority was “obliged to give effect to the purpose of the Resource Management Act” and, affirming the finding in *Bella Vista*, this did not allow for an individual’s economic interests to be given weight in the consenting process given the broad range of considerations that decision-makers needed to weigh up in the public interest.⁹⁴¹

The Court went further in its critique of the proposed duty to refuse consents in order to protect applicants from hazards that the consent authority knew about, or ought to have known about:⁹⁴²

it cannot be suggested, with any degree of conviction, that a party applying for a resource consent can expect the issuing authority to apprise it of deleterious aspects of the land upon which a development is planned to proceed. To recognise such a duty would not only be impossible in these

⁹³⁸ *Bella Vista Resort*, above n 935, at [56]–[59].

⁹³⁹ At [60].

⁹⁴⁰ *Monticello Holdings*, above n 921.

⁹⁴¹ At [87].

⁹⁴² At [88].

circumstances, given what I see as the similarity of this case to *Bella Vista*, but would also impose an intolerable burden upon local authorities in their quasi-judicial consent-issuing role.

For these reasons, the likelihood of local authorities facing successful claims in negligence appears to be very low. However, that does not mean that the mere possibility of liability in negligence cannot exert a chilling effect upon local authorities. Negligence law is developed by judges in individual cases, and the rules could change in the future if it was judged to be appropriate to find a duty of care in this area – ie, if the policy reasons given above were outweighed by other factors. Interviews with Australian planners evidence a widespread concern about tortious liability amongst local government,⁹⁴³ and the Australian Productivity Commission observed that fear of legal liability had been a key obstacle to implementing climate adaptation.⁹⁴⁴ Therefore, while liability in negligence for consenting and plan making may be less pronounced in New Zealand than in Australia, the creation of a legislative liability shield could reduce some of this unfounded concern and improve the uptake and use of climate adaptation measures in Aotearoa New Zealand.

⁹⁴³ Peel and Osofsky, above n 52, at 2238-2240.

⁹⁴⁴ At 2242.

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