

Resource Management Law Association

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Planning Controls and Property Rights – Striking the Balance

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1. INTRODUCTION – DEFINING THE ISSUE

- 1.1 The heated debate surrounding the Government's proposal to make Conservation land available for mining illustrates the tension that exists between economic development as a result of the exploitation of resources and suitable protection of environmental values. Similarly, the threat of sea level rise as a result of global warming and the seemingly significant increase in the prevalence of extraordinary weather events also produces a similar set of conundra around the tension between restricting development in hazard prone areas and allowing land owners to develop their land in the manner they wish.
- 1.2 The upshot is that resource management functionaries, particularly district and regional councils, are increasingly facing real challenges in terms of resource use and protection and are having to make difficult policy decisions about the introduction or implementation of planning controls under the Resource Management Act 1991 ("RMA"). Some such controls are of a nature that would not have been contemplated even 20 years ago. Resource management professionals are required to advise on the lawfulness and appropriateness of such planning controls.
- 1.3 In this context, whether and the extent to which central or local government can impose planning controls which infringe on a landowner's property rights (or what are perceived to be "rights") and whether landowners can seek compensation for such (alleged) infringements are issues which are coming into sharper focus as pressure on resources (including amenity values) grows, the actual and perceived value of resources (for example, water and coastal land) increases and we learn more about human impacts on the environment (including climate change).
- 1.4 The importance of this debate was reflected in the theme of the 2009 New Zealand Centre for Environmental Law conference "Property Rights and Sustainability: The Evolution of Property Rights to meet Ecological Challenges". That conference canvassed a range of issues relevant to the tension between private property rights and environmental sustainability.¹ As one commentator at that conference put it:

"...there is a discernable polarisation of views in society regarding property rights, with one end of the spectrum asserting that such rights are sacrosanct and the imposition of sustainability principles are a dangerous threat to those rights, and thus economic development. At the other end there is the belief that private property rights are inherently incompatible with ecological integrity and the survival of life on earth. And never the twain shall meet....!"²

- 1.5 By definition, planning controls impinge upon the freedom of landowners to do what they wish with their land. In that sense, the issue can be characterised as the power of the State versus the rights of individual property owners. A great many legal papers have been written about the nature of private property rights (including the fundamental question of whether we have any at all) and the legitimacy of

1 See for example, the commentary of the late Judge John Bollard, "The Resource Management Act regime and private property rights and interests – is there an untoward tension between the two?" (presented at NZCEL Conference 2009); K Bosselman, "Property Rights and Sustainability: Can they be reconciled?" (Draft, presented at NZCEL Conference 2009); D Grinlinton, "Evolution, adaptation and invention: Property rights in natural resources in a changing world" (Draft, presented at NZCEL Conference 2009). We have provided references for the NZCEL conference papers (some of which are in draft form, where noted) which are of particular relevance to this paper and it is our understanding that all of the papers presented at the conference will shortly be published by NZCEL.

2 Grinlinton, *ibid*, at 1.

environment regulation in that context.³ Although it is possible to argue that there should be no control of land use at all, the key issue generally relates to the appropriate extent of the controls ought to be and whether landowners should be compensated as a result.

- 1.6 The issue of whether such controls can lawfully be imposed represents a legal issue and the scope of powers arising under the RMA define the extent to which New Zealand law will allow property rights to be infringed upon and, if so, whether compensation will be payable or other relief.
- 1.7 At another level, this debate can be seen as a philosophical or policy issue, i.e., whether such controls should be imposed. Key issues which arise in that context include whether the control can be justified having regard to the environmental issues at stake, the alternatives available, and whether the controls are fair and/or overly restrictive. If they are, it may be possible to secure an amendment to the relevant provision via a plan submission or section 85 of the RMA.
- 1.8 The issues relevant to the policy debate are also relevant to the legal issues because Parliament via the RMA and the Courts via judicial decision making have imposed limitations on the scope of planning controls. In other words, issues relevant to whether such controls should be imposed in any particular case may be relevant to whether they can. Where this line in the sand is drawn at any one time will ultimately be a balancing act between the public interest in maintaining appropriate environmental goals and the impact/cost on those who are subject to those controls.

Purpose and scope of paper

- 1.9 The situations in which planning controls are applied are numerous and range from common and generally accepted controls such as maximum height or height to boundary to much more novel and far-reaching controls. Planning controls which have recently emerged and which can be seen as relevant to the property rights debate include those which impose controls that:
 - (a) Afford blanket protection of trees;⁴
 - (b) Protect public goods such as heritage, landscape and amenity values;
 - (c) Manage land activities such as farming and forestry which threaten water quality by producing non point discharges of nitrogen;⁵
 - (d) Manage risks associated with natural hazards and coastal erosion and the effects of climate change and natural hazards.
- 1.10 Against that background, the purpose of this paper is to explore, at a high level, the manner in which policy and legal mechanisms are intended to work together to attempt to strike an appropriate balance between planning controls and property rights and, in so doing, to create a context for readers to think about these issues and to assess the appropriateness of planning controls in any particular case. It is not intended in this paper to examine a wide range of controls. However, these issues are directly raised throughout New Zealand in the manner in which local authorities

3 Examples which specifically consider the New Zealand context include D A Kirkpatrick, "Property Rights – Do You Have Any?" (1997) 1 NZJEL 267; B Barton "The Legitimacy of Regulation" (2003) 20 NZULR 364; P A Joseph, "The Environment, Property Rights and Public Choice Theory" (2003) 20 NZULR 408, D A Kirkpatrick, "Has the Resource Management Act replaced the Property Law Act?", NZLS Resource Management Intensive 2007; D Grinlinton (2009), loc. cit.

4 For example, Waitakere City Council, North Shore City Council and Auckland City Council's district plans.

5 For example, Variation 5 to the Waikato Regional Plan relating to water quality in Lake Taupo.

have responded to the threat of coastal erosion and sea level rise. For that reason, we have focussed on coastal hazard controls for the purposes of presenting case studies which raise the issues canvassed in this paper, given that such controls exist throughout New Zealand.

1.11 Specifically, it is proposed to:

- (a) Outline the powers which exist to promulgate standards, policy statements and plans under the RMA (section 2) and the restrictions or requirements which exist in relation to those powers (section 3).
- (b) Outline the key property rights arguments which are commonly raised against proposed planning controls and address those arguments by reference to relevant decisions of the Courts (section 4).
- (c) Address section 85 of the RMA, being the most potent remedy available to landowners who consider that planning controls affect the use of their property, including relevant case law (section 5).
- (d) Consider planning controls imposed to manage coastal hazards as a means of more closely examining the issues addressed in this paper (section 6). Examples of local planning controls are examined more closely in the schedules at the end of the paper.
- (e) Make some brief concluding comments (section 7).

Disclaimer

1.12 There is scope for extensive analysis in relation to each of the many inter-related topics canvassed in this paper and it is not possible to go into “chapter and verse” in relation to each. The focus in terms of the legal topics will therefore be identification of key principles that have emerged from case law and “cherry picking” relevant examples rather than attempting or purporting to be fully comprehensive. It should therefore not be assumed that this analysis represents the “whole picture”. Further, it is assumed that the readers of this paper will already be familiar with the general statutory provisions relevant to plan making powers, etc., so that extensive citation of lengthy sections of the RMA has as far as possible been avoided in the interests of brevity.

2. NATURE AND SCOPE OF POWER TO IMPOSE PLANNING CONTROLS

2.1 The RMA provides the scope for both central government and local authorities to impose planning controls on private property, primarily via regional and district plans. This section briefly outlines the powers that central government agencies and local authorities have to promulgate planning controls that regulate the use of private property for the purpose of the sustainable management of natural and physical resources. These provisions are well known and an in-depth analysis is not possible here. Accordingly, they are addressed only briefly.

Source of controls on activities – duties and restrictions under Part 3

2.2 Part 3 of the RMA contains the duties and, in particular, the restrictions that represent the primary source of control under the RMA. For example, the ability to require compliance with rules in regional and district plans derives from section 9, which provides that land may not be used in a manner which contravenes a district or regional rule unless the use is expressly allowed by a resource consent or existing use rights apply.

- 2.3 Sections 11 – 15 proscribe and control subdivision, activities in the Coastal Marine Area, use of water bodies and rivers, use of water and discharges. Those provisions prohibit such activities unless expressly allowed by a plan or a resource consent.
- 2.4 Thus, having regard to the purpose and scheme of the RMA, including duties and restrictions placed on landowners in sections 9 – 15 and the definitions of “environment” and “effects” outlined above, it is clear that the RMA contemplates and empowers the imposition of restrictions on the use of property which would result from planning controls which are implemented for the purposes of promoting the sustainable management purpose of the RMA.

Central government powers

- 2.5 The RMA empowers the Minister for the Environment to issue national environmental standards (“NESS”) through regulations and to recommend the promulgation of national policy statements (“NPSs”). NESS and NPSs are binding at both the regional and district level and require local authorities to impose planning controls in order to meet those national standards and policy statements.⁶
- 2.6 The Minister of Conservation may also issue New Zealand Coastal Policy Statements and approve regional plans. New Zealand Coastal Policy Statements also have a binding effect at regional and district council level.

Regional Council functions and powers

- 2.7 Section 68 of the RMA states that:

“(1) A regional council may, for the purpose of –

(a) Carrying out its functions under this Act (other than those described in paragraphs (a) and (b) of section 30(1)); and

(b) Achieving the objectives and policies of the plan, –

include rules in a regional plan.”

- 2.8 Regional council functions and powers are set out in section 30 of the RMA. Generally speaking, a regional council’s primary responsibility is for the integrated management of natural and physical resources and regional council functions involve both policy direction and control functions in order to achieve integrated management. Policy functions include the establishment of objectives, policies and methods to achieve integrated management and in relation to regionally significant effects of land use. Control functions include the control of the use of land for a range of purposes including the maintenance and enhancement of water quality, water quantity and water body ecosystems and the avoidance or mitigation of natural hazards. Regional councils are also charged (alongside the Minister of Conservation) with control of the use and occupation of the Coastal Marine Area, the use and taking of water and discharges of contaminants to air, land and water.

6 There are now NESS in effect relating to air quality, human drinking water and telecommunications facilities, with NESS on ecological flows and water levels, electricity transmission, future sea-level rise, measurement of water takes and on-site wastewater systems currently in development. An NES on contaminated land is also presently being scoped. A number of NPSs are also being developed, relating to renewable energy generation, electricity transmission, freshwater management, flood risk management and urban design.

2.9 Section 65(1) requires regional councils to consider the desirability of preparing regional plans where a range of identified “circumstances or considerations” arise, including:

- “(a) *Any significant conflict between the use, development, or protection of natural and physical resources or the avoidance or mitigation of such conflict.*
- “(b) *Any significant need or demand for the protection of natural and physical resources or of any site, feature, place, or area of regional significance.*
- “(c) *Any threat from natural hazard or any actual or potential adverse effects of the storage, use, disposal, or transportation of hazardous substances which may be avoided or mitigated.*
- “(d) *Any foreseeable demand for or on natural and physical resources.*
- “(e) *Any significant concerns of tangata whenua for their cultural heritage in relation to natural and physical resources.*
- “(f) *The restoration or enhancement of any natural and physical resources in a deteriorated state or the avoidance or mitigation of any such deterioration.*
- “(g) *The implementation of a national policy statement or New Zealand coastal policy statement.*
- “(h) *Any use of land or water that has actual or potential adverse effects on soil conservation or air quality or water quality.*
- “(i) *Any other significant issue relating to any function of the regional council under this Act.”*

District Council functions and powers

2.10 District councils are also responsible for the integrated management of physical resources, but with a particular focus on land use. Section 31 sets out the functions of district councils. Generally speaking, district councils are responsible for the control of the effects of the use, development and protection of land, including to avoid or mitigate natural hazards and maintain indigenous biodiversity, and the control of subdivision and noise. District councils’ policy functions include the establishment of objectives, policies and methods to achieve integrated management of the effects of land use.

2.11 Section 75 sets out requirements as to the contents of district plans. Section 76 contains provisions relating to district plan rules.

2.12 A comparison of sections 30 and 31 shows that there is some overlapping of regional and district functions, including management of natural hazards and hazardous materials. In those circumstances, the powers of the district council to make rules in respect of natural hazards and hazardous materials are subject to the powers of the regional council to make rules in respect of the same subject matter.⁷ With respect to

⁷ *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189.

natural hazards, the regional policy statement is required to state the local authority responsible for the management of natural hazards and, if not, the regional council retains primary responsibility for natural hazard management.⁸

- 2.13 It is also to be borne in mind that the RMA is effects based legislation and that the term “effects” is defined very broadly.⁹ The definition of effects includes positive and adverse effects, permanent and temporary effects, past, present and future effects, cumulative effects, potential effects of high probability, and potential effects of low probability but high potential impact.¹⁰

Case law

- 2.14 These provisions have spawned a significant body of case law which is beyond the scope of this paper to address. In terms of first principles, as long as planning controls proposed by a regional council fall within the functions set out in section 30 and controls proposed by a district council fall within the functions set out in section 31, those controls will be within the scope of the councils’ powers to promulgate provided they meet overriding legal requirements in terms of justification and promote the sustainable management purpose of the RMA (see below). In these circumstances, the relevant council can (i.e., has the legal power to) promulgate the provision in question. In terms of the formulation framed at the beginning of this paper, the question which then arises is whether they should.

3. STATUTORY REQUIREMENTS AND SAFEGUARDS ON PROMULGATION OF PLANNING CONTROLS

- 3.1 In promulgating planning controls, a number of legal requirements need to be observed and procedures followed. A substantial body of case law has developed which assists in determining the scope of these powers and the type of considerations which apply in determining the appropriateness of planning provisions, which will generally be based on expert evidence in light of a somewhat arcane concept of sound resource management practice. Collectively these provide a degree of protection for those subject to planning controls. The purpose of this section is to provide a brief overview of relevant provisions. It is beyond the scope of this paper to attempt to provide an overview of the manner in which the merits of plan provisions are considered – the examples are too diverse and numerous. However, the consideration of specific examples later in the paper will hopefully provide some tools for considering the merits of such provisions in the context of coastal hazard provisions.

Section 32 – cost benefit and options analysis

- 3.2 Section 32 of the RMA requires that when plan provisions are being prepared an assessment of alternatives and the costs and benefits associated with the options available for achieving the council’s objectives are considered. Sections 32(3) to 32(4) provide that:

“(3) *An evaluation must examine:*

8 Sections 62(1)(i) and 62(2).

9 Section 3.

10 In relation to section 3(f), the Court noted in *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 that that subsection relates to two types of “potentiality”. The first type of “potentiality” relates to effects of low statistical probability (but which are scientifically proven effects). The second type of “potentiality” relates to an effect of low scientific probability, i.e., the effect is not scientifically proven and therefore not certain.

- (a) *the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and*
 - (b) *whether, having regard to their efficiency and effectiveness, policies, rules, and other methods are the most appropriate for achieving the objectives.*
- (3A) *This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.*
- (4) *For the purposes of this examination, the evaluation must take into account –*
- (a) *the benefits and costs of policies, rules, or other methods; and*
 - (b) *the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.”*

3.3 Section 32 requires that the objective is the most appropriate way of achieving the purpose of the RMA and that the proposed policies and methods are the “most appropriate” way of achieving that objective.¹¹ Until recently, the generally accepted formulation of the approach to be adopted in assessing proposed planning provisions has been found in *Eldamos Investments Ltd v Gisborne District Council*¹² in the following terms:

- “A. *An objective in a district plan is to be evaluated by the extent to which:*
1. *It is the most appropriate way to achieve the purpose of the Act (s32(3)(a)); and*
 2. *It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72); and*
 3. *It is in accordance with the provisions of Part 2 (s74(1)).*
- B. *A policy, rule, or other method in a district plan is to be evaluated by whether:*
1. *It is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and*

11 See discussion by K Palmer, “Introduction to Environmental Law”, *Environmental and Resource Management Law* (3rd ed., Nolan, 2005). Prior to the Resource Management Amendment Act 2003, section 32 required that the local authority be satisfied that the proposed method was “necessary” for achieving the purpose of the RMA. The High Court in *Gisborne District Council v Eldamos Investments Ltd* (26/10/05, Harrison J, HC Gisborne CIV-2005-485-1241) noted that the change from the “necessity” test to the “most appropriate” test makes it easier for a local authority to initiate a plan change and assume a proactive rather than a reactive role.

12 W047/05. This case amended the previous test which was set out in *Nugent v Auckland City Council* [1996] NZRMA 481.

2. *It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72);*
3. *It is in accordance with the provisions of Part 2 (s74(1)); and*
4. *(if a rule) it achieves the objectives and policies of the plan (s76(1)(b)).”*

- 3.4 The Court rejected submissions that section 32 requires that the “optimum planning solution” needed to be adopted. Rather, the relevant matters to be considered by the regional council are its functions under section 30, the provision of Part 2 and its duty under section 32.¹³
- 3.5 The recent decision of the Environment Court in the *Long Bay*¹⁴ case limited the application of *Eldamos*, making clear that the *Eldamos* tests are incomplete and in particular omits references to the required cost / benefit and risk analysis, and set out a comprehensive summary of the mandatory requirements of section 32.¹⁵
- 3.6 The upshot of section 32 is that local authorities promulgating plan provisions need to undertake a robust analysis of the options available to address the situation which the variations propose to address and to arrive at the “most appropriate” solution,¹⁶ which is supported by reliable technical information and gives effect to the purpose of the RMA.¹⁷
- 3.7 Councils need to actively consider whether controls are necessary; non-action may not be an option. A case in which the Environment Court took the view that a failure to act would not promote the purpose of the RMA is addressed in *Bay of Plenty Regional Council and Waihi Beach Protection Society Inc v Western Bay of Plenty District Council*.¹⁸ The Court said:

“In response to the Society’s case (later discussed), it was argued [by the district council] that the voluntary assumption of risk by private property owners does not abrogate the Council’s responsibility of controlling the use of “at risk” land for the purpose of avoiding or mitigating natural hazards. We accept that submission, having regard to the Act’s purpose and provisions relating to the coastal environment, not to mention relevant principles and policies of the NZCPS (see below at paragraphs [72] and [73]). Failure to manage known and actual and potential effects of natural hazards at Waihi and Pukehina Beaches under the Act’s regime would not, in our view, be consistent with the legislative purpose of sustainability.”¹⁹

13 This is to be contrasted with the decision in *Briggs v Christchurch City Council* (Env C C45/2008) in which the Environment Court indicated that in the context of a plan appeal the Court is seeking the optimum planning solution within the scope of the appeal before it.

14 *Long Bay – Okura Event Park Society Inc v North Shore City Council* (A078/2008).

15 *Long Bay* at paragraph [34].

16 The phrase “most appropriate” (or its predecessor, “necessary”) has been interpreted as meaning “better”. See *Suburban Estates v Christchurch City Council* (C217/01); *Thompson v Western Bay of Plenty District Council* (A016/05); *Bates v Selwyn District Council* (C007/06).

17 Note also that where a rule imposes a greater prohibition or restriction than an NES, the section 32 evaluation must examine whether that restriction is justified by the particular circumstances of the region or district (Section 32(3A)).

18 8 ELRNZ 97.

19 *Waihi Beach*, at 109.

- 3.8 Indeed, the Court in *Fore World Developments v Napier City Council*²⁰ considered that councils are compelled to take action in relation to hazard management. In that regard, the Court said:

*"In particular, once a risk is identified as a matter of fact, these provisions of the NZCPS effectively require the creation of some cautionary or protective mechanism."*²¹

- 3.9 The Environment Court in the *Waihi Beach* case gave some direction as to the considerations that ought to be taken into account and information required in managing effects of natural hazards. The Court said:²²

"... we reiterate the importance of carefully analysed and integrated planning in managing the actual and potential effects of natural hazards within the coastal environment. Such a course may be expected to incorporate an informed assessment of: (a) a coastal area's resources, including (in this case) the combination of natural and man-made elements; (b) the range of recognised natural hazards to which the area is realistically subject; (c) the range of options for avoiding or mitigating related effects; and (d) the pertaining values, directives and guidance under the RMA, the NZCPS and other relevant instruments."

- 3.10 A further relevant principle, particularly in the context of hazard management, is that where there is uncertainty in the information available, it may be appropriate to apply a precautionary approach. In that regard, the Court in *Rotorua Bore Users Assn Inc. v Bay of Plenty Regional Council* said:²³

"Where scientific uncertainty exists, the need for balance may only be adequately achieved by applying precaution to the ultimate judgement."

- 3.11 A further example which may be relevant to the promulgation of planning controls which affect private property is *Capital Coast Health v Wellington City Council*.²⁴ In that case, the Court was required to consider whether the council could impose an Open Space Zone on privately owned land and, in particular, whether the Open Space zone was the best way to achieve the statutory purpose of the RMA (as was then required by section 32). The council admitted that it had not considered whether it could impose an Open Space zone on private land and, in response, the Court said:

*"We find that admission surprising for without proper identification of how the land was held, the council was in no position to analyse some of the threshold tests under its s 32 evaluation and consequently in no position to establish the effects of its Open Space proposal on the landowner."*²⁵

20 W029/06.

21 *Fore World Developments* (2006), at 27.

22 *Waihi Beach*, at 64.

23 A138/98 at 50.

24 W101/98 (interim decision).

25 *Capital Coast* (interim decision), at 25.

- 3.12 While the Court recognised the difficulty associated with undertaking a section 32 analysis on a macro scale in terms of the application of the assessment on specific sites, it nevertheless held that:

“...the imposition of such inhibiting development controls (as required by the Open Space B zoning) on private land is a decision which requires particular consideration of the site specific factors involved.”²⁶

- 3.13 In that regard, in its final decision,²⁷ the Court agreed with submissions of counsel that the council’s duty under section 32 is to carry out an assessment with respect to the district as a whole, but where the controls particularly affect an individual property a site specific assessment may be required.²⁸
- 3.14 *CS Family Trust v Auckland City Council*²⁹ is an example of a case in which the circumstances required a site specific assessment of the appropriateness of a rule and resulted in site specific planning controls. In that regard, the subject site was located on the floor of a disused quarry, with the maximum height of buildings defined by a line between the highest points of the roof of the two adjoining houses. The effect of the proposed maximum height rule was that the maximum height was defined at a level at or below the current foundation levels for the house and any building (including any alterations to the existing building) would require consent as a full discretionary activity. The Court undertook its own section 32 analysis and concluded that a site specific rule which would enable building and alterations up to the height of the existing house as a restricted discretionary activity (and above the existing height as a fully discretionary activity) would still achieve the objectives and implement the policies of the district plan and meet the purpose of Part 2 of the RMA, but would also be more focussed and efficient and may reduce costs to the landowner.

Plan change procedures – opportunity to test the merits

- 3.15 The First Schedule outlines the procedure to be followed by local authorities when promulgating plans or plan changes. Councils must consult with specified parties during preparation of the plan,³⁰ notify and invite submissions and further submissions on the plan, hold a hearing of submissions and issue a written decision, including reasons for the decision. A full merits hearing before the Environment Court is also available.³¹
- 3.16 Thus, in the context of promulgating plans, even if the legal and procedural requirements outlined above are satisfied, parties can use the First Schedule procedures to argue against a plan provision on its merits, i.e., that the controls sought to be imposed by the plan change are unfair, that there is a better way, etc.

26 *Capital Coast* (interim decision), at 28.

27 W004/00 (final decision). The Court issued a final decision approving of proposed provisions giving effect to its interim decision. That decision also addressed (as a result of the council’s concerns with respect to the interpretation of comments made in the interim decision) questions of law relating to the council’s ability to zone private property as Open Space and its obligations to undertake a section 32 analysis with respect to individual sites.

28 *Capital Coast* (final decision), at 3.

29 099/2009.

30 Note in the recent case, *Waikato Tainui v Hamilton City Council* 3/6/10, Allan J, HC Hamilton CIV2009-419-1712, the High Court held that consultation under clause 3(1) of the First Schedule is mandatory and is required to occur prior to notification of a proposed plan (see paragraphs 42 - 43, 58 – 60, 63 - 65 and 75 – 77).

31 A recommendation by the Technical Advisory Group on the RMA that appeals to the Environment Court should be on points of law only was rejected by the Select Committee.

- 3.17 Professor Barton sees the overall scheme of these provisions as providing a significant constraint on Council's plan making powers:

*"While it is true that councils do not have to "buy" the effects they have on landowners, it is arguable that their use of regulation is strongly constrained by the scrutiny of the plan-making process, including section 32, by the cost of the plan-making process, by the possibility of reversal in the Environment Court, and ultimately by the adverse political reaction of affected voters."*³²

- 3.18 As indicated earlier,³³ it is beyond the scope of this paper to consider the manner in which the merits decisions of plans and plan changes are determined.

Part 2 of the RMA

- 3.19 The exercise of these powers ultimately needs to promote the purpose of the RMA being the "sustainable management of natural and physical resources",³⁴ which is defined in section 5 as:

"...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 wellbeing 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."*

- 3.20 Any assessment which is undertaken in relation to whether the purpose of the RMA is achieved in terms of section 5 is informed by anything that may be relevant in sections 6, 7 and 8, which identify key matters which must be taken into account by local authorities when making a decision under the RMA.
- 3.21 Section 6 contains matters of national importance that need to be "recognised and provided for" and includes matters such as the protection of natural character of the coastal environment, outstanding natural features and landscapes, areas of significant indigenous vegetation and significant habitats of indigenous fauna and historic heritage, etc.
- 3.22 Section 7 contains "other matters" which RMA functionaries are required to "have regard to" which include the maintenance and enhancement of amenity values and the quality of the environment, intrinsic values of ecosystems, finite characteristics of natural and physical resources and the effects of climate change.
- 3.23 Section 8 requires RMA functionaries to take into account the "principles of the Treaty of Waitangi".
- 3.24 In any particular context, the matters in sections 6, 7, and 8 can be in conflict. In such cases, the factors are weighed and balanced in making an overall evaluation

32 B Barton (2003), loc. cit., page 380.

33 Paragraph 2.14.

34 Section 5.

under section 5³⁵ and local authorities are required to make an overall broad judgement, by weighing the significance of conflicting considerations against each other, in determining whether a proposal will promote the sustainable management of natural and physical resources. This approach was confirmed in *Geotherm Group v Waikato Regional Council*³⁶ in which the Court described the correct approach to section 5(2) and the overall judgement thus:

“Our approach is to weigh the matters in section 5(2) in order to reach a broad judgement as to whether an objective, policy or rule would promote the sustainable management of natural and physical resources. The values in section 5 have been variously referred to as “indicators”, “guidelines”, “directions”, or “touchstones” for promoting the goal of sustainable management.

The matters in section 5(2)(a), (b) and (c), are all to be accorded full and equal significance. Accordingly, they are to be applied having regard to the circumstances of each case. Applying section 5 involves a broad overall judgement of whether a proposal, or in this instance, the provisions of the proposed change and variation, would promote the single purpose of the Act. This allows for the balancing of conflicting considerations in terms of their respective significance or proportion in the final outcome.”³⁷

3.25 In *Infinity Group v Queenstown Lakes District Council*,³⁸ the Court accepted submissions summarising the basis for deciding a variation as follows:

“... the variation has to –

- (a) be necessary in achieving the purpose of the Act;*
- (b) assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act’s purpose;*
- (c) be the most appropriate means of exercising that function; and*
- (d) have a purpose of achieving the objectives and policies of the Plan.”³⁹*

3.26 Section 5 is said to be the finishing point which is to be considered in the overall exercise of the local authority’s judgment under Part 2 of the RMA.⁴⁰ In that regard, it is important in the context of this paper to note that the sustainable management purpose of the RMA relates not only to natural resources (i.e., trees, lakes, rivers, etc.) but also to physical resources (which includes buildings and infrastructure).⁴¹ The definition of “environment” is also very broad and includes not only plants and

35 *Doves Bay Soc Inc v Northland Regional Council* (C126/02).

36 A047/06.

37 *Geotherm*, at 74 and 75. This reflects the approach set out in *Auckland Regional Council v North Shore City Council* [1997] NZRMA 59.

38 C010/05.

39 *Infinity Group*, at 27.

40 *Suburban Estates Ltd v Christchurch City Council* (C 217/01).

41 “Natural and physical resources” is defined in section 2 as:

“land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures”.

“Structure” is then defined in section 2 as:

“any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft”.

animals, landscapes and water bodies, but also natural and physical resources, amenity values and people and communities.⁴²

Existing use rights

- 3.27 The protection afforded to landowners who are carrying out existing lawfully established activities is also relevant in the context of this paper. In that regard, section 10(1)(a) of the RMA enables a landowner to continue to carry out an activity which was lawfully established in terms of the district plan rules which applied at the time indefinitely provided the character, intensity and scale of that activity is the same or similar to that which was originally established.
- 3.28 In other words, if, for example, district planning controls prohibited the establishment of a dwelling in an area which is identified as being prone to hazards or in an area of high landscape value, that does not mean that the owners of existing dwellings in that area are required to remove those dwellings or to stop living in them – existing use rights continue despite the promulgation of district plan rules and such rights cannot be extinguished by district plan provisions.
- 3.29 The scope of existing use rights are more constrained in the context of regional planning instruments. In that regard, section 20A of the RMA only provides for existing use rights to continue until new plan rules are made operative. Thus, if it is desired to extinguish existing use rights and it is within the scope of the relevant regional council's jurisdiction, it may be possible to promulgate regional rules under section 20A which affect those rights. In that regard, in *McKinlay v Timaru District Council*,⁴³ the Environment Court confirmed that the regional council has the power to control the use of land in respect of coastal hazards, including the extinguishment of existing use rights.
- 3.30 Our analysis of regional plans (see Schedules A – H) suggests that regional councils have been reticent to extinguish existing use rights, but one of the possible outcome of the review of Environment Waikato's Regional Policy Statement is that Environment Waikato will seek to extinguish existing use rights via its regional plan.⁴⁴

Certificates of compliance

- 3.31 A mechanism by which landowners can secure a degree of protection from changes to district or regional plans which may impact on their development rights is to obtain a certificate of compliance ("COC") under section 139 of the RMA. Such certificates can be issued by consent authorities or the Environmental Protection Authority "*if an activity could be done lawfully in a particular location without a resource consent.*"⁴⁵ Indeed, the relevant authority is required to issue such a COC (provided the appropriate administrative charge is paid) provided that this requirement can be met.
- 3.32 It follows that a COC may be useful when a plan change or variation is to be notified (or which has been notified but before the rules become operative) where that change would alter the status of an activity which a landowner wishes to undertake from a permitted activity to an activity requiring a resource consent. To that extent, a COC effectively represents a means of crystallising an existing development right before such development has been undertaken.

42 Section 2.

43 [2001] NZRMA 569.

44 See Schedule A, paragraphs 4 – 8.

45 Section 139(1).

Other safeguards

3.33 Other safeguards on the promulgation of planning controls include:

- (a) Section 85 of the RMA - a plan provision may be opposed on the basis that it would prevent reasonable use of land and places an unfair and unreasonable burden on the landowner.
- (b) Provision for exercise of recognised customary activities – iwi are entitled to exercise customary activities recognised under the Foreshore and Seabed Act 2004, despite the rules in a plan.⁴⁶
- (c) Administrative Law - Actions and decisions of local authorities are subject to the principles of Administrative Law and will thus be limited to that extent. The upshot of those principles is that local authorities must act within their jurisdiction (as set out in sections 30 and 31), make decisions based on sound analysis (i.e. scientific analysis, costs/benefits analysis) and which are a reasonable (or, more correctly, not unreasonable) response to the particular situation.⁴⁷ It is to be noted, however, that any rights of appeal must be exercised before judicial review proceedings can be taken.⁴⁸

3.34 Of these, section 85 is the most relevant in the context of this paper and that provision will be addressed in more detail presently.

4. DO PRIVATE PROPERTY RIGHTS OVERRIDE OR INFLUENCE THE POWER TO REGULATE?

4.1 Some landowners affected by proposed plan provisions (i.e. your clients) may wish to argue that proposed planning controls amount to an unreasonable restriction on their private property rights which cannot (or at least should not) be imposed and, if so, that they should be compensated for such an infringement. That view is based on an assumption that private land ownership carries with it a set of protections which precludes the State from “overstepping the mark”. This section provides an overview of the arguments for and against that proposition by reference to legal research and analysis and key relevant decisions of the Courts.

4.2 There is a great deal of legal commentary on this issue;⁴⁹ we have relied heavily on a comprehensive article⁵⁰ by Professor Barry Barton which summarises the arguments on both sides of the property rights debate. The main arguments advanced in favour of the superiority of private property rights over the public interest can be briefly summarised as follows:

- (a) Private property rights are fundamentally protected by constitutional conventions, including the Magna Carta and the Bill of Rights Act 1990.
- (b) American law and jurisprudence suggests that the regulation of the use of property gives rise to a right to compensation.

46 Section 17A of the RMA. Note that the Foreshore and Seabed Act 2004 is currently under review. See *Reviewing the Foreshore and Seabed Act 2004: Consultation document* (New Zealand Government, March 2010).

47 Any challenge to plan provisions must first traverse First Schedule procedures and be appealed to the Environment Court – no application for judicial review can be made until that right has been exercised (See section 296 of the RMA).

48 Section 296 RMA.

49 See P Joseph (2003) loc. cit.; D Grinlinton, “Property Rights and the Environment” (1996) 4 Aust Property LJ 41; D Kirkpatrick (1997) loc. cit.; K Ryan (1998) loc. cit.

50 B Barton, *The Legitimacy of Regulation* (2003) 20 NZULR 364.

- (c) Other countries have constitutional protections against taking private property without compensation.
- (d) Liberal political theorists such as Locke and Blackstone advocated that property rights are immune from State interference.
- (e) There is no historical precedent for environmental regulation and intrusion on rights of property owners.
- (f) The owners of freehold land have full rights to that land.

4.3 We will briefly canvass each of these propositions.

Constitutional protections

4.4 New Zealand does not have a written constitution and is not therefore restricted in its ability to legislate in a manner which erodes private property rights. Constitutional arguments sometimes raise the protection of property rights contained in the Magna Carta in support of the argument. Professor Barton notes that while the general proposition that the State should not take private property without compensation is generally accepted, he also says:

“... however significant the original pact, and however potent its later history, Magna Carta’s importance is as a symbol; it does not give legal grounds for striking down modern legislation such as the RMA.”⁵¹

4.5 On that note, the High Court has held that the New Zealand Bill of Rights Act 1990 (“BORA”) does not contain any protection of property rights. It was held in *Westco Lagan v Attorney-General*⁵² that, while the BORA contains provisions against search and seizure and in favour of natural justice, it does not contain any protection of private property rights and its provisions cannot be extended to deal with the seizure of property without compensation.

4.6 Of particular relevance in the present context is the case of *Falkner v Gisborne District Council*.⁵³ In that case, the Court was required to consider whether landowners were permitted to erect coastal defences to protect their properties from the inroads of the sea (an acknowledged property right derived from English Law). The High Court dismissed an argument that a policy of managed retreat from coastal erosion caused by the sea effectively constitutes a “seizure of property” in terms of the BORA because land lost to the sea would vest in the Crown. The Court noted that the RMA deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights:

“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

51 Ibid., at 368.

52 [2001] 1 NZLR 40 (HC).

53 [1995] 3 NZLR 622.

procedure envisaged by the Act; accordingly, any protection work proposed by the residents must be subject to that procedure ...

[T]here is nothing in the scheme of the Act to suggest that the common law right cannot be infringed – quite the reverse. The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources.

As has been acknowledged both academically and judicially, the statutory implementation of integrated planning and environmental regimes represents a clear policy shift towards a more public model of regulation, based on concepts of social utility and public interest. Private law notions such as contract, property rights and personal rights of action have consequently decreased in importance.”⁵⁴

- 4.7 In short, there is no constitutional guarantee of property rights in New Zealand.⁵⁵

American legal principles

- 4.8 In relation to arguments which rely on American jurisprudence, the bottom line is that the American and New Zealand legal systems are very different – so different that the comparison between the two is of little value. Property rights are constitutionally guaranteed in America by way of the Fifth and Fourteenth Amendments.⁵⁶ The American Courts have recognised that some regulation can constitute a “taking” and therefore give rise to compensation, but Prof Barton notes that in the large majority of cases, the landowner does not succeed.⁵⁷

- 4.9 On this point, the recent decision of the New Zealand Supreme Court in *Waitakere City Council v Estate Homes Limited*,⁵⁸ is instructive:

“New Zealand law provides no general statutory protection for property rights equivalent to that given by the eminent domain doctrine under the Fifth Amendment to the United States Constitution, under which taking of property without compensation is unconstitutional and prohibited. The New Zealand Bill of Rights Act 1990 does not protect interests in property from expropriation.”⁵⁹

Constitutional protections from other jurisdictions

- 4.10 In considering constitutional protection in other countries (such as Australia, Northern Ireland and Canada), Prof Barton notes that planning, zoning and conservation legislation are ordinarily examples of the types of restrictions that can be imposed

54 *Falkner*, at 632.

55 Note that a proposal via a Private Members Bill in 2005 to amend the New Zealand Bill of Rights Act to include the right not to be arbitrarily deprived of property or to be deprived of the use or enjoyment of property without just compensation was not successful.

56 The Fifth Amendment says:

“No person shall be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation”.

The Fourteenth Amendment says:

“No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”

57 In *Pennsylvania Coal Co v Mahon* 260 US 393 (1993), the Court held that the general rule is that while property may be regulated to a certain extent, if that regulation goes too far, it will constitute a taking. It follows (in the American jurisdiction) that regulation of private property may give rise to a right to compensation. See B Barton (2003), loc. cit., at pages 369 – 374 for discussion.

58 [2007] 2 NZLR 149.

59 *Estate Homes*, at 45.

without the need for compensation.⁶⁰ For example, in *Belfast Corporation v O D Cars Limited*⁶¹ the House of Lords held that town planning restrictions did not amount to a taking of property and, in the ordinary use of language, an authority which imposes some restriction has not taken that property. The Court held that:

*“It is clear that such a diminution of rights can be affected without a cry being raised that the Magna Carta is dethroned or a sacred principle of liberty infringed.”*⁶²

4.11 Thus, Prof Barton concludes that:

*“Even if New Zealand did have a constitutional guarantee of property rights like that of Australia, Northern Ireland or Canada, environmental regulation of land use would be common and perfectly legal.”*⁶³

4.12 The case of *Auckland Acclimatisation Society (Inc) v Commissioner of Crown Lands*⁶⁴ enunciates the legal position in New Zealand. In considering the right of a landowner to drain swampy parts of privately owned farm land which constituted part of an internationally significant wetland, the High Court stated that:

*“The objectives of preserving the wetland may well be desirable in the national interest; the private rights of the particular farmers concerned who wish merely to develop their own land, ought arguably to be made subordinate to the public interest...If this is to happen, however, they should have to give up their land only if proper compensation is paid to them.”*⁶⁵

4.13 On appeal, the Court of Appeal acknowledged the general principle that, without clear language to the contrary, a statute should not be construed as taking away private rights without compensation, but also noted that:

“While the High Court was of course quite right about the existence of the principle, its scope in planning law is limited and we have to say that it cannot be imported in the present field...”

*...The farmers have the ordinary rights of landowners to use their land in its natural state, but the effect of the 1967 Act⁶⁶ is that they have no right to divert the natural water that is on the land. Ownership of the land does not of itself carry the right to alter the natural conditions in that way. The scheme of the Act means that to refuse the water rights applied for would not be to deprive the landowners of anything. Rather it would be to deny them privileges. There can be no moral claim to or expectation of compensation in the event of a refusal.”*⁶⁷

4.14 Some commentators argue that the common law presumption that regulation of property use does not amount to a taking can be rebutted and point to constitutional jurisprudence in Canada and Australia which recognise that regulation can reach a

60 B Barton (2003), loc. cit., at 374.

61 [1960] AC 490.

62 *Belfast Corporation*, at 519.

63 B Barton (2003), loc. cit., at 375. See K Ryan (1998) loc. cit. for further discussion of takings jurisprudence in the UK, Australia and America.

64 9 NZTPA 299 (Planning Tribunal); 10 NZTPA 255 (High Court); [1985] 11 NZTPA 33 (Court of Appeal).

65 *Auckland Acclimatisation Society v Sutton Holdings Ltd* [1985] 10 NZTPA 225.

66 Water and Soil Conservation Act 1967.

67 [1985] 11 NZTPA 33 at 37.

point it represents a *de facto* expropriation without compensation.⁶⁸ Nevertheless, overseas constitutional jurisprudence is not binding in New Zealand (as reflected in the *Estate Homes* case referred to above) and the RMA clearly precludes compensation and provides an alternate remedy (i.e. altering the planning provisions themselves) where the section 85 threshold tests are met. This remedy is discussed in the following section.

The arguments of the liberal theorists

- 4.15 Arguments based in political theory often rely upon the theories of liberal theorists, Locke and Blackstone. For example, Locke said:

*“... The Supreme Power cannot take from any Man any part of his Property without his own consent.”*⁶⁹

- 4.16 In his paper, Prof Barton examines the arguments of the liberal theorists and concludes that those theories do not actually support absolute property rights immune from regulation. Prof Barton noted:

*“The utilitarian and positivist justification for private property therefore finds that property rights are justified and entitled to respect for the ability to contribute to overall welfare, but not on the basis of some exterior natural law, property rights are part of the legal system and a human construct ... There is no reason for property rights to claim a specifically-protected position as against other elements of the legal system, such as environmental regulation ... The New Zealand debate about property and regulation will be improved by drawing on ... a wider and more modern range of thinking, rather than on misreadings of Locke and Blackstone.”*⁷⁰

- 4.17 Prof Barton goes on to make the point that, even if these arguments were valid, there is good reason to move on from that philosophical standpoint. Environmental and resource management has increased greatly over the recent years as a result of our increasing knowledge about human impact on the environment.⁷¹ The increasing need for environmental regulation puts to rest the arguments about a lack of historical precedent for environmental regulation or historical limitation of such regulation to nuisance⁷² - environmental regulation has and continues to evolve over time.⁷³
- 4.18 A consequence of this is that the Courts have recognised the need to interpret legislation in a way which provides scope for environmental legislation to be effective.

68 See for example S Ratnapala “Environmentalism versus Constitutionalism: A contest without winners” [2007] UQLRS 2; (2007) Resource Management Theory and Practice, at 110 – 164.

69 J Locke, Two Treatises of Government (P Laslett, ed, 1988)(1690).

70 B Barton (2003), loc. cit., at 391 – 392. See also D Grinlinton (2009), loc. cit., at 2, who notes that Blackstone acknowledged that such rights exist “save only by the laws of the land”.

71 B Barton (2003), loc. cit., at 393.

72 For example, S Ratnapala (2007), loc. cit., says:

“RMA’s mandate is not limited to the prevention of nuisance or even to the scientifically supported conservation goals. Even so it denies compensation to property owners who are asked to sacrifice their enjoyment of property for officially determined public benefits that may have nothing to do with nuisance prevention or reasonable demands of conservation.”

73 See summary of evolution of environmental regulation in K Palmer (2005), loc. cit. In relation to the evolution of property rights, see K Bosselman (Draft, 2009), loc. cit.; E Freyfogle, “The Evolution of Property Rights” (presented at NZCEL Conference 2009).

In *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand*, the High Court noted:⁷⁴

“...The RMA is not considered by this Court as a drastic erosion of the rights of property owners, and so to be construed restrictively to protect their rights. That judicial perspective has gone. The RMA operates to minimise adverse effects. It can be seen as a reform, by extension, of the common law. The common law had various tort remedies preventing or remedying adverse externality effects on neighbouring properties. Thereby the common law for centuries has restricted and still restricts use of private property. See the common law against: all manner of nuisance, for example, from dust; escape of dangerous things; preventing loss of support of land; and diversion and pollution of water.”⁷⁵

4.19 The leading New Zealand’s text on statutory interpretation reflects this view:⁷⁶

“Once the Courts were most protective of private property both real and personal. This protection has understandably diminished in the area of planning and land use legislation: here the public interest in the control of land use prevails.”⁷⁷

4.20 The nature of property rights has also evolved over time⁷⁸ and some commentators argue that property rights will need to continue to evolve in order to address environmental responsibilities.⁷⁹

Absolute property rights

4.21 The above analysis also leads to the conclusion that there are no “absolute property rights” which are somehow immune from interference or restriction by legislation. The freehold or fee simple estate is held subject to the underlying ownership of the State – which concept stems from feudal times when the royal power ultimately held all land.⁸⁰

4.22 The absence of “absolute property rights” is reflected in the comments made by the Environment Court in *Gargiulo v Christchurch City Council*:⁸¹

“It is sufficient here to state that we have no difficulty with private property rights being limited by the public benefit because that is authorised by the RMA if certain preconditions exist. But first we recognise that there are in our law no such thing as absolute, divine or

74 16/6/06, Chisholm J and Fogarty J, HC Christchurch, CIV-2006-409-000673.

75 *West Coast*, at 73.

76 J F Burrows, *Statute Law in New Zealand* (4th ed, 2009), at 221.

77 *Ibid.*, at 221.

78 See D Grinlinton (Draft, 2009) for a useful summary of the evolution of traditional property rights in natural resources.

79 E Freyfogle (2009), loc. cit., at 14 and 23. See also D Grinlinton (Draft, 2009), loc. cit., for further discussion on this topic. K Bosselman (Draft, 2009) loc. cit., also notes that constitutional amendments have been adopted overseas (e.g. in Europe, South America and South Africa) which go some way towards reconciling property rights to environmental responsibilities. N Wheen, “Climate Change and the Protection of New Zealand’s Terrestrial Flora and Fauna” (presented at NZCEL Conference 2009) at 6 and 9, contains discussion of the need for private landowners to take more responsibility for conservation in order to address the effects of climate change on New Zealand’s terrestrial flora and fauna and the potential role of district plan controls in that regard.

80 See P A Joseph (2009), loc. cit., D A Kirkpatrick (1997), loc. cit., and D Grinlinton (Draft 2009), loc. cit., for discussion on this topic. For further discussion of the nature, history and evolution of property rights, see K Bosselman (Draft, 2009), loc. cit., E Freyfogle (2009), loc. cit., and D Grinlinton (Draft, 2009), loc. cit.

81 C137/2000.

natural rights to property. Rather, property rights are themselves creatures of law which create costs (taxes) and can thus be measured against the interests to be protected under the RMA.”⁸²

- 4.23 However, the Court’s further observations in that case in relation to the relationship between private property rights and the RMA are also noteworthy in putting private property rights into perspective:

“...property rights are justified precisely because they are usually in the public benefit – either because they maximise wealth, and/or freedoms, and/or because of a systemic scepticism that any guardians (whether legislators or, worse, because not democratically elected, courts) know what is best for everybody in all cases. So there is no inherent conflict between private property rights and the public benefit. Indeed section 9 of the RMA appears to work on the hypothesis, perhaps even the presumption, that existing property rights should apply to land uses unless they are shown to be less efficient and effective and are controlled in district (or regional) plans. Only if those property rights are clearly shown to be inefficient and ineffective does the public benefit justify imposing limits on the exercise of private property rights relating to land use.”⁸³

The status of private property rights under the RMA

- 4.24 In light of the above, it is clear that New Zealand law allows for private property rights to be diminished or affected by environmental regulation and that the common law does not provide an form of immutable protection. That is not to say that planning law does not continue to support the principle that land should not be taken without compensation and we will see in the following section that where reasonable use of land is not possible the regulation may need to be mollified under section 85.
- 4.25 The *Falkner* case has already been referred to.⁸⁴ In more recent cases, the Environment Court has followed the *Falkner* approach in holding that the concept of sustainable management takes priority over private property rights. In particular, the Court in *New Zealand Suncern Construction Ltd v Auckland City Council*⁸⁵ said:

“It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer.”⁸⁶

- 4.26 Further, the Supreme Court has recently considered the question of protection of property and the right to compensation in *Waitakere City Council v Estate Homes Limited*,⁸⁷ a case which concerned a condition of a subdivision consent requiring a certain area of land to be vested in the Council for the purposes of widening a road reserve. McGrath J said:

“In general, where permission to develop land is refused, with the consequence that it is greatly reduced in value, the courts have not applied the statutory presumption and have treated what had happened as a form of regulation rather than a taking of property.”⁸⁸ ...

82 *Gargiulo*, at paragraph 72.

83 *Gargiulo*, at paragraph 72.

84 See paragraph 4.6.

85 [1996] NZRMA 411.

86 *NZ Suncern*, at 425.

87 [2007] 2 NZLR 149.

88 *Estate Homes*, at 47.

*"If a lawful condition to a subdivision consent requires the giving up of land in exchange for the right to subdivide, no expropriation or taking will be involved and the common law presumption of interpretation will not apply to the empowering legislation. If a condition is unlawfully imposed, for example for a purpose outside of those for which power to impose conditions of subdivision consent is given, that will not convert a regulatory requirement into a taking of property. The remedy for the landowner is to seek invalidation of the condition in the courts or, if the legislation permits, the substitution of a different outcome on appeal."*⁸⁹

- 4.27 This point is recognised by both Barton and Joseph,⁹⁰ i.e., that local authorities can lawfully regulate land use without compensation, but whether they should as a matter of policy or principle, is a different question. Barton says:⁹¹

"...it is legal, constitutional, principled and ethical to regulate the use of land. Land use regulation cannot be dismissed if we are to make progress on amenity, natural character, ecological integrity, biodiversity, and sustainability. Policymakers should remain undeterred by the possibility that RMA regulation will affect the rights of property owners."

- 4.28 The Environment Court's comments in *Mawhinney v Waitakere City Council* are also relevant.⁹²

[75] Overall the plaintiff's perception of malice seems to follow from a fundamental misunderstanding of the rights of owners of property. He submitted that the starting point for interpretation of planning legislation is the common law right that an owner of land may do what he or she likes with the land except to the extent restricted by law...

[76] ...There is an increasing recognition that the reason for planning legislation, including the RMA is that the exercise of private property rights can impose unwanted adverse effects/costs on the neighbourhood. Parliament has intervened to manage the imposition of these costs. It has never been the position at common law that a landowner can do what he likes with his land."

Summary

- 4.29 Thus, when all of the arguments are considered, it is clear that, in contemporary New Zealand law, there is no immutable principle relating to the protection of private property rights that extend beyond the protections afforded by existing legislation. The RMA enables constraints to be placed on the rights of private landowners in order to advance the greater good of the community and the environment and that a right to compensation does not arise as a result of such regulation other than in the case of designations and heritage orders.

89 *Estate Homes*, at 48.

90 B Barton (2003) loc. cit.; P A Joseph (2003) loc. cit.

91 B Barton (2003) loc. cit., at 364. See also P A Joseph (2003) loc. cit., at 410. He also notes that property owners must simply accept that environmental management may have some impact on the value of their property.

92 [2007] NZRMA 173.

- 4.30 Even at common law, property rights have always been the subject of qualification or regulation of one kind or another⁹³ and it is reasonable to assume that the ability of a landowner to do what they like with their property will retreat in the face of increasing density of population, scarcity of resources and enhanced knowledge of our adverse effects on the environment (both globally and locally), together with the means of addressing those effects. One commentator⁹⁴ made this sardonic observation:

“A landowner’s home may be their castle, but the local authority could redirect the moat if that were necessary for the efficient drainage of the district.”⁹⁵

- 4.31 Thus, the real arena for argument about conflicts between property rights and the power to regulate land for environmental protection lies not in whether such regulation can be imposed (it clearly can),⁹⁶ but whether in all the circumstances it should be imposed. It follows that there will generally be no scope for opposing a stringent land use control solely on the basis that it impinges on private property rights. In other words, any submission will need to focus on the substantive merits of the plan provision in issue rather than whether the relevant council had the jurisdiction to promulgate it. If the measure has a severe impact on a landowner’s interest in land, it might be worth raising section 85 in the submission, that section being a potentially potent tool. We turn to that section now.

5. RELIEF FOR IMPACT ON PROPERTY RIGHTS - SECTION 85 OF THE RMA

- 5.1 Section 85 is of particular relevance in the context of this paper because it provides a specific remedy for landowners who are aggrieved at the effect which a proposed plan provision will have on their land, with a procedure and remedies for challenging rules in a plan where they consider that the use of their land will be unreasonably affected. Section 85 states:

“85 Compensation not payable in respect of controls on land

(1) *An 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.*

(2) *Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds -*

(a) *In a submission made under Part 1 of the First Schedule in respect of a proposed plan or change to a plan; or*

93 The common law rule that “the owner of the land surface owns the airspace above and the subsurface below the land” has always been tempered by the rule “use your own property so as not to damage another’s”. See D Nolan, loc. cit., page 10 for discussion.

94 D A Kirkpatrick (1997), loc. cit.

95 Ibid., at 278.

96 Whether regulatory takings legislation should be introduced which alters the ability of councils to introduce planning controls which affect property rights without compensation is beyond the scope of this paper, but such discussion can be found in K Ryan (1998), loc. cit., S Ratnapala (2007), loc. cit., and E Freyfogle (2009), loc. cit. . See also B Nahkies, “Heritage Protection and the Compensation Issue”, Planning Quarterly (March 1999) at 11; O McShane, “Think Piece 2: Improving the implementation of the Resource Management Act at the local level can produce better outcomes” March 2003 (commissioned by Federated Farmers of New Zealand (Northland) Inc).

- (b) *In an application to change a plan made under clause 21 of Schedule 1.*
- (3) *Where, having regard to Part 3 (including the effect of section 9(3)) and the effect of subsection (1), the Environment Court determines that a provision or proposed provision of a plan or a proposed plan renders any land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Court, on application by any such person to change a plan made under clause 21 of Schedule 1, may -*
 - (a) *In the case of a plan or proposed plan (other than a regional coastal plan), direct the local authority to modify, delete, or replace the provision; and*
 - (b) *In the case of a regional coastal plan, report its findings to the applicant, the regional council concerned, and the Minister of Conservation, which report may include a direction to the regional council to modify, delete, or replace the provision.*
- (4) *Any direction given or report made under subsection (3) shall have effect under this Act as if it were made or given under clause 15 of Schedule 1.*
- (5) *In subsections (2) and (3), a “provision of a plan or proposed plan” does not include a designation or a heritage order or a requirement for a designation or heritage order.*
- (6) *In subsections (2) and (3), the term reasonable use, in relation to any 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.*
- (7) *Nothing in subsection (3) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14.”*

5.2 Section 85(1) makes clear that the regulation of the use of private property by a local authority via planning provisions (as opposed to designations or heritage orders) does not amount to injurious affection and does not give rise to a right to compensation. The outcome of an appeal or application brought on the grounds of section 85 is that the plan provisions are amended (discussed below) rather than providing compensation for a disaffected landowner.

5.3 This is in contrast with the provisions of the Town and Country Planning Act 1977 (“TCPA”), which did provide for compensation for district scheme restrictions in certain circumstances⁹⁷ - section 85 therefore represented a significant policy shift. In *Leith v Auckland City Council*⁹⁸ the Court said:

“We think it is significant that, unlike the former Town and Planning Acts which expressly provided for compensation for district scheme restrictions in certain circumstances (see section 44 of the 1953 Act and section 126 of the 1977 Act), the Resource Management Act expressly provides (by section 85) that an interest in land is not taken

97 Section 44, Town and Country Planning Act 1953, section 126 of the Town and Country Planning Act 1977.

98 [1995] NZRMA 400.

or injuriously affected by reason of any provision in a plan. Instead of providing for compensation, the section provides that where a plan provision renders land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Tribunal can delete or direct deletion of the provision.”⁹⁹

Section 85 tests

- 5.4 The procedures for obtaining a remedy in terms of section 85 are:
- (a) To lodge a submission on the plan (or plan change) when it is proposed (section 85(2)); or
 - (b) To apply for a change to the rules by referring them directly to the Environment Court, either in the context of plan change procedures or once the provisions are operative (section 85(3)).¹⁰⁰
- 5.5 The Environment Court may direct the local authority to modify, delete or replace the provision if it determines that it:
- (a) Renders the land incapable of reasonable use; and
 - (b) Places an unfair and unreasonable burden on any person having an interest in the land.
- 5.6 Both limbs of this test need to be satisfied before the Court will direct a change to the provisions.¹⁰¹
- 5.7 The Court in *Hastings v Auckland City Council*¹⁰² provided a useful summary of the section 85 test, making clear that the focus of the section 85 test is the public interest, not private property rights. It stated:
- “The test to be inferred from s85 is not whether the proposed provision is unreasonable to the owner (a question of the owner’s private rights), but whether it serves the statutory purpose 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.”¹⁰³*
- 5.8 Some examples from case law are discussed below for the purposes of examining the scope of the concept of “reasonable use” and the type of control which will be seen to constitute an “unfair and unreasonable burden” on a landowner. Importantly, the “incapable of reasonable use” test is independent of the identity or characteristics of the landowner. Those matters are considered under the second limb of the test in relation to the reasonableness of the burden on the landowner.

99 *Leith*, at 419.

100 *Fore World Developments v Napier City Council (W12/05)* at 2 - 7. See also *Re an Application by McAuley Trust (W029/07)*, at paragraph 6. See that case also for discussion as to appropriate notification of applications to change plans made directly to the Environment Court.

101 In the context of a regional coastal plan, the role of the Environment Court is to report its findings to the applicant, regional council and Minister of Conservation and that report may include a direction to the regional council to modify, delete or replace a provision (section 85(3)(b)).

102 A068/01.

103 *Hastings*, at 19.

Incapable of reasonable use

- 5.9 Whether land is “incapable of reasonable use” needs to be determined on a case by case basis; however, a number of useful principles or yardsticks have emerged from the decided case law.
- 5.10 It is relevant to note at the outset that section 85(6) of the RMA precludes any use which would generate significant adverse effects from being considered “reasonable”.¹⁰⁴ The High Court’s comments in *Francks v Canterbury Regional Council*,¹⁰⁵ reflect a similar philosophy. In that case, the High Court was called upon to consider stringent plan provisions that prevented development in an erosion prone area, including the complete prohibition on development seaward of an identified building line. The Court found that undertaking residential development on land which is subject to erosion would not be a “reasonable” use of the land, and said:
- “How could the Judge find that the land was at risk from erosional forces on the one hand, and conclude in terms of s 85 that building upon it was a reasonable use which had to be permitted on the other?”¹⁰⁶*
- 5.11 Whether land is capable of reasonable use must be determined in the context of the site as a whole. For example, in the *Landco Mt Wellington v Auckland City Council*¹⁰⁷ case, Landco sought that land be rezoned for the purposes of enabling a comprehensive residential development on a site which comprised 110ha, including 2400 housing units. The land at issue comprised 2.4ha of that site (and 29 housing units), which represented around 2% of the available land and housing units proposed. The Court took the view that a zoning which precluded Landco from using a small portion of the entire site for housing development would not deprive Landco of the reasonable use of its interest in land - certainly not to the extent that Landco would suffer an unfair and unreasonable burden.¹⁰⁸
- 5.12 It is important to note that a landowner’s wish to use the land in a way that maximises its value or economic potential does not make that use alone reasonable and others unreasonable. Of particular note is the principle that reasonable use is not synonymous with optimum financial return.¹⁰⁹ Similarly, if land is of a type or quality that it is not necessarily appropriate for the applicable zoning, e.g., rural zoned land which is not economically viable for farming, it does not necessarily follow that the zoning renders the land incapable of reasonable use. In that regard, it is the inherent quality of the land itself that renders the land incapable of a particular use, not the zoning.¹¹⁰
- 5.13 However, the case of *Steven v Christchurch City Council*¹¹¹ demonstrates that where planning controls impose an “all or nothing” quality to the landowner’s options, the land may be considered incapable of reasonable use. The *Steven* case related to the heritage listing of a house situated in the middle of the site which prevented the house from being demolished. The Court found that, in the circumstances, the listing rendered the land incapable of reasonable use. It noted:

“Nor is this case similar to, for example, a rule in a rural area whereby a territorial authority makes clearance of indigenous vegetation a

104 Section 85(6).

105 10/6/04, Panckhurst J HC Christchurch CIV-2003-485-1131.

106 *Francks*, at 26.

107 W042/08.

108 *Landco*, at 18.

109 *Landco*, at 125.

110 *Landco*, at 122 and 123.

111 [1998] NZRMA 289.

discretionary activity. In such a case other factors may come into play while the land may not be able to be used for grazing or other farming or forestry, it might be possible to allow it to be used for residential purposes or even subdivided for that purpose. And of course as part of a discretionary consent some vegetation could be removed for a building site. Alternatively, it might be possible to fence the area off if it is not a large part of the title so that the land as a whole, can be seen as having a reasonable use.”¹¹²

- 5.14 The fact that it is possible to obtain a consent for an activity does not necessarily mean that the land will be capable of reasonable use. For example, in *Mullins v Auckland City Council*,¹¹³ a proposed density rule provided that building on the subject site was a non-complying activity. That factor formed part of the basis for the Court’s finding that the land in question was incapable of reasonable use. Similarly, in *Seabreeze Investments v Christchurch City Council*,¹¹⁴ the Court considered that a non-complying activity status raised issues as to whether reasonable use of a property could be made. In that regard, the Court said:

“We cannot accept the possibility of obtaining a resource consent means that the plan provides for its reasonable use.”¹¹⁵

- 5.15 The upshot is that while the circumstances of each case will ultimately determine the outcome, land will only be considered incapable of reasonable use if the land as a whole is so affected and there is truly no *reasonable* use for the land, regardless of whether the land may be applied to the highest value use.

Unfair and unreasonable burden

- 5.16 The factors that need to be considered in determining whether a provision which is challenged under section 85 imposes an unfair and unreasonable burden in terms of the second limb of the section 85 test are well summarised in the *Steven* case as follows:

“Whether there is an unfair and unreasonable burden cannot be considered in the abstract but in the context of the Act and in particular (with differently weighted) reference to:

- (1) The natural and physical resources in the case;*
- (2) That no reasonable use can be made of the land (that is whether the first test in section 85(3) (is satisfied);*
- (3) Part II of the Act (the purpose and principles) because these underpin everything else in the Act;*
- (4) Part III of the Act and the inference from section 9 that real property rights prima facie meet the purpose and principles of the Act – Part III and section 9 are expressly referred to in section 85(3) so there can be no doubt of their relevance;*
- (5) The relevant provisions of the proposed plan (in this case the heritage section and discretionary rules) because the listing of the property has to be looked at in the context of that plan;*

112 *Steven*, at 38.

113 A035/96.

114 C081/02.

115 *Seabreeze*, at 30.

- (6) *The rebuttable presumption that the proposed plan is effective and efficient – otherwise the work on the (proposed) plan is wasted;*
- (7) *The personal circumstances of the applicant, looked at objectively – because in assessing a burden one has to look at who is carrying it.*

We have to exclude from our considerations Part IV of the Act, and section 32 in particular (except to the extent identified in (6) above which allows the assumed results of a section 32 analysis to be considered).¹¹⁶

- 5.17 The expression “burden” suggests that some imposition on a landowner is acceptable, but the question of whether a provision places an unfair or unreasonable burden on a person is a question of fact and degree. Financial costs are one factor leading to unfairness and unreasonableness.¹¹⁷
- 5.18 In the *Mullins* case, five building sites had been created by way of cross lease prior to the proposed district plan being notified and the appellants had purchased those sites in expectation of being able to build on them. The proposed new density rules would prevent building on those sites without a resource consent for a non-complying activity. The Court heard uncontested evidence that a dwelling could be built on the sites which would comply with all other rules of the proposed plan and that the effects of such building would be minor. The combination of these factors led the Court to find that the sites would be incapable of reasonable use.¹¹⁸ Because the building sites were purchased for the purposes of erecting a dwelling, which could not be achieved under the new rules, the Court found that the density rule placed an unfair and unreasonable burden on the appellants.¹¹⁹
- 5.19 In this context it is worth mentioning the case of *Daylight v Auckland City Council*¹²⁰ which related to an appeal against density provisions. While section 85 matters were not specifically raised in that case, the Court found that it would be inappropriate to amend the plan provisions to take account of the appellant’s disappointment that the proposed development could not be undertaken because the appellant had not committed himself to the development before the district plan was notified, nor had a certificate of compliance been sought which would facilitate the development in the transitional period.

Compensation and the ability to require acquisition of land

- 5.20 As noted, the effect of section 85 is that compensation is not payable on the basis that plan rules are deemed not to injuriously affect an interest in land. The only remedy is to alter the relevant plan provision.
- 5.21 Neither can an affected landowner take measures to require a council to acquire their land on the basis of plan provisions. The only provision in the RMA that contemplates such a taking is section 185 which relates to designations and not ordinary plan provisions.¹²¹ While the Local Government Act 2002¹²² (“LGA”)

116 *Steven*, at 34.

117 *Steven*, at 40 – 46.

118 A035/96, at 5 and 6.

119 *Mullins*, at 6. For further discussion, see also K Palmer, “Zoning Wipeout and the No Compensation Principle (Casenote: *Mullins v Auckland City Council*)” NZJEL 316 (1997).

120 A032/96.

121 The equivalent provision relating to heritage orders is section 198 of the RMA, which empowers the Environment Court on application to give the heritage protection authority the option to remove the heritage order or acquire the land under the Public Works Act 1981.

122 Section 190 of the LGA.

provides for compensation where land is taken for or injuriously affected by a public work those provisions do not override or qualify section 85 of the RMA which relates only to the provisions of plans.

- 5.22 It is worth noting that councils are not precluded from entering into financial arrangements with a landowner in order to ensure that a provision will not be changed under section 85 or in order to share the cost of regulation. In that regard, one commentator¹²³ suggests that “stewardship payments” in recognition of the conservation of land to protect flora and fauna from the effects of climate change:

“would both encourage and develop a positive land ethic in and provide an income for land owners, and section 85 does not rule them out in the same way as it rules out compensation.”¹²⁴

- 5.23 The RMA also contemplates that councils can acquire land by agreement under the Public Works Act 1981 where it is considered necessary or expedient for terminating any non-complying or prohibited activity on that land or facilitating an activity in relation to land which is in accordance with the objectives and policies of the plan.¹²⁵

6. **EXAMPLES OF CONTEMPORARY PLANNING CONTROLS – MANAGING COASTAL HAZARDS**

- 6.1 As noted earlier, we are all familiar with the “traditional” controls that are common in district plans such as height controls, side yard requirements, etc. These controls clearly impinge on the right of a landowner to use their property as they wish but there can be little debate that we should focus on the appropriateness of such controls (in terms of the actual limitation or requirement imposed) rather than whether they are lawful.
- 6.2 In that context, we are now seeing the emergence of a different type of controls in both district and regional plans designed to protect or enhance amenities or address other environmental effects.

Tree protection controls

- 6.3 An example of a widespread control on amenities are general tree protection rules introduced by some Auckland councils¹²⁶ which prevented the trimming and/or removal of trees of a particular species or over a certain height without a resource consent. The legitimacy of such controls and their impact on private property rights became a focus¹²⁷ of the newly elected National Government which legislated to curtail the powers of local government to make such rules. Blanket tree protection was banned by the Resource Management (Simplifying and Streamlining) Amendment Act 2009¹²⁸ and the RMA now precludes councils from restricting the trimming or felling of trees unless they are specifically identified in the district plan.¹²⁹

123 N Wheen (2009) loc. cit.

124 Ibid., at 11 - 13. Wheen also suggests that one option to facilitate the conservation of flora and fauna is to provide an exception to section 85 in the context of protecting endemic flora and fauna under climate change projections as that approach would be consistent with the ability to obtain compensation if land were protected under certain covenants, consistent with New Zealand’s legislative and international commitments to protect biodiversity and on the basis that landowners are generally motivated to protect biodiversity by financial considerations.

125 Sections 86 and 197 of the RMA.

126 Waitakere City Council, Auckland City Council and North Shore City Council.

127 See NZ Herald articles, “Stumped by the prospect of a great chainsaw massacre”, Sigrid Shayer & Hueline Massey, 28 August 2009; “Tree savers’ law protest on shaky ground”, Editorial, 9 September 2009; “Putting home owners back in control of their gardens”, Nick Smith, 10 September 2009.

128 The Resource Management (Simplifying and Streamlining) Amendment Act 2009 came into force on 1 October 2009.

129 RMA, section 76(4A).

(We could have an interesting side debate about the appropriateness of central government to interfere with lawfully promulgated plan provisions but such a debate would ultimately be fruitless.)

Controls to protect of landscape/ amenity

- 6.4 A further example of district plan controls which could be seen to impinge on private property rights are those which restrict particular activities on private property for the purposes of protecting landscape and amenity. In particular, regional and district councils across the country have either identified, or are currently identifying, outstanding natural features and outstanding natural landscapes in accordance with section 6(b).¹³⁰ The question which arises is whether and to what extent private landowners should bear the cost of protecting those landscapes – particularly where that cost falls largely on rural landowners for the enjoyment and benefit of all, including urban dwellers?¹³¹ Decisions involving the Roy's Peninsula /Lake Wanaka provide useful examples of the impact that planning controls for the protection of landscape may have on development rights.¹³²

Regional land use controls to restrict nitrogen leaching

- 6.5 Environment Waikato's Regional Plan Variation 5: Lake Taupo ("RPV5") is an example of planning controls which impact development rights for the purposes of managing water quality. RPV5 was promulgated to reduce non point discharges of nitrogen from land in the catchment entering Lake Taupo as a result of concerns raised by scientific investigations that revealed that if inputs of nitrogen are not abated the outlook for the future pristine health of Lake Taupo would be compromised.
- 6.6 In brief and simple terms, farmers in the Taupo Catchment are not allowed to discharge nitrogen at a greater rate than their estimated average nitrogen discharge for the 2001 – 2005 period. Each farmer undertaking such activities is required to apply for a controlled activity consent and obtains a nitrogen discharge allowance ("NDA"). Any activities which would result in nitrogen leaching beyond this benchmark NDA level need to be authorised as a non-complying activity or be achieved by trading NDA's from land being retired from farming within the cap.
- 6.7 The effect of the NDA approach on farmers is that any increases in stocking rates, etc., cannot produce any further nitrogen. Nitrogen levels therefore must be maintained, either via the adoption of measures¹³³ or by obtaining nitrogen allocation from another source.¹³⁴ However, for existing foresters it means that plantation forestry cannot be converted to farm land which has much higher nitrogen leaching potential than forestry. The same applies to undeveloped land, although some flexibility is built in to the variation to enable limited development of undeveloped land i.e., it could well be developed for forestry but not for farming.

130 For comprehensive discussion of the case law with respect to outstanding landscapes, see B Barton, "Outstanding Landscapes" (NZLS Intensive Seminar: Environmental Issues – Insight and Inspiration, 2006).

131 For further commentary on the property rights / protection of amenity and landscapes debate, see C Somerville, "Community Values, Private Property", (presentation at the RMLA conference, October 2007) and K Ryan, (1998), loc. cit.

132 *Wakatipu Environmental Society v Queenstown Lakes District Council* (C129/2001), *Matukituki Trust v Queenstown Lakes District Council* (W010/2006), *Upper Clutha Environmental Society v Queenstown Lakes District Council* (C113/2009).

133 Via nitrogen reduction technologies, etc.

134 It is anticipated that a trading market will establish (although that is not part of the variation).

- 6.8 The variation was heavily criticised by farmers aggrieved at limitations on development of their land and by foresters and owners of undeveloped land concerned that the development potential of their land would be compromised.

Regional case studies - planning controls to manage coastal hazards

- 6.9 It is not possible in this paper to consider all examples of such controls. However, coastal hazards issues (i.e., coastal erosion and inundation from the sea) tend to give rise to much debate over the extent to which councils should introduce planning controls which restrict the exercise of property rights and these arise all over the country given New Zealand's geography.¹³⁵
- 6.10 Key issues which arise in that regard include:
- (a) The need to protect people and property from coastal hazards;
 - (b) The extent to which property owners should be entitled to protect their property via coastal protection works; and
 - (c) The effects of coastal protection works, particularly on coastal processes, etc.
- 6.11 We have thus focussed on coastal hazards as a more comprehensive case study. In light of that, the remainder of this section provides an overview of the types of planning controls which are being promulgated to address coastal hazards and an analysis of the relevant case law in that regard. Schedules A to H provide further detail and some comment on the specific coastal hazard planning controls adopted by councils in the Waikato, Auckland, Wellington, Nelson/Tasman, Otago, Canterbury, Taranaki, and Hawke Bay regions.

General approach – setbacks or statutory protections

- 6.12 Many councils adopt an approach whereby a coastal hazard setback is established, either on a precautionary basis or via scientific studies, with activities on land forward of the setback (primarily building and subdivision) being subject to more stringent restrictions than those behind the setback. In some cases, building is even prohibited forward of the setback.¹³⁶
- 6.13 Other councils rely more heavily on the provisions of the Building Act 2004 (with respect to buildings)¹³⁷ and section 106 of the RMA (with respect to subdivision),¹³⁸ which establish circumstances in which building consent (Building Act) or resource consent (RMA) cannot be granted. Those provisions are addressed below.

Jurisdiction to impose controls

- 6.14 Regional councils derive their jurisdiction to promulgate planning controls relevant to coastal hazards from section 30(1)(c)(iv) of the RMA which empowers them to control the use of land for the purpose of "the avoidance or mitigation of natural hazards".
- 6.15 District councils derive their jurisdiction from sections 31(1)(a) and (b)(ii) of the RMA which require them to manage natural and physical resources including "the avoidance or mitigation of natural hazards".

135 See, for example, NZ Herald article, "Our eroding nation: We shall not be moved", Simon Collins, 31 December 2002.

136 For example, the Napier District Plan – see Schedule H.

137 For example, Thames-Coromandel District Plan – see Schedule A.

138 For example, Central Hawke's Bay District Plan – see Schedule H.

- 6.16 In terms of the definition of “environment”, coastal hazard controls address that part of the environment that comprises “physical resources” and “people and their communities”. In terms of effects, they deal with “potential” effects of “low probability” but with a “high potential impact”.
- 6.17 We have already seen from the *Waihi Beach* and the *Fore World Development* cases that once a particular risk (in this case, of erosion or inundation) is identified, councils are required to undertake measures to manage the effects of those natural hazards. As noted earlier¹³⁹, section 65(1)(c) requires regional councils to address “any threat from natural hazards” if that issue arises in their region. In that regard, there can be no doubt that the promulgation of controls to deal with natural hazards falls within the jurisdiction of both regional and district councils.

Nature and appropriateness of controls

- 6.18 District councils have powers under the Building Act 2004 to refuse to issue building consents where the land is subject to coastal hazards such as erosion and inundation.¹⁴⁰ Section 106 of the RMA empowers the district councils to refuse applications for subdivision if it is considered that:

“(a) *the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or*

(b) *any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or*

...”

- 6.19 Thus, district councils which seek to restrict building on, and subdivision of, land via planning provisions under the RMA can already do so to a limited extent via the provisions of the Building Act 2004 and section 106 of the RMA. However, this is obviously an ad hoc response which does not enable a comprehensive approach or consistent policy to be tested, adopted and pursued.
- 6.20 In terms of the general policy approach, the concept of “managed retreat” in terms of setting of hazard lines which restrict buildings and structures, is promoted by the NZCPS¹⁴¹ and has generally been accepted by the Courts as fulfilling the section 31 function to manage the effects of natural hazards.¹⁴²
- 6.21 The concept of establishing coastal hazard setbacks and building restrictions forward of those setbacks has been accepted in a number of cases, including the *Waihi Beach* case, *Skinner v Tauranga District Council*,¹⁴³ *New Zealand Cashflow Control v*

139 Paragraph 2.18.

140 Section 71 Building Act 2004.

141 Note that the Proposed New Zealand Coastal Policy Statement and the Recommended New Zealand Coastal Policy Statement (i.e. recommended by the Board of Inquiry) also promote support for the avoidance of development in coastal hazard areas and redevelopment of land subject to coastal hazard risk, including managed retreat and modification to enable relocation, etc.

142 See discussion above in relation to the *Falkner* case (although the Court expressed reservation about an “insensitive application” of a managed retreat policy which promoted the discontinuance of coastal protection works, which was shared by the Court in the *Waihi Beach* case), the *Waihi Beach* case and *Skinner v Tauranga* (A163/02).

143 A163/02.

*Christchurch City Council*¹⁴⁴ and *Fore World Developments*.¹⁴⁵ The real questions in terms of the merits of the planning controls relate to the location of the coastal setback line and the nature of the restrictions.

Coastal hazard setbacks

- 6.22 A key issue which arises is whether there is sufficient technical evidence to support the location of the zones and setbacks.
- 6.23 In that regard, the Court in *Fore World Developments* was required to consider conflicting evidence as to the appropriate location of the setback line. In doing so, the Court accepted that planning on the basis of a 100 year time frame was appropriate, noting that such a time frame was also considered in the *Waihi Beach* and *Skinner* cases to be sound in planning terms.

- 6.24 The Court also accepted that the process of erosion would be episodic and incremental and would not reach its full extent suddenly. On that basis, it found that while it is not necessary to be overly cautious, the precautionary principle should be applied and “it would be prudent to provide for a buffer in addition to the estimated extent of coastal erosion”.¹⁴⁶ Having said that, the Court also noted that:

*“The kind and degree of precaution to be taken depends on the level of knowledge of the risk, its likelihood of occurrence, and its consequences. We do not live in a risk-free world and the RMA does not require the avoidance of all risks.”*¹⁴⁷

- 6.25 In the *New Zealand Cashflow* case, the Court considered that once a “worst case scenario” had been identified, a further buffer need not be applied as that was beyond the application of the precautionary approach.¹⁴⁸ Similarly, the Court in *Skinner* noted that a framework which consisted of three graduated coastal hazard zones had already been implemented with such caution that an additional buffer zone with a safety factor of 30% placed a restriction on property which went beyond the extent necessary to ensure sufficient recognition of the risk.¹⁴⁹

- 6.26 The Ministry for the Environment has issued a guide to local government in relation to planning for coastal hazards and climate change.¹⁵⁰ That document provides best practice information on the key effects of climate change on coastal hazards, a risk assessment framework for incorporating coastal hazard and climate change considerations into decision-making and promotes the development of long-term adaptive capacity for reducing coastal hazard risk. In particular, the MfE document:

- (a) Supports a lengthy planning time frame for coastal erosion, such as 100 years.¹⁵¹

144 *New Zealand Cashflow Control Ltd v Christchurch City Council* (C060/03), *Francks v Canterbury Regional Council* (CIV-2003-485-001131, Panckhurst J, 10 June 2004) and *New Zealand Cashflow Control Ltd v Christchurch City Council* (C091/05).

145 W029/06.

146 *Fore World Developments* (2006), at 84.

147 *Fore World Developments* (2006), at 31.

148 *New Zealand Cashflow* (2003), at 160.

149 *Skinner*, at 24 and 25.

150 Ministry for the Environment, 2008 “Coastal Hazards and Climate Change: A guidance manual for local government in New Zealand” (2nd edition), revised by Ramsay, D and Bell, R. (NIWA). Prepared for Ministry for the Environment.

151 *Ibid.*, at page 67.

- (b) Recommends that allowance for sea level rise is based on the IPPC Fourth Assessment Report (i.e., 0.5m relative to 1980 – 1999 average for planning to 2090 – 2099).¹⁵²
- (c) Recommends that consideration be given to the potential consequences from higher sea-levels due to factors not included in the current global climate models (i.e., at least 0.8m relative to 1980 – 1999 average for planning to 2090 – 2099).¹⁵³

6.27 Ultimately, the location of setbacks will involve a pragmatic judgment based on all relevant factors. In *Save the Bay v Christchurch City Council*¹⁵⁴ the Court noted:

*“In our view, drafting a hazard line is not as scientific as ascertaining where the MHWS is (although that too is fraught with difficulty). The task is to draw a line as an administrative boundary which is conveniently ascertainable.”*¹⁵⁵

Restrictions on land use

- 6.28 The nature of planning restrictions forward of a setback line will depend upon the circumstances of each case. In the *Waihi Beach* case, it was accepted that building forward of the setback should be a discretionary activity; in the *Skinner* case, it was found that building forward of the setback should be a prohibited activity.
- 6.29 In the *New Zealand Cashflow* case, the Court considered that there should be no building allowed forward of the setback, although it did not have the jurisdiction to apply a prohibited activity status with respect to buildings.¹⁵⁶ The Court also considered that subdivision should not be allowed forward of the setback and determined that subdivision should be a non-complying activity because that would provide flexibility for exceptional cases,¹⁵⁷ having regard to the Environment Court’s test for the appropriate use of prohibited activity status enunciated in *New Zealand Minerals Industry Association v Thames-Coromandel District Council*.¹⁵⁸ (Note that this test has since been overturned by the Court of Appeal.)¹⁵⁹
- 6.30 In light of the recent decision of the Environment Court in *Otago Regional Council v Holt*,¹⁶⁰ it is worth noting that resource consent may still be granted where risks of natural hazards exist (provided, of course, the activity is not prohibited by the plan). In that case, the Court granted consent to build a pole house on land potentially subject to tsunami, coastal inundation and flooding. The proposed dwelling was designed to mitigate the effects of natural hazards and the applicants agreed to sign a deed acknowledging the hazards and agreeing not to complain or sue the council for negligence for issuing the consent.¹⁶¹

152 Ibid., at page 20.

153 Ibid., at page 20.

154 C006/2001.

155 *Save the Bay*, at 31.

156 *New Zealand Cashflow* (2003), at 164-165.

157 *New Zealand Cashflow* (2005), at 37.

158 (2004) 11 ELRNZ 105. The Environment Court in the *New Zealand Minerals Industry* case considered that surface mining should not be a prohibited activity and that a prohibited activity status may only be applied if all three of the following limbs of the Environment Court test are met i.e., It is used “sparingly”; it used “in a precisely targeted manner”; and it is only used in areas or circumstances in which the activity should never be contemplated.

159 *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562.

160 [2010] NZEnvC 120.

161 *Holt*, at 81.

Coastal hazards and section 85

- 6.31 A challenge that often arises in relation to coastal setback zones is whether the proposed planning controls render land incapable of reasonable use and impose an unreasonable burden in terms of section 85 of the RMA. In particular, the types of provisions most likely to come under attack are those which require subdivision, new buildings, alterations and additions to obtain consent as non-complying activities or, indeed, which prohibit those activities altogether. There may also be some resistance to the classification of these types of activities as discretionary.
- 6.32 In *Fore World Developments*, the appellant contended that the plan provisions, which included a prohibited activity status for buildings in the coastal hazard area (but which were permitted or restricted discretionary elsewhere on the site), would preclude the reasonable use of its land because there would be little chance of a successful application to subdivide and use the land for residential purposes. The Court considered that a residential development was feasible although the section yield may not be what the appellant desired. Land outside the coastal hazard area could be used for other purposes, including for passive uses within a residential development such as landscaping, etc.¹⁶² On that basis, the Court held that the proposed provisions did not render the land incapable of reasonable use.¹⁶³
- 6.33 The case of *Palmer v Timaru District Council*¹⁶⁴ did not specifically address section 85 issues, but it is interesting to note the Court's comments in that case, which required it to determine the activity status of the extension of a dwelling in an area identified in the district plan as subject to flooding. On interpretation of the plan, the Court found that the extension fell to be considered as a prohibited activity and noted in that regard:

"The Council has taken the unusual step of providing that household units are prohibited activities in the Recreation 1 Zone, presumably because of the natural hazards inherent in areas covered by the zone..."

Having regard to the text of the plan and the purpose behind it – which is the serious aim of protecting human lives in an area where they have been lost before from flooding – I find the extension is classified as "prohibited". I emphasise that the Council's prohibited activity rule is a response to a clear and present danger and accordingly is not bureaucratic overkill."¹⁶⁵

- 6.34 Thus, it is clear that it is possible for plans to contain provisions which are quite restrictive, even to the extent of prohibiting activities, particularly in the context of natural hazards where a high level of risk may be posed to life and property.
- 6.35 Ultimately, whether proposed coastal hazard provisions will render the land incapable of reasonable use requires consideration of the extent of the impact of the proposed provisions on a particular property in light of the level of risk that is posed to that property. In that regard, the following observations can be made:
- (a) Land may not be considered incapable of reasonable use where it has already been developed, particularly where the proposed provisions do not affect existing use rights because the existing use can continue (including

162 *Fore World Developments* (2006), at 121 - 124.

163 *Fore World Developments* (2006), at 125.

164 C68/2010.

165 *Palmer*, at 11 and 29.

rebuilding to a certain extent) despite the need for consent to be obtained for additions or other further development.¹⁶⁶

- (b) If there is scope for landowners to build somewhere on their property, provisions restricting building on part of the land may be considered acceptable, even where the landowner may not be able to do exactly what they want with their property.
- (c) If the rule completely precludes the building of a dwelling on a residentially zoned property, that land may be considered to be incapable of reasonable use depending upon the particular circumstances. In that regard, the Court in *New Zealand Cashflow* altered a proposed setback line by a few metres to enable the application of less stringent rules to a property because the risk was minimal, noting that “the difference is not significant in metres but is of moment to the affected landowners”.¹⁶⁷

Case study examples – general observations

- 6.36 While difficult to generalise, the following observations can be made in relation to the coastal hazard controls we which have analysed via our regional case studies.
- 6.37 There has been a shift from historical methods of managing coastal hazards via hard engineering solutions (i.e. coastal protection structures) towards soft-engineering (i.e., dune protection, etc) and non-engineering solutions (e.g., managed retreat). In that regard, it appears from our review that it is now commonly accepted that coastal protection works adversely affect natural character and amenity and can have adverse effects on coastal processes themselves. In that regard, many regional councils have implemented policies which discourage coastal protection works except where absolutely necessary.¹⁶⁸ In light of this shift, planning controls must play a more central role in managing coastal hazards.
- 6.38 Many councils have adopted the coastal setback / restrictive activity status approach to managing coastal hazards, but others rely on the provisions of the Building Act to refuse building consent or impose conditions (although consent may be granted or an activity may be permitted under the RMA) and section 106 of the RMA to refuse subdivision consent. The former approach appears to be adopted in those areas which are most at risk (e.g., such as Hawke’s Bay / Napier; Christchurch) and this approach is generally reflected in the more recent plans.
- 6.39 The latter approach tends to be reflected in the older plans and it may be that as they are reviewed, more of them adopt the former approach. For example, the Thames-Coromandel District Plan currently relies on the provisions of the Building Act to refuse consent to buildings forward of a coastal setback. However, TCDC notified a draft Natural Hazards Plan Change for consultation in 2007 which proposed primary and secondary setbacks, with building forward of the primary setback as a non-

166 It is noted that the Canterbury District Council and Canterbury Regional Council reached a settlement with an appellant prior to the hearing of the *New Zealand Cashflow* cases which would provide for a right of reconstruction of existing homes in the coastal hazard area. Thus, that matter was not required to be considered by the Court. See *New Zealand Cashflow* (C60/2003).

167 *NZ Cashflow* (2003), at 146.

168 For example, Environment Waikato (see Schedule A, paragraph 2), Wellington Regional Council (see Schedule C, paragraph 6(b)), Taranaki Regional Council (see Schedule G, paragraphs 3 – 5), Hawke’s Bay Regional Council (see Schedule H, paragraphs 3 and 4), Canterbury Regional Council (see Schedule F, paragraph 3), Otago Regional Council (see Schedule E, paragraph 3) and Auckland Regional Council (see Schedule B, paragraph 2).

complying activity and between the primary and secondary setbacks as a discretionary activity.¹⁶⁹

- 6.40 Across the plans reviewed, there is a wide variance as to the extent to which coastal hazard planning controls impinge on private property rights. Those plans which rely on the provisions of the Building Act and section 106 will naturally infringe on property rights to a lesser extent.¹⁷⁰ In light of the information that has become available over the last decade with respect to climate change and sea level rise, the question which arises is whether those plans should adopt a more restrictive approach. For example, the draft Proposed Hauraki District Plan introduces climate change as a significant resource management issue for the district, which is reflective of the change in thinking which is likely to occur in the next round of plan reviews.¹⁷¹
- 6.41 The level of impact on property rights also varies within that category of plans which adopts the coastal setback approach. For example, the Napier District Plan prohibits new structures forward of a coastal setback. Such planning controls are precisely the type of controls which may come under challenge in terms of section 85 but, as we have seen above in the *Fore World* case, that is an approach which was sanctioned by the Environment Court. Other plans control building forward of a setback line as discretionary / restricted discretionary activities.¹⁷²
- 6.42 Broadly speaking, none of the plans reviewed appear to contain provisions which would on their face contravene section 85. However, that will always involve consideration of the individual merits and it is possible that individual properties may be affected in a manner in which section 85 could be invoked, for example, where an undeveloped property lies entirely forward of a coastal setback. That analysis would need to be undertaken on a site specific basis. A good example of the type of controls which may address such a situation is contained in the Waikato District Plan. In that regard, buildings in the Coastal Zone are a non-complying activity if located within 100 metres of mean high water springs, with the exception that where the whole of the allotment is within 100 metres of mean high water springs, the coastal setback is 32 metres.¹⁷³ Controls which provide for structures as a discretionary activity would also provide some flexibility in addressing such situations.
- 6.43 It will be interesting to observe the role that regional councils take with respect to coastal hazards in the future. In that regard, it may be that they begin adopt a more directive role, as can be seen in the Hawke's Bay and Canterbury Regions, and in the proposed Waikato Regional Policy Statement. One possible consequence of that (again, Environment Waikato's Regional Policy Statement represents an example) is that regional councils may seek to extinguish existing use rights in the most hazard prone areas, which means that existing dwellings will need to be relocated. Such provisions would likely be tested under section 85 and will no doubt spawn a raft of case law on the point. Ultimately, the question is likely to come down to the level of risk which is posed to a particular property (supported by scientific information) and whether it could be considered "reasonable" to build on that property given that level of risk.

169 See Schedule A, paragraphs 19 and 20.

170 For example, the Central Hawke's Bay, Wairoa and Hastings District Plans (see Schedule H, paragraphs 7 – 11), Clutha District Plan (see Schedule E, paragraph 8).

171 See Schedule A, paragraphs 16 – 18.

172 For example, Franklin District Plan (see Schedule B, paragraphs 10 – 14), New Plymouth District Plan (see Schedule G, paragraphs 8 – 11), Nelson Resource Management Plan and Tasman Resource Management Plan (see Schedule D, paragraphs 6 and 8).

173 See Schedule A, paragraph 11.

7. CONCLUDING REMARKS

- 7.1 This paper has considered the tension between planning measures and the impact these have on the ability of a landowner to do what they wish with their land. The key conclusions from this paper can be summarised in the following way.
- 7.2 Local authorities have broad jurisdiction to impose controls on activities via the imposition of rules in regional and district plans, provided the controls fall within the scope of their powers and duties and, ultimately, promote the purpose of the RMA, being the sustainable management of natural and physical resources. Thus, prima facie it is likely in any given case that the local authority can impose reasonably stringent rules to achieve the purposes of the RMA and to comply with superior instruments.
- 7.3 This position is not altered where the measure represents a burden on private property owners. It is commonly accepted that the application of environmental controls does not amount to the expropriation or taking of land and the Courts have acknowledged that the RMA sets in place a scheme in which the concept of sustainable management takes precedence over private property rights.¹⁷⁴ Indeed, the RMA specifically provides that “an interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan ...”.¹⁷⁵ Analysis of all of the arguments to the effect that planning controls cannot impinge on private property rights lack a sound legal basis.
- 7.4 As the late Judge Bollard noted:
- “It would be hard to find anyone today who would argue that there should be no control of the use of land for the purposes of sustainably managing scarce resources for the present as well as for the future. Whether a person or group considers that the RMA achieves this aim without inappropriate erosion of private property rights depends on their perspective”.*¹⁷⁶
- 7.5 In terms of whether controls should be imposed, RMA procedures provide a significant degree of protection for property owners to ensure that rules do not impose upon them too harshly. A robust analysis of costs, benefits and alternatives needs to be undertaken in terms of section 32 of the RMA. This ensures that the option of doing nothing is considered and that there is a sound technical basis for any rules proposed to be promulgated.
- 7.6 The First Schedule process, including a possible hearing before the Environment Court, enables a broad consideration of the merits having regard to whether the measure in question represents the “most appropriate” to be giving effect to the purpose of the RMA.
- 7.7 Section 85 provides that if land is rendered incapable of reasonable use and an unreasonable and unfair burden is imposed on a landowner, the relevant provision may need to be altered but in the context of plan rules, no right to compensation or to require the land to be acquired arises.
- 7.8 Where the “line in the sand” is drawn in relation to any particular set of provisions will obviously depend upon the instrument and rule in question, including the importance of the environmental objectives being achieved. The determination of that issue will

174 See the *Falkner* case; see also *NZ Suncern*, at 425, confirmed in *NZ Suncern Construction Limited v Auckland City Council* (1997) 3 ELRNZ 230.

175 Section 85(1).

176 Judge R J Bollard (2009) loc. cit., at paragraph 75. See also K Bosselman, (Draft 2009), loc. cit.

ultimately be played out via First Schedule processes and, if necessary, will need to be the subject of a pronouncement by the Courts.

- 7.9 In terms of planning controls for the management of coastal hazards, the Court has generally accepted reasonably restrictive planning controls which infringe on private property rights in order to address the risk that is posed to those properties. Indeed, many planning instruments around the country adopt controls which provide a coastal setback, forward of which the activity status reflects the level of risk posed. The majority of those plans are beyond challenge and, with respect to some of them, impositions on property rights have been endorsed by the Court despite section 85 challenges.
- 7.10 In light of the information now available with regard to climate change and sea level rise, it may be that some planning controls become even more restrictive. Whether controls which, for example, extinguish existing use rights for buildings located in coastal hazard prone areas can be imposed remains to be seen but the cases which suggest that private property “rights” need to yield to RMA control suggest that such controls are lawful and that “land” cases will be addressed via section 85.

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October 2010

SCHEDULE A

COASTAL HAZARD CONTROLS IN THE WAIKATO REGION

Introduction

1. Coastal hazard issues in the Waikato Region are illustrated particularly on the Coromandel Peninsula, such as at Cooks Beach and Buffalo Beach, but also on the west coast in areas such as Mokau Spit, Waitomo. Mokau Spit has been subject to three severe erosion events since the 1960s, which have resulted in significant loss of property and homes have required relocation as a result.¹⁷⁷ Twelve sections at Mokau Spit have been lost to the sea since the Spit was subdivided in 1957.¹⁷⁸

Regional planning controls

2. Waikato Regional Council (“Environment Waikato”) (“EW”) has identified coastal hazards as a significant resource management issue in the region. In that regard, the operative Waikato Regional Policy Statement (“WRPS”) promotes development which avoids or mitigates adverse effects of natural hazards, adopts a precautionary approach to managing coastal events of high potential impact and low probability and promotes soft / non-engineering options for managing coastal hazards.
3. The working draft of the proposed Waikato Regional Policy Statement (“draft Proposed RPS”) contains stronger direction than the WRPS and will potentially result in more stringent or restrictive controls (once district plans are brought into line) than those currently found in the district plans of the region.
4. The draft Proposed RPS proposes that development is not located within any area which will be affected by a foreseeable range of coastal processes (over a minimum 100 year planning period), including requiring the relocation of existing development where necessary.¹⁷⁹
5. The draft Proposed RPS would also require district councils to map natural hazard zones, which will include land which is within 2m (vertically) of mean high water springs (including an allowance for sea level rise of 0.8m to 2099 relative to 1999 levels) and land which is likely to be subject to coastal erosion over the next 100 years.¹⁸⁰ The draft Proposed RPS requires the identification of primary hazard zones (in relation to coastal inundation, that is land which is within 1m vertically of mean high water springs, including an allowance for sea level rise of 0.8m to 2099 relative to 1999 levels¹⁸¹ and in relation to coastal erosion, land which is likely to be subject to coastal erosion over the next 100 years¹⁸²) and secondary hazard zones.
6. District councils would then be required to control subdivision and land use within natural hazard zones so that existing and new development can only continue if measures are put into place which reduce the natural hazard risk.¹⁸³ Existing uses

177 Waitomo District Plan, section 27.1.9.

178 “Managed Retreat from Coastal Hazards: Options for Implementation”, Environment Waikato Technical Report 2006/48, April 2006.

179 Draft policy 4.4.25, draft Proposed RPS.

180 Draft policy 4.9.1.4, draft Proposed RPS.

181 Draft policy 4.9.1.5(b), draft Proposed RPS.

182 Draft policy 4.9.1.5(d), draft Proposed RPS.

183 Draft policy 4.9.1.7, draft Proposed RPS.

will not be allowed to continue in primary hazard zones where it is deemed unsafe or is destroyed by a natural hazard.¹⁸⁴

7. A similar philosophy is reflected in EW's submission on the review of the New Zealand Coastal Policy Statement ("Proposed NZCPS"), which seeks stronger direction with respect to development in areas subject to coastal hazards, particularly with respect to existing uses.¹⁸⁵
8. One outcome of the draft Proposed RPS (if promulgated as drafted at present) may be that existing use rights may be curtailed and the circumstances of each individual case will need to be considered to determine whether plan provisions promulgated in that regard will render land incapable of reasonable use.
9. Territorial authorities are charged with addressing the landward aspects of coastal hazards, and the Waikato Regional Coastal Plan ("WRCP") requires EW to work with territorial authorities to identify and assess areas vulnerable to coastal hazard risk.¹⁸⁶

District planning controls

10. The districts within the Waikato Region which have coastline also seek to reduce the effects of coastal hazards (and natural hazards generally) on people and property in various ways. A brief overview of the coastal hazard planning controls in Waikato District, Waitomo District, Hauraki District and the Thames-Coromandel District is provided below.

Waikato District

11. Waikato District Council's Proposed District Plan ("Waikato PDP") establishes a policy framework which seeks to avoid coastal hazards and implements coastal building setback rules in the Coastal Zone. In that regard, buildings are non-complying activities if located within 100 metres of mean high water springs. There is an exception to that rule where the whole of the allotment is within 100 metres of mean high water springs, in which case the coastal setback is 32 metres for allotments created prior to the notification of the district plan (with buildings within the setback non-complying activities).¹⁸⁷ Subdivision is a non-complying activity unless lots are capable of containing a building platform 100 metres from mean high water springs.¹⁸⁸
12. The interesting point to note with respect to these provisions is that they represent an example as to how an appropriate balance may be struck by planning controls, insofar as the general 100m setback is relaxed in circumstances where an entire allotment falls within the setback and therefore may otherwise render land as a whole incapable of reasonable use.

Waitomo District

13. Waitomo District Council's District Plan ("Waitomo DP") specifically identifies the Mokau Spit and estuary as being at serious risk of coastal erosion and any new buildings in the "at risk" area are prohibited.¹⁸⁹
14. In other coastal areas, buildings which are located within 25 metres of estuaries and 50 metres of open coast are non-complying activities unless specifically designed to

184 Draft policy 4.9.1.8, draft Proposed RPS.

185 EW submission on Proposed NZCPS, section 6.

186 Section 17.7.7, WRCP.

187 Waikato PDP, Rule 26.49A.

188 Waikato PDP, Rule 26.76.2.

189 Waitomo DP, Rule 27.5.2.1(a).

be relocatable,¹⁹⁰ in which case they are discretionary activities.¹⁹¹ Existing lawfully established buildings located in those areas / Mokau area may be relocated to safer position on the same lot as a permitted activity.¹⁹²

15. Planning controls which prohibit buildings in an area which has seen such extensive damage due to coastal hazards, such as the Mokau Spit, may be seen as striking an appropriate balance given the extent of possible damage to both human life and property.

Hauraki District

16. Hauraki District Council has recently released a Draft Proposed District Plan ("Hauraki Draft PDP"), which introduces climate change as a significant resource management issue for the district, including storm surges, tides and sea level rise.¹⁹³ Whiritoa Beach is specifically recognised as the only developed area of the district which is at risk of coastal erosion and specific rules apply to buildings located there.
17. The draft plan establishes primary development setbacks (which represent the area at risk under existing conditions) and secondary development setbacks (which represent the area at risk over next 100 years from sea level rise and climate change). New dwellings located within the primary development setback are non-complying activities, and additions to dwellings are restricted discretionary activities.¹⁹⁴ New dwellings located between the primary and secondary setbacks are non-complying activities, but additions to dwellings are permitted if they are designed to be relocatable (and otherwise restricted discretionary).¹⁹⁵
18. The draft plan has not yet been notified, and it may be that those planning provisions could come under challenge from landowners at Whiritoa Beach. However, provided that the science (i.e. as to the likely level of risk) supports the plan provisions, we have seen from the analysis of the case law that these types of plan provisions may be considered appropriate.

Thames-Coromandel District

19. The Thames-Coromandel District Council's ("TCDC") District Plan ("Thames-Coromandel DP") notes that coastal flooding and erosion issues are to be addressed via the Building Act and does not contain specific plan rules which restrict building subject to coastal hazards. It does however note that building consents may not be issued within established coastal setbacks, being 30 metres on the East Coast and 15 metres from the West Coast from Tararu to Waikawau.¹⁹⁶
20. TCDC is in the process of reviewing the approach in the District Plan. In that regard, TCDC notified a draft natural hazards plan change for consultation in 2007 which proposed primary and secondary setbacks, with building forward of the primary setback as a non-complying activity and between the primary and secondary setbacks as a discretionary activity. As a result of the comments received, TCDC (alongside EW) undertook a review of the setbacks and it is anticipated that coastal hazard management will be addressed once there is more certainty around EW's Proposed RPS and via TCDC's upcoming district plan review.

190 Waitomo DP, Rule 27.5.2.1(b).

191 Waitomo DP, Rule 27.5.2.3(c).

192 Waitomo DP, Rule 27.5.2.3(a).

193 Hauraki Draft PDP, section 3.2.

194 Hauraki Draft PDP, Rule 8.2.3.3.

195 Hauraki Draft PDP, Rule 8.2.3.3.

196 Thames-Coromandel DP, Section 453.

SCHEDULE B

COASTAL HAZARD CONTROLS IN THE AUCKLAND REGION

Introduction

1. The Auckland Region has a significant amount of coast line and development has tended to be concentrated along the coast. A significant part of Auckland's coast line is therefore potentially subject to coastal hazards.¹⁹⁷ For example, Muriwai Beach has been eroding since the 1960s, with the shoreline retreating at around 1m per year.¹⁹⁸ Properties at Omaha suffered significant destruction in the 1970s as a result of a major storm event and associated coastal erosion.¹⁹⁹

Regional planning controls

2. The Auckland Regional Policy Statement ("ARPS") acknowledges coastal erosion as an issue arising in the Auckland Region in the context of the broader Natural Hazards section.²⁰⁰ The objectives and policies of the ARPS seek to avoid, remedy or mitigate the adverse effects of natural hazards,²⁰¹ including ensuring that new subdivision, use or development in the coastal environment should be located and designed so that the need for hazard protection measures is avoided.²⁰² Where existing subdivision, use or development is affected by a coastal hazard, the ARPS directs that coastal protection works should only be permitted where that is the best practicable option, and requires consideration of the abandonment or relocation of existing structures as an option.²⁰³ The ARPS also promotes the precautionary approach²⁰⁴ and promotes setting aside esplanade reserves / strips as a means of addressing coastal hazards.²⁰⁵
3. The Auckland Regional Plan: Coastal ("ARP:C") addresses natural coastal hazards via objectives, policies and rules, but rules relating to land use above mean high water springs are not addressed in the ARP:C and are left to the district councils.²⁰⁶ Consistent with the ARPS, the objectives and policies of the ARP:C seek to guide development toward locations with avoid interference with natural coastal processes²⁰⁷ and to avoid further development in locations which are already threatened by coastal hazards.²⁰⁸ It also promotes "soft engineering" rather than "hard engineering" options for addressing coastal protection issues.²⁰⁹

District planning controls

4. The district plans within Auckland region address coastal hazards in various ways. Given the number of district plans in the region, this section will focus on the planning controls in the Rodney and Franklin Districts, both of which have recently

197 Auckland Regional Council, *"Coastal Hazard Strategy: Coastal Erosion Management Manual"* (TP130), July 2000.

198 P Blackett, et al, (2010) loc. cit.

199 Auckland Regional Policy Statement, section 11.2.1.

200 ARPS, Section 11.

201 ARPS, Objective 11.3.

202 ARPS, Policy 11.4.1.10. See also policies contained in Chapter 7, which direct development in the coastal environment to appropriate locations.

203 ARPS, Policy 11.4.1.11.

204 ARPS, Policy 11.4.1.12.

205 ARPS, Method 11.4.2.12. See also Chapter 28 – Esplanade Reserves and Strips.

206 ARP:C, Method 21.6.7.

207 ARP:C, Policy 21.4.1.

208 ARP:C, Policy 21.4.2.

209 ARP:C, Policies 21.4.3 – 21.4.7. See also Chapter 12 which addresses coastal protection structures.

promulgated plan changes to address natural hazards / coastal hazards issues in the districts.

Rodney District Plan

5. The Rodney District Plan 2000 (“RDP”) addresses coastal hazards within the context of the Natural Hazards chapter.²¹⁰ As with other district plans, the RDP establishes an objective and policy framework which seeks to avoid the effects of natural hazards on human life, property and the environment.²¹¹ Sensitive activities are to be avoided in hazard prone areas where possible and new development located in order to avoid the need for coastal protection works, otherwise mitigation measures are required to be implemented.²¹² The RDP promotes soft engineering methods to address hazards²¹³ and a precautionary approach.²¹⁴
6. The activity status of buildings and household units varies throughout the district, depending upon the zone, but the RDP establishes shoreline yard development controls as a means of addressing coastal hazards, within which buildings cannot be located. (Non-compliance with the shoreline yard alters the activity status of permitted and controlled buildings and household units.) The shoreline yard restriction in the rural zones is generally 50m, with some exceptions (including 200m in some areas of the Landscape Protection Rural zone and 100m in the Dune Lakes zone). In the residential zones, the shoreline yard is generally 23m.
7. Another method employed in the RDC to manage coastal hazards is to establish an Open Space (Conservation) zone which, while a recreation zone, contains many esplanade reserves which include foredunes, river margins and lakes and provide a buffer against erosion processes.²¹⁵ Reliance is also placed on section 106 of the RMA and the Building Act as a means of addressing coastal hazards²¹⁶ and areas susceptible to coastal erosion are noted on the Land Information Register.
8. Rodney District Council (“RDC”) has also promulgated Variation 61 to the RDP which deals specifically with coastal inundation and flooding issues as a result of a study undertaken by Tonkin and Taylor, which identified certain coastal settlements which are subject to the risk of coastal inundation and flooding in a severe storm event.²¹⁷ Variation 61 therefore addresses coastal hazards in parts of the High Intensity and Medium Intensity Residential zones and:
 - (a) Alters the activity status for multiple household units (not exceeding 3) in the High Intensity Residential Zone from permitted to restricted discretionary, where located in an area at risk of inundation;²¹⁸ and
 - (b) Introduces additional assessment criteria in the High and Medium Intensity Residential zone for multiple household units which addresses inundation issues.²¹⁹

210 RDP, Chapter 5.

211 RDP, Objective 5.3.1.

212 RDP, Policy 5.4.1.

213 RDP, Policy 5.4.4.

214 RDP, Policy 5.4.5.

215 RDP, Method 5.6.1.1.

216 RDP, Methods 5.6.1.3 and 5.5.6.2.1.

217 Variation 61, at 1.

218 Variation 61, Rule 8.9.2.

219 Variation 61, Rule 8.12.2.2.

9. The variation does not alter the activity status for single household units, or integrated residential development or cluster housing, but does introduce new assessment criteria for those activities which addresses coastal inundation.²²⁰

Franklin District Plan

10. The Franklin District Plan (“FDP”) acknowledges that the district’s extensive coastal is subject to naturally occurring processes of erosion and notes that the predecessors to the FDP (Franklin County Scheme and Raglan Country Scheme) adopted Coastal Protection Yards in the rural zone (60m and 100m from mean high water springs respectively).²²¹ The FDP maintains that approach, although acknowledges that the yards are not scientifically based.²²²
11. The policy framework of the FDP is similar to other district plans insofar as it seeks to guide activities away from areas known to be subject to hazards, protect natural buffers to coastal erosion and adopt a precautionary approach to addressing the issues.²²³
12. The FDP adopts a 60m coastal protection yard for all buildings and structures (except in the Residential, Rural-Residential and the Business Zone, otherwise a restricted discretionary activity status applies).²²⁴ In the Residential zone, a 20m or 30m setback applies as a development standard²²⁵ (which appears largely focussed on addressing natural character issues) and dwelling house, for example, forward of that setback would be a discretionary activity.²²⁶ Similar setbacks are adopted for the Rural-Residential and Business zones.²²⁷
13. Plan Change 14 (“PC14”) (currently under appeal) addresses objectives, policies and rules for rural and coastal areas. PC 14 specifically addresses the management of coastal hazards,²²⁸ which was previously only addressed in the natural hazards chapter. PC 14 acknowledges the potential increase in coastal hazard risk due to sea level rise and need to move away from hard engineering coastal protection structures (e.g. at Glenbrook and Clarkes Beaches) as a means of managing coastal hazards. It thus establishes three coastal management areas, with objectives and policies specific to those areas which address the range of issues relevant to each area, including coastal erosion and inundation.²²⁹
14. PC 14 also establishes a “Coastal Protection Setback” in the coastal management areas as follows:²³⁰
- (a) In the Tasman Coast Management Area, the area between mean high water springs and 60m landward of the top edge of coastal escarpments or ridgelines;
 - (b) In the Manukau Harbour Management Area and the Rural zone, the area within 60m of mean high water springs and that land below 3.8RL above mean sea level datum;

220 Variation 61, at 1.

221 FDP, section 7.1.2.

222 FDP, section 7.1.2.

223 FDP, Objective 7.2.1 and related policies.

224 FDP, Rule 7.3.5.

225 FDP, section 27.6.1.10.

226 FDP, Rule 27.3.

227 FDP, sections 28 and 29. Note also that Plan Change 14 introduces new zones and adopts a similar setback approach for the new zones.

228 See PC 14, section 16.5.3 for coastal hazard issues.

229 PC 14, sections 17.2.7, 17.2.8, and 17.2.9.

230 PC 14, Rule 50.

- (c) In the Seabird Coast Management Area, the area within 60m of mean high water springs and additional land seaward of East Coast Road (except Miranda Chenier Plain).
15. Dwellings and buildings forward of the Coastal Protection Setback are a non-complying activity²³¹ and are permitted beyond that (except where an additional natural character area applies). External additions and alterations to existing buildings are discretionary activities forward of the setback.
 16. Franklin District Council (“FDC”) also recently notified Proposed Plan Change 25 (“PPC25”), which relates in part to natural hazards, on 2 March 2010. The PPC25 was notified in order to take account of legislative changes and also in response to the Auckland Regional Civil Defence Emergency Management Plan 2005 which required FDC to strengthen its district plan with respect to natural hazard management.²³²
 17. PPC25 implements more specific objectives for natural hazards, including that activities do not increase risk from natural hazards,²³³ adverse effects of inundation by coastal waters are reduced²³⁴ and of coastal erosion are avoided, remedied or mitigated.²³⁵ The amendments strengthen the policy framework to avoid development (including subdivision) which would interfere with natural coastal processes and avoid the need for coastal protection works.²³⁶ PPC25 also encourages the use of esplanade reserves to manage natural hazards,²³⁷ as directed by the ARPS. PPC25 removes the general 60m setback for outside the Residential, Rural-Residential and Business zones (note that PC14 addresses the setback in the Rural zone), but maintains a 30m setback from mean high water springs for those zones of residential / business character.

231 PC 14, Rules 23A.1.5.5 and 23B.1.5.2.

232 PPC25, at 3.

233 PPC25, Objective 7.2.2.1.

234 PPC25, Objective 7.7.2.2.

235 PPC25, Objective 7.7.2.3.

236 PPC25, Policy 7.2.3.8.

237 PPC25, Method 7.2.4.14, Objective 11.4.1.3, Policy 11.4.1.3.

SCHEDULE C

COASTAL HAZARD CONTROLS IN THE WELLINGTON REGION

Introduction

1. Coastal hazard issues in the Wellington region can be seen particularly in the Wairarapa, which is an area subject to coastal erosion and accretion processes and which is becoming increasingly popular as a place for both development and recreation. The effects of coastal erosion and the potential impact of coastal erosion on property may best be seen at Palliser Bay, where parts of Cape Palliser Road and several houses have been lost to the sea.²³⁸

Regional planning controls

2. The Greater Wellington Regional Council (“GWRC”) has broadly identified natural hazards as a significant resource management issue in its region. The Operative Regional Policy Statement (“RPS”) notes that erosion through flooding, storms, etc., is a significant resource management issue. It also notes that the Wairarapa is of particular concern in that regard²³⁹ and requires regard to be had to natural hazards when considering applications for new subdivision and development.
3. The Proposed Regional Policy Statement (“PRPS”)²⁴⁰ sets out a more comprehensive and indeed more stringent, objective and policy framework for addressing natural hazards.
4. One of the key policies which is introduced by the PRPS requires regional and district plans to identify areas at high risk from natural hazards and include policies and rules to avoid subdivision and inappropriate development in that area.²⁴¹ Areas of high risk are considered to be those which would experience serious consequences in a hazard event, including cyclical long term erosion. The explanation to this policy notes that it promotes a precautionary risk-based approach.
5. An example of a method which is cited as one which would implement the policy is establishing a setback distance from an eroding coastline. While neither the PRPS (nor the Regional Plan) sets out rules for addressing natural hazards,²⁴² this policy clearly contemplates that district plans will include rules establishing subdivision and development in areas of high risk as non-complying or prohibited activities.
6. Other key policies introduced by the PRPS include:
 - (a) The requirement to minimise the risks and consequences of natural hazards when considering an application for a resource consent, notice of requirement

238 “Coastal Hazards in the Wairarapa” Fact Sheet, Greater Wellington Regional Council. See also, for example, discussion of coastal hazards in the Palliser Bay area in *Buckley v South Wairarapa District Council* (W004/08). That case concerned a proposal to construct a dwelling approximately 40 metres from mean high water springs, between the foreshore and Whatarangi Road (i.e. beyond the 30 metre setback required by the Operative South Wairarapa District Plan). The Court considered evidence with respect to the potential coastal hazards and found that the risk from coastal inundation from the combined effects of sea level rise and storm surge and from tsunami was moderate to high. That finding contributed to the Court’s refusal to grant consent.

239 RPS, 1994, page 20.

240 Decisions on submissions were approved by the Wellington Regional Council on 18 May 2010 and publicly notified on 22 May 2010.

241 PRPS, Policy 28.

242 See PRPS Policy 62 which allocates responsibility for promulgating rules to the city and district councils.

or a change or variation to or replacement of a plan, having regard to a range of factors.²⁴³

- (b) The requirement to consider whether coastal protection works are required, with guidance toward soft engineering methods (including setbacks and managed retreat, among others) where possible and hard engineering structures only where there is an unacceptable risk to a development.²⁴⁴

District planning controls

7. The districts of the Greater Wellington Region which are located on the coast also seek to reduce the effects of coastal hazards (and natural hazards generally) on people and property in various ways. For the purposes of this paper, we have focussed on the planning tools used in the Proposed Wairarapa District Combined Plan (“PWDCP”) (a combined district plan for the South Wairarapa, Masterton and Carterton Districts) and the Kapiti Coast District Plan (“KCDP”).

South Wairarapa, Masterton and Carterton

8. The PWDCP identifies coastal erosion and inundation (from storm surges or tsunami) as a resource management issue for the district, noting that while it is not always possible to avoid adverse effects in already developed areas, measures can be taken to ensure the risk is not exacerbated, such as requiring setback from coastal margins. It also notes that where risks are significant, consideration of increased setbacks or even retreat may be required but that obtaining accurate information about hazards, such as the rate of coastal erosion, etc., is a significant challenge.²⁴⁵
9. In order to address the risks associated with coastal hazards, the PWDCP seeks to control the location of structures close to the foreshore²⁴⁶ and adopt a precautionary approach to subdivision and development where knowledge is lacking about coastal processes and hazard risk is high.²⁴⁷ In that regard, the PWDCP identifies a Foreshore Protection Area (within a Coastal Environment Management Area overlay) for the purposes of managing risks from natural hazards together with the potential effects of development on natural character.
10. The Foreshore Protection Area generally extends 50 metres inland from mean high water springs (other than at Riversdale where a variable boundary has been defined), which is considered by the district councils to generally provide adequate distance to avoid potential coastal hazards.
11. The Foreshore Protection Area extends the coastal setback under the Operative South Wairarapa District Plan (for example), from 30 metres from mean high water springs.²⁴⁸ It is understood that it is intended that, as further information becomes available over time, the 50 metre coastal setback will be refined.
12. Development within the Foreshore Protection Area requires consent to determine the appropriateness of the proposal having regard to the level of risk from coastal hazards. In that regard, any subdivision which creates a new allotment in the Coastal Environment Management Area is a discretionary activity.²⁴⁹ The only structures which are permitted in the Foreshore Protection Area are fences and non-habitable

243 PRPS, Policy 50.

244 PRPS, Policy 51.

245 PWCDP, section 14.1.

246 PWCDP, section 13.3.2(h).

247 PWCDP, section 13.3.2(m).

248 Operative South Wairarapa District Plan, section 6.2.2(A)(1)(a).

249 PWCDP, section 20.1.5(h)(iv).

buildings of a limited size.²⁵⁰ Other structures fall to be considered as a discretionary activity within that setback.²⁵¹

13. The appropriate width of the Foreshore Protection Area (i.e. the coastal setback) was considered by the Hearing Committee in light of submissions on the PWCDP which requested that the setback be reduced (to 30 metres) and increased (to 100 metres). In that regard, the Committee noted that there is a degree of variable hazard risk along the coast, but that the only location at which a detailed survey had been undertaken was Riversdale. Thus, in the absence of further information, the Committee considered that 50 metres represented a precautionary approach based on the information at the time and declined to either reduce (to 30 metres) or increase (to 100 metres) the setback as requested by submitters. As noted above, it is intended to refine these setbacks as further information becomes available. While the PWCDP is largely beyond appeal, the appeals which remain unresolved may affect the extent of the coastal setback.
14. The Hearing Committee was also required to consider the extent of permissible structures forward of the setback. In that regard, the proposed plan as notified did not permit any structures in the Foreshore Protection Area. After hearing submissions, the Committee modified the rule to allow for fences (up to 1.8m) and non-habitable structures (up to 3 m in height and 15m² gross floor area), which would enable water tanks and small sheds to be built in that area. The Committee considered that requiring a resource consent for new structures in the Foreshore Protection Area, which represents a narrow strip along the coastline, would not unduly constrain the efficient use of the land resource. In that regard, the Hearing Committee considered that most properties have sufficient land area outside of the Foreshore Protection Area to continue using and developing the land for a range of purposes and that existing lawfully established structures would continue to have existing use rights.

Kapiti Coast District Plan

15. The KCDP identifies coastal hazards in the district as long term erosion of the shoreline, short term fluctuations in the shore line, erosion from river mouth migration and wind erosion of dunes (which can threaten development, including engulfing houses).²⁵² In order to address those issues, the KCDP establishes a policy framework which:
 - (a) Discourages the development of buildings and other significant assets in areas which may be prone to coastal erosion or the effects of sea level rise unless they need to be located in the coastal environment and are relocatable;²⁵³
 - (b) Controls residential development in areas prone to coastal erosion;²⁵⁴
 - (c) Discourages coastal protection works; and
 - (d) Encourages managed retreat.²⁵⁵

250 PWCDP, section 21.1.15(a).

251 PWCDP, section 21.4(a).

252 See KCDP, section C.15.

253 KCDP, section C.9.1, Policy 2.

254 KCDP, section C.9.1, Policy 3.

255 KCDP, section C.9.1, Policy 4.

16. In that regard, the KCDP establishes Coastal Building Line Restrictions (as development standards) in the residential zone at Waikanae, Te Horo Beach, Peka Peka, Paraparaumu, Raumati and Paekakariki. Those restrictions vary at those locations from 7.5 metres to 70 metres.²⁵⁶ The effect of these development standards is that dwellings in the residential zone behind the Coastal Building Line Restriction are permitted activities, but dwellings proposed to be located forward of that line become discretionary activities. Dwellings located a further 30 metres beyond the Coastal Building Line Restriction at Paraparaumu and Paekakariki are permitted only if they are relocatable.²⁵⁷
17. In the Rural Zone, the KCDP prohibits new buildings being located on land within 100 metres (or 50 metres on Kapiti Island) of the seaward title boundary or Esplanade Reserve (whichever is most seaward) or the seaward toe of the foredune or vegetation line, where that is within the Esplanade Reserve or title.²⁵⁸
18. The KCDC is currently reviewing its District Plan, with the intention of notifying a proposed plan in 2011. A District Plan review scoping discussion paper has recently been released which notes the importance that the review have regard to a number of factors, including the future effects of climate change, including sea level rise, increased rainfall and increased storm severity so that future development is resilient to these potential hazards. Climate change is thus one of the proposed focus areas of the review and it is intended to specifically address the question as to whether the District Plan should promote a policy of “managed retreat” which seeks to encourage gradual moves away from the coast and what coastal setbacks would be required to avoid effects of sea level rise and increased storm events, etc.²⁵⁹
19. The extent of coastal setbacks and appropriate rules for development within coastal setbacks will obviously need to be considered in the context of the review of the KCDP. In terms of the current planning provisions, the building line setbacks vary in different locations. In particular, it is notable that the setbacks in the residential zone are targeted and significantly less restrictive than in the Rural Zone, given the ability to apply for a discretionary activity consent. The setback in the Rural Zone represents a blanket prohibition on building forward of the 100 metre setback, but presumably that land could reasonably be used for other endeavours and landholdings in the Rural Zone are of a sufficient size that buildings can be located elsewhere.

256 KCDP, section D.1.2.1.

257 KCDP, section D.1.2.1

258 KCDP, section D.2.1.5.

259 KDC District Plan Review scoping discussion paper, at page 11.

SCHEDULE D

COASTAL HAZARD CONTROLS IN THE NELSON / TASMAN REGION

Introduction

1. Coastal hazard issues arise along the coastline of the Nelson / Tasman area, as they do elsewhere in New Zealand. For example, the long term coastal erosion at Tahuna Beach required council intervention in 2005 to build a new seawall and stormwater channel, in conjunction with restoration and maintenance of dunes, in order to assist the beach to rebuild.²⁶⁰ The Ruby Bay – Mapua coastline is also subject to long term coastal erosion and specific provision is made for that coastline by the Tasman District Council.

Nelson City

2. Nelson City Council (“NCC”) is unitary authority, which carries out the functions of both a district and regional council. The Nelson Resource Management Plan (“NRMP”) contains a policy framework which seeks to encourage development away from hazard prone areas, on the basis that it is preferable to avoid rather than mitigate the effects of natural hazards.²⁶¹ In relation to coastal hazards, the NRMP addresses issues related to coastal inundation by establishing an Inundation Overlay (which includes tidal inundation) which is based on calculations of likely flood events, taking into account potential sea level rise.
3. Coastal erosion is addressed via a Coastal Environment Area Overlay, the purpose of which relates both to coastal hazards and natural character of the coastal environment.
4. In the Inundation Overlay (or low lying areas in the Rural Zone), new buildings and extensions of existing buildings or a change in use to involve human habitation are generally controlled activities in the first instance, with control reserved so that appropriate floor height and fill levels can be determined relative to the risk.²⁶² While subdivision is generally a controlled activity, subdivision in the Inundation Overlay is a discretionary activity.²⁶³
5. In terms of coastal erosion, the width of the Coastal Environment Overlay varies having regard to the extent to which particular areas are subject to coastal processes/coastal erosion. In the Residential zone, there are no particular rules for development within the Coastal Environment Overlay, although the overlay is to be taken into account in considering resource consent applications.²⁶⁴
6. In the Rural zone, setbacks are established for new habitable buildings located in the Coastal Environment Overlay. New habitable buildings are permitted beyond 100 metres from mean high water springs, controlled activities between 20 metres and 100 metres from mean high water springs and discretionary activities within 20 metres of mean high water springs.²⁶⁵ This graduated approach is likely to

260 See Nelson City Council website, <http://www.nelsoncitycouncil.co.nz/stormwater-diversion/?calendardate=2064-9-1>.

261 NRMP, section DO2.1.

262 NRMP, section 7.REr.83.

263 NRMP, section 7.REr.107 and section 12.REr.82.

264 NRMP, section 7.REr.67. A general 5 metre setback from mean high water springs is required, but the rationale for the setback relates to natural character rather than natural hazards. See REr.37.

265 NRMP, section 12.REr.50.

provide sufficient space to enable land to be put to reasonable use and enables such matters to be considered in the context of a resource consent application.

Tasman District

7. Like NCC, Tasman District Council is also a unitary authority. The Tasman Resource Management Plan ("TRMP") recognises that the Tasman District has a substantial length of coastline which is subject to coastal erosion, noting that there is relatively high risk of erosion affecting soft shorelines particularly in Pakawau, Rangihaeata, Mapua, Ruby Bay, Marahau and, to a lesser extent, Parapara and Pohara.²⁶⁶ The TRMP addresses the risks associated with coastal hazards by establishing a policy framework which seeks to avoid the effects of coastal hazards on activities on sites which are at significant risk of erosion or inundation and otherwise by remedying or mitigating the effects of natural hazards on subdivision, use and development.²⁶⁷
8. The TRMP establishes a pattern of zoning which emphasises containment of development away from natural hazards.²⁶⁸ For example, the TRMP establishes a Coastal Hazard Area which is applied at Ruby Bay / Mapua. The TRMP rules effectively establish a setback of 25 metres from the inland boundary of the Coastal Hazard Area (which itself varies in width and recognises the extent of coastal erosion and indicates a possible future erosion hazard²⁶⁹), whereby any construction or alteration of a building (other than accessory buildings) within the setback is a restricted discretionary activity²⁷⁰ and beyond the setback, is a permitted activity.²⁷¹
9. Subdivision is generally a controlled activity in the first instance (although section 106 of the RMA would still apply) but the TRMP also prohibits subdivision in certain areas due to coastal erosion, for example in the Rural Residential Closed Zone at Rangihaeata.²⁷²

Comment

10. The coastal hazard provisions in the NRMP and the TRMP are significantly less restrictive than some of the coastal hazard provisions in other district plans. Depending on the actual level of risk that arises from coastal hazards in Nelson and Tasman, there may even be scope for the adoption of more restrictive measures than those contained in the TRMP and NRMP.
11. It is also worth noting in that regard that while existing use rights prevail over district plan rules, regional rules can extinguish existing use rights. It would therefore be within the powers of both councils to promulgate rules which extinguished existing use rights and such rules would likely be considered appropriate if they were justified by the level of risk which arises.

266 TRMP, section 13.1.30.

267 TRMP, section 3.1.3.

268 TRMP, section 13.1.20(a).

269 TRMP, section 18.9.20.

270 TRMP, section 18.9.2.2.

271 TRMP, section 18.9.2.1.

272 TRMP, section 16.3.8.5.

SCHEDULE E

COASTAL HAZARD CONTROLS IN THE OTAGO REGION

Introduction

1. Coastal hazard issues arise along the coastline of the Otago Region, i.e., in Clutha District, Waitaki District, and Dunedin City. In addition to coastal erosion issues, the Otago coastline has also been identified as at risk of tsunami and storm surge hazards. According to a 2008 paper originally presented to Otago Regional Council's Engineering and Hazards Committee,²⁷³ work by NIWA has shown that the Clutha, Waitaki and Dunedin districts are potentially at risk from such hazards as a result of seismic activity originating from the Puysegur Fault, located to the south-west of the South Island.

Regional planning controls

2. Otago Regional Council ("ORC") has identified two coastal hazards in the Otago Regional Policy Statement ("ORPS") as significant resource management issues in the region, being erosion and accretion of that coast and possible sea-level rise in the long term.
3. The ORPS policy frameworks seeks to minimise the impacts of coastal processes, including by identifying hazard-prone areas and avoiding development in those areas unless it can be easily relocated.²⁷⁴ While it is acknowledged that coastal protection may be required in some circumstances, the potential effects of such works are acknowledged and alternatives are required to be considered.²⁷⁵
4. It is noted that the ORPS is due to be reviewed.

District planning controls

5. The Clutha, Waitaki and Dunedin District Plans contain objectives and policies aimed at addressing the adverse effects of coastal hazards, although the approach adopted by the councils vary. A brief overview of the coastal hazard planning controls in the Clutha District and Dunedin City is provided below.

Clutha District

6. The Clutha District Plan ("CD" P) (operative since 1998) notes that the coastal environment is susceptible to a range of coastal processes and settlements such as Taieri Mouth, Toko Mouth, Jacks Bay and Pounawea may be adversely affected by sea level rise, while Newhaven is currently affected by erosion which is likely to be accelerated by sea level rise.
7. The relevant objective of the CDP is to reduce adverse effects of natural hazards by providing non-structural strategies to avoid or mitigate those effects.²⁷⁶ There are a range of relevant policies which encourage consultation with the regional council with respect to natural hazards, the identification of hazards and provision information to assist in council decision-making.

273 NIWA, "Otago Region Hazards Management Investigation: Tsunami Modelling Study", cited in Report No.: 2008/002, Richard Woods, 24 January 2008.

274 ORPS, Policy 8.5.7.

275 ORPS, Policy 11.5.3.

276 CDP, Objective NHZ.1.

8. Rather than promulgate rules restricting land use (except for some specific activities, such as landfill) the CDP relies heavily on the use of the provisions of the Building Act to impose design conditions or refuse building consent where land is affected by natural hazards.²⁷⁷ In that regard, the rules do require that an applicant provide relevant hazard information and recommendation from the regional council and / or otherwise other relevant expertise.²⁷⁸
9. It is noted that the CDP is currently undergoing a review and, in light of the information that has become available over the last decade, it may be that a different approach to coastal hazards will be adopted.

Dunedin City

10. Sea-level rise and coastal erosion are recognised in the Dunedin District Plan (“DDP”) (operative since 2006) as potential issues for Dunedin City as a consequence of its natural topography and geography. Indeed, certain areas within the City are identified as requiring mitigation works in the event that sea levels do rise.
11. The DDP thus seeks to control development in those areas as well as areas located in or adjacent to areas affected by coastal hazards.²⁷⁹ The District Plan notes that the principal method to achieve these policies is through the use of zoning, in order to avoid, remedy or mitigate adverse effects associated with natural hazards. Specific setbacks are not established, but the nature of the hazard is also listed as a matter to which the Council must have regard when assessing any application for resource consent.
12. In relation to subdivision, where a site proposed to be subdivided is subject to a natural hazard, that may affect the activity status of subdivision (i.e. to a discretionary activity status).²⁸⁰ The subdivision rules also require an esplanade strip of not less than 20 metres from mean high water springs for any subdivision abutting the Coastal Marine Area which results in an allotment of less than 4 hectares.²⁸¹
13. Again, the approach adopted in the DDP is comparatively light-handed and, depending upon the level of risk which arises, the DDP could arguably impose more restrictive controls.

277 CDP, Method NHZ.2.

278 CDP, Rule NHZ.1.

279 DDP, Policies 17.3.5 and 17.3.6.

280 DDP, Rule 18.5.1(A).

281 DDP, Rule 18.5.4.

SCHEDULE F

COASTAL HAZARD CONTROLS IN THE CANTERBURY REGION

Introduction

1. Much of Canterbury's coastline is affected by coastal hazards. The Canterbury Regional Coastal Plan notes that, excluding Banks Peninsula, 75% of Canterbury's coastline is in a long-term erosional state, with retreat ranging from 3.0m one year at Washdyke to 0.2m per year in Hurunui.²⁸² Areas such as Taylors Mistake and Pegasus Bay²⁸³ are well known for being at threat from coastal erosion, with planning controls at South Brighton Spit being the subject of the *New Zealand Cashflow* cases.

Regional planning controls

2. The Canterbury Regional Policy Statement ("CRPS") acknowledges erosion as an issue in the region and adopts a similar policy framework to natural hazards generally as we have seen from other regional and district councils. The CRPS is currently under review (having been made operative in 1998).
3. The Canterbury Regional Coastal Environment Plan ("CRCEP") notes that coastal erosion and inundation from the sea are regionally significant due to their widespread nature and ability to cause extensive damage. The objective of the CRCEP is thus to locate development away from areas subject to coastal erosion and inundation²⁸⁴ and policies are adopted which seek to ensure that habitable buildings are not located in such areas, new development is designed so that coastal protection works are not required and natural buffers to coastal erosion are protected.²⁸⁵
4. The CRCEP establishes two Coastal Hazard Zones which are mapped in the plan. While many regional councils do not map setbacks in their plans, regional councils are typically heavily involved and generally take the lead in gathering information in order to establish coastal setbacks, etc. The CRCEP also establishes rules for development within the Coastal Hazard Zones, which is not an approach which regional councils typically adopt, ordinarily leaving control of land use activities above mean high water springs to district councils. (Having said that, we have seen that the Hawke's Bay Regional Council does adopt a similar approach.) The CRCEP notes that the Coastal Hazard Zones have been used in order to provide clarification to developers and territorial authorities, but that in the regional council's experience, provision of information about coastal hazards has not been sufficient to deter development from risky coastal locations,²⁸⁶ which may explain the more hands on approach adopted by CRC.
5. Coastal Hazard Zone 1 addresses the current active beach system and land which is at risk within the next 50 years. Coastal Hazard Zone 2 marks land at risk from erosion in the next 50 to 100 years.²⁸⁷ Reconstruction of structures are generally permitted within the Coastal Hazard zones, although structures damaged by the sea are only able to be reconstructed as a permitted activity if the site has not eroded to less than 450m².²⁸⁸ But for some exceptions in specific areas, new structures are generally restricted discretionary or discretionary activities within the Coastal Hazard

282 CRCP, section 9.1.

283 CRCP, section 9.1.

284 CRCP, Objective 9.1.

285 CRCP, Policy 9.1.

286 CRCP, section 9.1.

287 CRCP, section 9.1.

288 CRCP, Rule 9.1(a) and (b).

Zones,²⁸⁹ although new habitable buildings over 25m² (or alterations which cause a habitable building to exceed over 25m²) are prohibited within Coastal Hazard Zone 1.²⁹⁰

6. It is interesting to note the Environment Court's comments in *New Zealand Cashflow* (2003) with respect to the distinctions made in the CRCEP between habitable and non-habitable buildings and the size of the buildings. In that regard, the Court considered that those distinctions were not justified and that the most effective means of addressing the issue would be to establish the seaward limit to which a structure can be built and make all other structures non-complying, however the Court did not have the jurisdiction to make such changes.²⁹¹

District plans which defer control to CRCEP

7. In contrast to the proactive role that the CRCEP takes in establishing coastal hazards setbacks and corresponding rules for development, some of the district plans adopt policy frameworks to address natural hazards (including coastal hazards), but do not make rules with respect to development in areas prone to coastal hazards.
8. For example, the Timaru District Plan ("TDP") identifies coastal erosion as an issue, including that Washdyke experiences the most rapid coastal erosion in Canterbury.²⁹² While the plan promulgates rules with respect to flooding and coastal inundation (including prohibiting dwellings within areas identified on the planning maps as subject to coastal inundation²⁹³), it refers to the CRCEP for coastal erosion rules affecting activities seaward of the 100 year coastal erosion line.²⁹⁴
9. Similarly, the Proposed Ashburton District Plan ("PADP") identifies coastal erosion and inundation from sea as a risk for the district and adopts a policy framework to address those issues.²⁹⁵ However, the APDP notes that the CRCEP provides the primary means of controls over development in coastal area²⁹⁶ and no rules are included in the APDP in relation to coastal hazard areas. Readers are directed to see the rules in the CRCEP which apply. This approach is different to the operative Ashburton District Plan ("ADP"), which establishes coastal setbacks for buildings in certain areas via development standards.²⁹⁷

District plans which control land subject to coastal hazards

10. The Selwyn District Plan ("SDP") and Christchurch City Plan ("CCP") promulgate rules with respect to coastal hazards, despite the approach taken in the CRCEP. For example, the SDP generally provides for new buildings in rural zones as permitted activities, buildings located forward of the Coastal Hazard 1 line are non-complying activities.²⁹⁸
11. The CCP has a more comprehensive framework for addressing coastal hazards and identifies sea level rise and climate change and erosion of the coastline as significant issues for Christchurch City.²⁹⁹ It contains policies for the purposes of controlling

289 CRCP, Rule 9.2(a).

290 CRCP, Rule 9.3(a) and (b).

291 *New Zealand Cashflow* (2003), at 167 and 175.

292 TDP, Section 4.

293 TDP, Rule 6.16.2.5(1).

294 TDP, see Rule 6.16.

295 APDP, see, for example, Rural zone policies 3.6A to 3.6D.

296 APDP, section 3.6.

297 ADP, Rules 7.2.5.1.11, 7.6.5.2.6 and 7.6.5.1.8.

298 ADP, Rule 3.1.4.

299 CCP, sections 3.4.1 and 3.4.2.

development to protect life and investment from natural hazards³⁰⁰ and to avoid increased adverse effects from natural hazards, including limiting scale and density of potentially affected development.³⁰¹ Specific policies are adopted with respect to avoiding or mitigating adverse effects of erosion and flooding in the coastal environment.³⁰² Christchurch City Council (“CCC”) has also recently promulgated Variation 48, which addresses flooding and inundation (including coastal inundation) in Christchurch City and which introduces policies to limit scale and density of development affected and imposes standards in order to mitigate flooding/inundation.

12. In terms of coastal hazards, the CCP establishes a Conservation 1A (Coastal margins) Zone, which extends from mean high water springs to provide a buffer between coastal processes and urban development for natural character, ecological, public access and natural hazards reasons.³⁰³ Buildings in this zone are generally discretionary activities, although the reconstruction of buildings damaged by the sea in the South Brighton Spit are permitted activities.³⁰⁴
13. South Brighton Spit at Pegasus Bay is acknowledged as an area particularly susceptible to coastal erosion. The regional and city planning controls for that area were the subject of the *New Zealand Cashflow* cases, in which the Court was rerequired to consider what, if any, land use controls are necessary and whether they should be included in the CRCEP or the Proposed CCP. As noted above, the Court considered and determined the appropriate building line (or Coastal Hazard 1 line) and considered that there should not generally be buildings located seaward of that line. However, neither the regional council nor the district council established a prohibited or non-complying activity status for buildings in that area (except habitable buildings over 25m² in the CRCEP noted above) and neither did the Court have jurisdiction to make such changes.
14. Given the limitations on its jurisdiction, the key findings of the Court were:
 - (a) In light of the deficiencies in both the regional plan and city plan, the practical approach is to retain the overlapping functions of both the CRC and CCC seaward of the building line (Coastal Hazard 1 zone in CRCEP).
 - (b) Thus, habitable buildings over 25m² forward of the setback will be prohibited and other buildings discretionary or restricted discretionary.
 - (c) Control of land on the landward side of the building line should rest with CCC.
15. Thus, three zones were created:³⁰⁵
 - (a) Seaward of the building line, is the Coastal Hazard Zone in the CRCEP and the Conservation 1A zone in the CCP, where habitable buildings over 25m² are prohibited and other buildings are either discretionary or restricted discretionary.
 - (b) Behind the building line, is South Brighton Coastal Management Area 1 (“SBCMA1”) where building is a restricted discretionary activity.
 - (c) Beyond SBCMA1 is South Brighton Coastal Management Area 2 (“SBCMA2”), where building is a controlled activity.

300 CCP, Policy 2.5.1.

301 CCP, Policy 2.5.2. See also Policy 2.5.4.

302 CCP, Policy 2.6.3.

303 CCP, section 5.1.3

304 CCP, section 5.2.3.1

305 *New Zealand Cashflow* (2003), at 177 – 179.

16. As a result, the CCP provides for the erection of a building in SBCMA1 as a restricted discretionary activity. The matters to which discretion is limited relate to primarily to erosion issues, including the impact of the building on infiltration, wave flow and coastal stability, its ability to withstand coastal erosion without threat of damage or collapse, protection of foredunes, measures to enhance sand volumes, etc.³⁰⁶ Buildings are a controlled activity in SBCMA2, which is an area less subject to coastal erosion and inundation.³⁰⁷

306 CCP, section 2.2.2.12.

307 CCP, section 2.2.2.12. See also section 8.1.10 for explanation for the rules.

SCHEDULE G

COASTAL HAZARD CONTROLS IN THE TARANAKI REGION

Introduction

1. Coastal hazards arise along the Taranaki coastline and areas under particular pressure include Oakura Beach, where an artificial surf reef is among the options for addressing erosion,³⁰⁸ and Urenui Beach, where resource consent was granted for a rock sea wall in order to protect baches and a golf course from the eroding forces of the sea.³⁰⁹

Regional planning controls

2. The Taranaki Regional Council's ("TRC") Taranaki Regional Policy Statement ("TRPS") identifies reducing the risks to the community from natural hazards as a significant resource management issue in the Taranaki region. The TRPS establishes objectives, policies and methods for this purpose.
3. The Taranaki Regional Coastal Plan ("TRCP") notes that the entire Taranaki coastline is eroding at an average rate of between 0.05m/yr and 1.89m/yr. It promulgates objectives, policies and rules aimed at reducing the risk of accelerated coastal erosion or accretion along the region's coastline as a result of human activities in the coastal marine area,³¹⁰ reducing the susceptibility of people, property and the coastal environment to loss or damage by coastal erosion,³¹¹ and avoiding the need for coastal hazard protection works.³¹²
4. In that regard, coastal protection structures historically (and across New Zealand) formed the vanguard of methods to protect the land against the relentless erosive effect of the sea. The TRCP now contains policies which recognize the cyclical nature of erosion and accretion and the potential for hard protection structures create adverse effects themselves, which can even accelerate coastal erosion. Such policies seek to ensure that new structures do not cause further erosion³¹³ and that structures be removed at the expiry of their authorisation or useful lives.³¹⁴
5. The TRCP provides that maintenance of coastal protection works is a permitted activity provided that a list of standards is met,³¹⁵ or is otherwise discretionary.³¹⁶ New structures are discretionary,³¹⁷ but large new structures are provided for as discretionary and restricted coastal activities.³¹⁸

308 Oakura Structure Plan (2006), page 23; Oakura Structure Plan Implementation Plan (February 2008), page 9. See also Taranaki Daily News, 24/12/2008, <http://www.stuff.co.nz/taranaki-daily-news/news/773613>.

309 P Blackett, T Hume, J Dahm, "Exploring the social context of coastal erosion management in New Zealand: What factors drive particular environmental outcomes?", The Australasian Journal of Disaster and Trauma Studies, Volume: 2010 – 1.

310 Objective 6(a)

311 TRCP, Objective 7(a).

312 TRCP, Objective 7(b).

313 TRCP, Policy 6.1.

314 TRCP, Policy 6.2.

315 TRCP, Rule C1.1.

316 TRCP, Rule C1.2.

317 TRCP, Rule C1.11.

318 TRCP, Rule C1.7 - 1.9.

6. The TRCP does not impose controls on landowners for the purpose of addressing coastal hazards in relation to land outside of the Coastal Marine Area, which is the responsibility of the district councils.
7. For completeness, it is noted that the TRCP is due to be reviewed.

District plan controls

8. Both the New Plymouth District Plan (“NPDP”) and the South Taranaki District Plan (“STDP”) contain provisions addressing natural hazards, including coastal erosion. Coastal erosion is recognized as a significant resource management issue in both districts, and both districts have adopted a similar approach to dealing with the issue. In particular the district plans of both districts utilise a coastal zone overlay with associated rules restricting the use of land within identified land prone to coastal erosion. The rules relating to subdivision also tighten the activity status for subdivision in land identified as being at risk from coastal erosion.
9. As both district councils employ similar methods to achieve similar objectives, it is proposed only to address the provisions of the NPDP in more detail.
10. The source of the coastal erosion controls in the NPDP is the Natural Hazards section of the plan. The policies in that section require *inter alia* that:
 - (a) Subdivision, land use and development be designed or located to avoid or mitigate the adverse effects of natural hazards;³¹⁹ and
 - (b) Subdivision, land use and development do not aggravate natural hazards.³²⁰
11. A Coastal Hazard Area (“CHA”) is identified, within which any building is a discretionary activity (with the exception of Tongaporutu-Whitecliffs Station). Assessment criteria include the design, construction and location of the building, whether the building can be relocated, whether the building will exacerbate or increase the effects of coastal erosion, and whether the building is likely to be inundated by the sea over its intended lifespan.³²¹ The erection of structures, excavation and filling, and vegetation clearance are permitted activities provided that these activities do not result in erosion or scour, or adverse disturbance modification or destruction of dune, wetland or estuarine systems (in which case those activities become discretionary).³²²
12. Subdivision is also controlled within the CHA. Subdivision in the CHA which creates a lot no smaller than the minimum size for that underlying Environment Zone is a discretionary activity; otherwise it is non-complying. Assessment criteria for discretionary subdivision (in addition to the Zone criteria) include the extent to which the hazard can be avoided or mitigated, the extent to which the subdivision will increase the risk to human life, property, infrastructure and the environment, and any proposed mitigation measures.³²³
13. Further, all subdivided land within the CHA must include a 20m wide reserve strip where the allotment is adjacent to mean high water springs, irrespective of the allotment size. The creation of the esplanade reserve is a controlled activity; if the

319 NPDP, Policy 12.1.

320 NPDP, Policy 13.

321 NPDP Rule OL10.

322 NPDP Rule OL11.

323 NPDP Rule OL13.

esplanade reserve does not meet the requirements for a controlled activity it falls to be assessed as a discretionary activity.³²⁴

14. As with the coastal hazard provisions in Nelson and Tasman, some of the land use controls in the NPDP are less restrictive than controls in some other areas and there may even be scope (depending on the actual level of risk) for more restrictive controls when the plans are reviewed in the future.

SCHEDULE H

COASTAL HAZARD CONTROLS IN THE HAWKE'S BAY REGION

Introduction

1. Coastal hazards issues are well illustrated in the Hawke's Bay year after year, in places such as Haumoana, where houses were built in coastal areas many years ago and are now under threat from inundation from the sea.³²⁵ This section provides an overview of how planning controls are utilised in the Hawke's Bay region to manage coastal hazards and briefly comment on those controls in light of the issues and analysis contained in this paper.

Regional planning controls

2. The Hawke's Bay Regional Council ("HBRC") has identified coastal hazards as a resource management issue in the region via its Proposed Regional Coastal Environment Plan ("PRCEP"), which notes that the entire region's shoreline is prone to storm damage and the influence of cyclical erosion and accretion trends³²⁶ and which establishes a number of objectives, policies and rules relating to coastal erosion and inundation.
3. The PRCEP contains a policy framework which seeks avoidance of the risk from coastal hazards in the first instance, including encouraging managed retreat, and promotes the use of hard engineering structures only where other options are not feasible or are inappropriate.
4. The PRCEP establishes three Coastal Hazard Zones which represent areas of land subject to different levels of risk as a result of coastal erosion and inundation (i.e. over the next ten years, 100 years, etc). Some of the key relevant rules which implement the objectives and policies identified in the plan include:
 - (a) Maintenance, repair and replacement of lawfully existing structures and extension (of less than 20m²) of existing structures is permitted (provided that the structure does not extend further seaward than the existing structure in Coastal Hazard Zone 1).³²⁷
 - (b) Any additions or alterations to an existing building or construction of new building greater than 20m² require consent as a non-complying activity in Coastal Hazard Zone 1³²⁸ and restricted discretionary activity in Coastal Hazard Zone 2.³²⁹
 - (c) New and replacement coastal protection structures are a non-complying activity in Coastal Hazard Zone 1 and Coastal Hazard Zone 2.³³⁰

325 See NZ Herald article, "Huge seas threaten homes", NZ Herald, Alanah May Eriksen, 9 March 2010; See also community movement for coastal erosion works to protect property at Haumoana <http://www.haumoana.com/pages/erosion.html>.

326 See HBRC PRCEP, Explanation and Reasons 15.1, page 48.

327 HBRC PRCEP, Rule 78A. Note that HBRC could require a consent for the replacement of existing buildings, as ongoing existing use rights do not arise with respect to regional plans as they do with district plans – see section 20A of the RMA.

328 HBRC PRCEP, Rule 87.

329 HBRC PRCEP, Rule 82.

330 HBRC PRCEP, Rule 85.

5. Some of the appeals on HBRC's PRCEP seek a less restrictive activity status for the development of property in the coastal hazard zones than that proposed, including a restrictive discretionary activity status for buildings rather than non-complying, and permitted activity status for replacement of existing buildings. It is not proposed to examine the PRCEP provisions in detail as they are subject to appeals to the Environment Court and whether particular planning provisions render land incapable of reasonable use will depend upon the specific facts of each individual case.³³¹

District planning controls

6. The Napier District Plan, Hastings District Plan, Central Hawke's Bay District Plan and Wairoa District Plan also address coastal hazards. While all of those plans seek to locate development away from areas which may be affected by coastal hazards, the planning tools used across the districts vary.

Light handed controls - Central Hawke's Bay, Wairoa and Hastings districts

7. The Central Hawke's Bay District Plan addresses coastal hazards in the context of natural hazards generally (which also includes earthquakes, flooding, land slip, etc), but does not control building construction in areas vulnerable to erosion, etc, leaving such control to the Building Act.³³²
8. Subdivision is generally a controlled activity (if it meets performance standards) with control reserved over matters relevant to addressing effects related to natural hazards and reliance is placed on the duty to decline subdivision consent in the event adverse effects cannot be appropriately addressed in terms of section 106.
9. The Wairoa District Plan adopts a similar approach (although subdivision within Coastal Zones or on land identified on the Council register as being subject to natural hazards is a discretionary activity).³³³
10. The Hastings District Plan identifies sites which are potentially subject to erosion³³⁴ and again leaves the regulation of land use and subdivision in such areas to the provisions of the Building Act and section 106.³³⁵
11. As noted above, depending upon the level of risk which arises, there may be scope, within what councils can (and perhaps should) do, for more stringent controls.

More stringent controls – Napier District

12. By contrast with the more light handed controls in Hastings, Wairoa and Central Hawke's Bay districts, the Napier District Plan ("NDP") contains provisions which introduce more significant restrictions on property rights.

331 The approach taken by the other district councils does not, in our view, represent the types of provisions which would be likely to give rise to challenges under section 85, given that they do not impose restrictive controls on land but rather rely on the Building Act and section 106 to govern when granting a resource consent or subdivision consent on hazard prone land is inappropriate.

332 Central Hawke's Bay District Plan, section 3.4.1.4.

333 Wairoa District Plan, see sections 8 and 27.

334 Hastings District Plan, section 2.7.2.

335 Hastings District Plan, section 12.3.1.

13. The NDP contains a policy framework which supports the identification of natural hazards,³³⁶ direction of development away from areas subject to natural hazards³³⁷ and the control of existing development in areas subject to natural hazards.³³⁸ The NDP establishes a coastal hazard area and rules relating to land uses within that zone. Key relevant rules include:
- (a) Maintenance, repair and minor alterations to existing structures are generally permitted in the coastal hazard area.³³⁹
 - (b) New structures / relocation of structures in the coastal hazard area are prohibited.³⁴⁰
 - (c) Other land development (including subdivision) in coastal hazard area is discretionary.³⁴¹
14. Some of the provisions of the NDP were the subject of a decision of the Environment Court in the *Fore World* case, which case is addressed in some detail in section 6 of this paper.

336 See NCC NDP, Objective 62.3 and related policies, page 62.0-3.

337 See NCC NDP, Objective 62.4 and Policy 62.4.1, page 62.0-4.

338 See NCC NDP, Objective 62.4 and Policy 62.4.2, page 62.0-4.

339 NCC NDP, Rule 62.7.

340 NCC NDP, Rule 62.13.

341 NCC NDP, Rule 62.12.