

Local Government New Zealand

Managing Council and Community Risk from Natural  
Hazards

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“Planning Controls and Property Rights  
– Addressing Council Risk”



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# Context

- Tension between economic development v environmental values
- Similar tension between ability of landowners to use their land where natural hazards exists, e.g., areas prone to coastal erosion.
- Regional and district councils developing novel planning controls.
- Raises issues re extent to which planning controls can impinge on property rights and extent of risk to councils, including whether compensation is payable.

# Issues

- Seen as power of “the State” or “City Hall” versus private property rights.
- Whether such controls can be imposed = legal issue.
- Whether such controls should be imposed = policy / political issue.
- Policy and legal issues are inter-related, especially in considering the merits of planning instruments via plan change procedures.

# Purpose and scope of presentation

- To explore interaction of policy and legal processes to strike an appropriate balance and thus reduce risk to councils in their capacity as planning authorities.
- The presentation will address:
  - The scope of legal powers to promulgate plans and limitations on those powers.
  - The scope of private property rights and relevance to plan making.
  - Purpose and effect of s. 85 of the RMA.
  - Focus on coastal hazard controls as example of planning controls that impact on property rights.

# Source material

- Presentation is adapted from a paper presented for the Resource Management Law Association in 2010 entitled “Planning Controls and Property Rights– Striking the Balance
- Available on RMLA www site and [www.simonberry.co.nz](http://www.simonberry.co.nz)
- Less focus on plan controls than original paper

# Scope of plan making powers

- Source of jurisdiction - sections 9 – 15.
- Central Government – NESs, NPSs.
- Regional Council functions – s. 30 – include controls or use of land for soil conservation, water quality, natural hazards (s. 30(c)).
- Must consider threat from natural hazards in preparing regional plan – s. 65(1).

## Scope of powers to impose plan controls

- District Council functions – s. 31 – focus on control of use of land, including natural hazards.
- Some overlap re regional and district council jurisdiction re natural hazards
- RPS should assign responsibilities – if not, regional council responsible - s 62(1)(i), 62(2)

# Scope of powers to impose planning controls

- Broad definitions of:
  - “environment” – includes natural/physical resources, people and communities.
  - “effects” – includes positive/adverse, permanent / temporary, past/present/future and low probability/high potential impact.



# Scope of powers

- RMA clearly contemplates restrictions on private property – provided controls fall within scope of decision-maker's powers.
- Councils can promulgate controls provided they:
  - Fall within council functions.
  - Meet overriding legal requirements re justification.
- Whether they should involves a consideration of the merits in light of alternatives, Part 2, etc.

# Statutory requirements and safeguards – section 32

- Range of limitations on plan making powers – need to be observed by councils.
- Section 32 requires robust analysis of costs, benefits and options – test is whether objectives, rules, etc. “most appropriate” way to achieve purpose of RMA and plan objectives – which control is “better”? (Previous test “necessary”.)

# Statutory requirements and safeguards – section 32

- Councils need to actively consider whether controls necessary – non-action may not be an option - *Waihi Beach*.
- Council responsibility is to manage known and potential effects of natural hazards – *Waihi Beach, Fore World Developments*.
- Precautionary approach where uncertainty of information – *Rotorua Bore Users*.
- Development controls on private land may requires consideration of site specific factors – *Capital Coast, CS Family Trust*.

# Statutory requirements and safeguards – First Schedule procedures

- First Schedule procedures require notification, submissions and further submissions, hearing and appeal to the Environment Court.
- *Waikato – Tainui v. Hamilton City* decision to the effect that consultation is mandatory
- Opportunity for landowners to be heard and to oppose proposed planning provisions on their merits – both whether they can be imposed (jurisdictional issue) and should be imposed (merits issue).

# Statutory requirements and safeguards

## - Part 2 considerations

- Need to measure proposed rules against sustainable management purpose of RMA having regard to key issues in Part 2.
- Overall broad judgement whether plan provisions promote purpose of the RMA allowing for “*balancing of conflicting considerations in terms of their respective significance or proportion in the final outcome*” – *Geotherm*.

# Statutory requirements and safeguards

- Existing activities protected from district plan rules provided:
  - Lawfully established.
  - Same or similar character, intensity and scale (section 10 RMA).
- Existing uses can be extinguished by regional rules – *McKinlay Trust*. May be necessary in coastal hazard areas.

# Statutory requirements and safeguards

- In summary, range of factors for councils to consider:
  - Section 32 requirements
  - First Schedule procedure, including requirement for consultation and possibility of appeals to Environment Court
  - Existing use rights
  - Section 85 ( to be addressed presently)
  - Possibility of backlash for unpopular policy decisions at election time

# Relevance of private property rights

- Landowners may oppose planning controls that infringe on private property rights.
- Range of legal arguments have been raised:
  - Constitutional protections
  - American and other overseas jurisprudence
  - Liberal political theories
  - Absolute rights of freehold owner



# Relevance of private property rights

- Constitutional protections – e.g. Magna Carta or NZ Bill of Rights Act 1990.
- However no constitutional protection in NZ – not able to argue Magna Carta (or Treaty of Waitangi) overrides or strike down modern legislation like the RMA.
- BORA does not protect property rights nor preclude policy of managed retreat – *Falkner, Westco Lagan*.

# Relevance of private property rights

- American 5<sup>th</sup> Amendment - property rights constitutionally guaranteed in the USA – eminent domain doctrine.
- NZ law different– *Auckland Acclimatisation Soc. v. Commissioner of Crown Lands*. See also *Waitakere CC v. Estate Homes Ltd* (SC):

*“NZ law provides no general statutory protection for property rights equivalent to ...the US Constitution...The NZ BORA does not protect interests in property from expropriation.”*

# Relevance of private property rights

- Other countries (Canada, Northern Ireland and Australia) have constitutional guarantees of property rights – zoning seen as de facto expropriation without compensation.
- These cases not binding in NZ - the RMA does provide for compensation.

# Relevance of private property rights

- Liberal political theories – e.g. Locke / Blackstone.
- Even if valid, good reason for resource management and property law to evolve to address emerging environmental issues –  
*West Coast RC:*

“The RMA is not considered by this Court as a drastic erosion of the rights of property owners, and so as to be construed restrictively to protect their rights. That judicial perspective has gone.”

# Relevance of private property rights

- Absolute rights of freehold owner – however, fee simple subject to underlying State ownership – *Gargiulo*.
- In *Gargiulo* the Environment Court said:
- *...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 natural rights to property. Rather, property rights are...creatures of law...and can thus be measured against the interests to be protected under the RMA.”*

# Summary of New Zealand legal position

- Common law property rights are subject to environmental regulation.
- “The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources”  
– *Falkner, Suncern*.
- Statutory presumption that planning controls are a form of regulation, not a taking of property – Supreme Court in *Estate Homes*.
- Clearly planning controls which impinge on the interests of landowners can be imposed – key question is whether it should depends on the circumstances.

## Section 85 - effect

- RMA clear that plan provisions do not cause injurious affection (s. 85(1)) – therefore no right to compensation (cf TCPA 1977) but can result in amendment to offending plan rules – *Leith v. ACC*.
- Section 85 therefore provides specific procedure for challenging plan provisions rules where they:
  - Render land incapable of reasonable use AND
  - Place an unfair and unreasonable burden on any person.
- Section 85 issues can be raised in plan submissions (s. 85(2)) or direct referral to Environment Court (s. 85(3)).

## Section 85 – tests

- Number of useful cases – see in particular *Hastings, Steven v. Chch CC*.
- However, not a common source of challenge - key issue is sustainable management not whether it is unreasonable to the owner – “*the focus in on the public interest, not private property rights.*” – *Hastings v. ACC*.
- Less risk to councils than may first appear



# Section 85 – incapable of reasonable use

- Whether land is rendered incapable of reasonable use – considered case-by-case. Identity or characteristics of landowner irrelevant.
- Use that would generate significant adverse effects are not reasonable – s. 85(6).
- Thus building in erosion prone area not a reasonable use – no section 85 protection – *Francks*.
- Capability of reasonable use must be considered in context of whole of relevant property – *Fore World Developments, Landco*.

# Section 85 – incapable of reasonable use

- “Reasonable use” does not mean optimum financial return – key focus is whether reasonable uses remain possible – *Fore World Developments*.
- Controls which impose an “all or nothing” quality to landowner options more likely to be seen to preclude reasonable use – e.g., inability to demolish heritage building meant whole site could not be used – *Steven*.
- Not dependant on ability to obtain resource consent – could still be incapable of reasonable use - *Mullins / Seabreeze*.

## Section 85 – unfair and unreasonable burden

- Unfair and unreasonable burden also requires case by case consideration.
- Will depend on a range of factors (*Steven*):
  - Natural and physical resources in issue.
  - Whether no reasonable use established (per first limb).
  - Parts 2 purpose and principles

# Section 85 – unfair and unreasonable burden

- Relevant factors per *Steven* (cont'd)
  - Part 3 of the RMA “and the inference from s. 9 that real property rights prima facie meet the purpose and principles of the Act.”
  - Plan provisions in the context of the plan.
  - The “rebuttable presumption that the proposed plan is effective and efficient”
  - The personal circumstances of the applicant, looked at objectively

# Compensation or taking of land

- Section 85(1) precludes compensation for effect of planning restrictions.
- Landowners can only require acquisition of land where affected by designation or heritage order (s. 185) – not planning controls.
- Open to councils to enter into agreements with landowners to provide compensation or financial support to:
  - Share risk / cost of control.
  - Avoid Court directed amendment under s. 85.

# Examples of contemporary planning controls

- Little debate re traditional (e.g. height) controls.
- Example of newer types of controls which could affect landowner interests:
  - Tree protection controls – *Auckland, North Shore, Waitakere.*
  - Protection of landscape / amenity / ONLs.
  - Control of nitrogen leaching – *EW RPV5.*
  - Management of coastal hazards.

# Coastal hazards

- Coastal hazards provide a good example of planning controls that impact of property rights
- Key issues arising:
  - Need to protect people and property.
  - Ability of property owners to protect property via coastal protection works.
  - Effects of coastal protection works on coastal processes.

# Coastal hazards – general approach

- Strong justification for control – legal requirement for Council to control the problem where non action is not an option – s. 65(1)(c)  
- *Waihi Beach, Fore World Developments.*
- Many councils adopt coastal hazard setback based on technical studies or precautionary approach - restrictive activity status for development in high risk areas – may even be prohibited activity–  
*Skinner.*



# Coastal hazards – jurisdiction

- Others rely on existing powers under Building Act 2004 and s. 106 RMA :
  - Building Act – ability to refuse building consent
  - Section 106 RMA – refuse consent to subdivision - *TCDC, CHBDC*.
- This approach clearly being superseded by plan controls which enable coherent policy framework

# Coastal hazards - setbacks

- “Managed retreat” policy and coastal hazard setbacks accepted by Courts - *Waihi, Skinner*, etc.
- Key issue – adequacy of technical evidence to support controls.
- Precautionary principle applies but not overly cautious – no need for response beyond “worst case scenario” - *New Zealand Cashflow, Skinner*.
- Response depends on level of knowledge of risk – RMA does not require avoidance of risk - *Fore World Developments*

# Coastal hazards - setbacks

- MfE guidelines:
  - Lengthy planning period (100 years).
  - 0.5m sea level rise
  - Consider 0.8m sea level rise.
- Setback should ultimately be a pragmatic response based on all relevant factors “...drafting a hazard line is not as scientific as ascertaining where the MHW is...The task is to draw a line as an administrative boundary which is conveniently ascertainable”
  - Save the Bay

# Coastal hazards – land use restrictions

- Setback and extent of restrictions must be supported by evidence / technical analysis.
- 100 year time frame seen as appropriate – *Waihi Beach, Skinner, Fore World*
- Consent may still be granted where risk exists – purpose designed pole house allowed in *Holt* alongside indemnity to council

# Coastal hazards and section 85

- Coastal setback approach may come under challenge in terms of s. 85.
- May not be incapable of reasonable use even where building prohibited on part of land – *Fore World Developments*.
- Where a response to “clear and present danger”, prohibited activity status not “bureaucratic overkill” – *Palmer*.

# Coastal hazards and section 85

- Needs to be assessed on case by case basis.
- May be acceptable if already developed provided existing use rights not extinguished.
- May be acceptable if can develop somewhere on property.
- If development completely precluded, may render land incapable of reasonable use – in *NZ Cashflow* the setback was moved to reduce impact of rules

# General observations

- General observations from review of coastal hazard provisions throughout New Zealand
- Trend from hard engineering to soft (dune protection) and non (managed retreat) engineering management of coastal hazards – *EW, Wellington RC, Taranaki RC, HBRC, ECan, Otago RC, ARC.*
- Setback approach v reliance on BA / s. 106 RMA both used – likely to see shift towards setback approach

# General observations

- Plan provisions vary in terms of affect on property rights – those that rely on BA / section 106 infringe to lesser extent.
- Some setbacks restrictive than others – *Napier* (prohibits new structures forward of setback) vs *Franklin, New Plymouth, Nelson, Tasman* (disc activity – full or restricted – status)
- Good example of addressing potential s. 85 issues – where whole allotment is within the setback, the setback is reduced – *Waikato DC*



# General observations

- More directive role from regional councils – *Hawke Bay and Canterbury, EW Proposed RPS*
- Can probably expect continuation of this trend, including extinguishing existing use rights
- Will need to be tested per 1<sup>st</sup> Schedule processes and section 85 – question is whether reasonable to build on particular property given level of risk