Aotearoa New Zealand's Climate Change Adaptation Act:
Building a Durable Future

CURRENT LEGISLATIVE AND POLICY FRAMEWORK FOR MANAGED RELOCATION

Working Paper 2

Raewyn Peart and Benjamin D Tombs

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Abbreviations

Aotearoa	Aotearoa New Zealand
DAPP	Dynamic Adaptive Pathways Planning
DOC	Department of Conservation
EDS	Environmental Defence Society
EQC	Toku Tū Ake Earthquake Commission
ICCPR	International Covenant on Civil and Political Rights
LGA	Local Government Act
LGOIMA	Local Government Official Information and Meetings Act 1987
LIM	Land Information Memorandum
LINZ	Land Information New Zealand
MBIE	Ministry of Business, Innovation and Employment
MFE	Ministry for the Environment
NBEB	Natural and Built Environment Bill 2022
NPF	National Planning Framework
NPS-UD	National Policy Statement on Urban Development 2020
NZCPS	New Zealand Coastal Policy Statement 2010
RMA	Resource Management Act 1991
SPB	Spatial Planning Bill 2022
Te Tiriti	Te Tiriti o Waitangi/Treaty of Waitangi

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EXECUTIVE SUMMARY

1 Introduction

In June 2022, the Environmental Defence Society (EDS) commenced a project titled *Aotearoa New Zealand's Climate Change Adaptation Act: Building a Durable Future* to develop recommendations for the content of a new Climate Adaptation Act. This was in response to the expressed government intention to develop new law to address the complex and distinctive issues associated with managed relocation such as funding, compensation, land acquisition, liability and insurance.[1]

In February 2023, EDS released its first working paper for the project. Titled *Principles and Funding for Managed Retreat*, the paper focused on conceptualising managed retreat and exploring what principles might underpin a new system and how it might be funded.[2] This second working paper focuses on describing and evaluating the adequacy of the current law and rights-based systems applicable to managed retreat. Working Paper 3, the final in the series, will present options to address gaps in the current system. The final report, which is due in late 2023, will contain concrete recommendations for the design of the Climate Adaptation Act.

As we outlined in Working Paper 1, 'managed' retreat involves the purposeful and coordinated movement of people and assets out of an area subject to significant hazard risk. Ideally it is pre-emptive, taking place before damage occurs, but it may occur post-event. In this working paper we use the term managed 'relocation' interchangeably with managed 'retreat'.

The Auckland Anniversary floods in January 2023, and Cyclone Gabrielle landing just a few weeks later, are a recent reminder of the urgency in considering managed relocation ahead of increasing climate risks. Treasury estimated that the damage caused by the two events could cost the country between $9 and $14.5 billion, with about half of this related to central and local government infrastructure.[3] Such events are likely to be more frequent in a climate changing world.

PART ONE: CURRENT PROPERTY AND RIGHTS FRAMEWORK

At the very core of many controversies over climate adaptation and managed relocation is the relationship people have with land. This is because land-based property rights underpin our society and economy. There is also a history of dispossession of Māori land in Aotearoa which colours contemporary discussion on managed relocation policy. In this section we traverse land, Te Tiriti o Waitangi/Treaty of Waitangi (te Tiriti) and human rights frameworks

2 Common law

Tikanga was the first law of Aotearoa and is part of common law today. It is relevant in developing a new climate adaptation statute, both in terms of informing approaches to addressing climate risks to Māori, and in determining broader principles to underpin climate adaptation policy. The latter could include, for example, showing respect, generosity and care for people affected by climate risks (manaakitanga); maintaining relationships between people and a sense of community when seeking to move households out of harm's way (whanaungatanga); and recognising the need to care for the natural environment when considering managed retreat options (kaitiakitanga).

Tort is a branch of common law that provides remedies for civil wrongs. It is based on the underlying premise that when parties undertake a wrongful act that causes demonstrable loss or harm to others, they should be liable to pay compensation. People may seek to recover such losses under the tort action of negligence where it can be shown that the conduct of one party (such as the local council) results in a loss by another (a property owner).

It is not yet clear the extent to which an action in negligence could succeed on the basis that a council authorised development in a high risk zone, without undertaking due diligence, as such a case has yet to be brought before the courts. However, based on other relevant case law, it seems probable that a duty of care would be found in some cases. A key question is whether such liability issues should be left to be determined by the courts, which will almost certainly continue to develop this branch of the law, or whether they are better addressed by Parliamentarians in statute, such as the proposed Climate Adaptation Act.

3 Land law

Prior to colonisation, land in Aotearoa was communally held and managed based on tikanga. After the signing of te Tiriti, the Crown acquired large areas of Māori land both through purchase and later confiscation. Further land was lost to Māori after the individualisation of land title under the Native Lands Act 1862. Any proposals for managed relocation must be sensitive to this history of Māori land dispossession.

Currently only about 5 per cent of the country (some 1.47 million hectares) is "Māori land" and this is mainly held as "Māori freehold land".[4]

Administration of Māori land is overseen by the Māori Land Court under the Te Ture Whenua Māori Act 1993 with the objective of retaining Māori land in Māori ownership; facilitating its occupation, use and development; and protecting wāhi tapu.[5]

General land title in Aotearoa stems from English common law where land is ultimately held by the Crown and granted in the form of estates.[6] There are four types of land estates: freehold, leasehold, unit title and cross lease. The importance placed on the ownership of land in Aotearoa is highlighted by the concept of indefeasibility of title, where the registered owner of land is protected against all claims that are not registered, as well as a state guarantee as to the accuracy of the registered rights.[7] However, this does not mean that the state cannot 'take' land from property owners.

Compulsory acquisition of land by government is likely one of the most controversial issues in managed relocation. In the 2006 *Estate Homes Limited* case, the Supreme Court confirmed that the there is no general right in Aotearoa to compensation where land has been taken, so long as the acquisition is authorised under statute. The court also made it clear that planning restrictions or conditions placed on the grant of resource consents do not amount to a 'taking' of land.[8] This is reiterated in section 85(1) of the Resoruce Management Act (RMA) which states that "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".

4 Other rights

Te Tiriti is a foundational constitutional document in Aotearoa's legal system which establishes and guides the ongoing relationship between the Crown and Māori.[9] Te Tiriti matters that will need to be considered in any managed relocation policy include protecting rangatiratanga, assisting Māori to access land required for managed relocation, ensuring that ongoing connections with land and other taonga are retained, and adequately resourcing iwi and hapū to undertake and implement climate adaptation planning. Fundamental human rights will also need to be considered in any managed relocation policy including the right to natural justice, to civil proceedings and to judicial review under the New Zealand Bill of Rights Act 1990.

PART TWO: LEGISLATIVE FRAMEWORK FOR MANAGED RELOCATION

Currently there is no for-purpose legal framework for managed relocation in Aotearoa. Instead, there is a complicated bundle of statutory provisions that central government agencies and local authorities must navigate, in an *ad hoc* manner, in order to relocate people away from areas exposed to natural hazards. For the purposes of our legislative review, we have identified seven key types of actions associated with undertaking managed relocation, as follows:[10]

1. Identifying risk and communicating it to the public
2. Preventing development in hazard prone areas
3. Undertaking adaptation planning
4. Rezoning land to prevent occupation
5. Acquiring properties and providing compensation
6. Relocating people, buildings and infrastructure, and developing new settlements
7. Clearing vacated land and undertaking ongoing land management

A list of the relevant legislation we have reviewed is set out below. This is not exhaustive but is intended to provide an integrated sense of a body relevant law.

List of current legislation relevant to managed retreat

Legislation (in date order)	**Agency**	**Relevance to managed retreat**
Soil Conservation and Rivers Control Act 1941	Regional councils	Construction and maintenance of flood protection works
Land Act 1948	Land Information New Zealand	Acquisition, disposal and management of Crown owned land
Health Act 1956	Territorial authorities Director of Health	Requires properties to have adequate potable water and facilities for the disposal of wastewater Enables buildings to be closed where they are likely to cause injury to health or are unfit for human habitation
Local Government Act 1974	Territorial authorities	Management and stopping of roads
Reserves Act 1977	Territorial authorities Other management entities	Classification and management of reserve land by a range of parties
Public Works Act 1981	Land Information New Zealand Local authorities	Compulsory acquisition of land for public works and payment of compensation
Local Government Official Information and Meetings Act 1987	Territorial authorities	Preparation of Land Information Memoranda for individual properties which can include information on climate risk
Conservation Act 1987	Department of Conservation	Designation and management of conservation land
Resource Management Act 1991	Regional councils Territorial authorities	Management of land, water, air and coastal marine area; planning and consenting for activities including subdivision and urban development
Te Ture Whenua Māori Act 1993	Māori Land Court	Classification, protection and management of Māori land
Climate Change Response Act 2002	Climate Change Commission	Preparation of a national risk assessment and national adaptation plan every six years
Local Government Act 2002	Regional councils Territorial authorities	Sets out consultation principles and decision-making requirements. Provides for 10-year long term plans, 30-year infrastructure strategies and financial strategies
Civil Defence Emergency Management Act 2002	Director of Civil Defence Emergency Management Local Authorities	Provides broad powers to respond to emergencies
Building Act 2004	Territorial authorities	Ensures compliance of buildings with the building code
Urban Development Act 2020	Kāinga Ora	Separate regime for specified development projects including compulsory acquisition of land
Water Services Entities Act 2022	Water Services Entities	Must identify and manage natural hazard risks affecting water assets

5 Identifying and communicating risk

Identifying and communicating risk effectively is essential to any meaningful adaptation planning and managed relocation process. The information needs to be reliable and trusted and reflect the most up to date science. Although there is a robust framework for the preparation and communication of a regular *national* climate risk assessment, by an independent agency (the Climate Change Commission), there is no requirement of similar rigour at a regional or local level. Under current law, outside the coastal environment, no agency is obliged to regularly collect and make available natural hazard and climate risk information.

While proposed amendments to the Local Government Official Information and Meetings Act 1987 (LGOIMA) regarding the information presented on Land Information Memorandum (LIMs) for individual properties, should make these documents more informative, they will only contain the information that the territorial authority holds. Broadly speaking, they also only communicate information to those who order the document which are primarily prospective property purchasers. The Local Government Act (LGA) effectively places an obligation on councils to identify natural hazard risks affecting infrastructure assets owned by them, which is important, but it does not extend to risks affecting assets owned by other parties.

The proposed new Spatial Planning Bill 2022 (SPB) and Natural and Built Environment Bill 2022 (NBEB) may result in more climate risk assessments being undertaken at a regional level. However, they fall short of placing a direct obligation on any particular agency to undertake regular regional risk assessments. They also provide no guidance as to how such assessments might be undertaken and on what basis. Such matters have been left to the National Planning Framework (NPF) rather than being provided for in the legislation itself.

The New Zealand Coastal Policy Statement (NZCPS) requires the identification of areas of the coastal environment potentially affected by coastal hazards over 100 years. It also requires national guidance and the best available information to be taken into account when doing so. It will be superseded by the NPF in the new resource management system and it is unclear to what extent its provisions may be retained or modified in future iterations of that document.

Summary of statutory provisions for identifying and communicating climate risk

Statute or policy	Effect
Climate Change Response Act	National risk assessment to be prepared 6-yearly by independent body and made public.
Local Government Official Information and Meetings Act	Inclusion of risk information on LIMs. Proposed amendments clarify and strengthen requirement to include risk information on LIMs, require regional councils to provide territorial authorities with the natural hazards information they hold, and reduce council liability associated with the provision of information. *Limitation:* No requirement to gather natural hazard information in the first place.
Resource Management Act	The NZCPS requires the identification of areas of the coastal environment potentially affected by coastal hazards over 100 years. It also requires national guidance and the best available information to be taken into account when doing so. The national planning standards require regional and district plans to include a chapter on natural hazards with coastal hazards to be included in a coastal environment chapter. Overlays are to be the prime spatial tool to identify risks in district plans *Limitation:* No explicit obligation for collection or communication of risk information although arguably this can be implied from council functions and prescribed content of plans.
Spatial Planning Bill and National and Built Environment Bill	Have stronger provisions around collection of information to inform strategies/plans, and further direction can be provided in the NPF. *Limitation:* The statutory provisions fall short of requiring regular regional risk assessments and providing minimum requirements for how they should be undertaken and what should be included in them.
Local Government Act Water Services Entities Act	Councils must identify and manage natural hazard risks affecting their infrastructure assets when preparing 30-year infrastructure strategies.

6 Stopping development in hazard prone areas

It is important to prevent new or intensified development occurring in high risk areas. Allowing an increase in the number of people, structures and assets located in risky areas will result in more people being exposed to harm (and in the worst cases death), unnecessary damage to property, and ultimately a need to relocate them out of harm's way.

The current legal framework is not well configured to stop development in hazard zones. The Building Act can be relied on to achieve this, to some extent, but only through the refusal of building consents when the safety of people is at stake. Its provisions do not enable building consent to be withheld when buildings alone might be subject to hazard damage. The Act is currently under review, but the scope of that exercise does not currently include hazard issues.

Under the RMA, councils can refuse to grant subdivision consent when there is a significant risk from natural hazards, but they are not required to do so. It will usually not be possible to exclude development and effectively 'downzone' land in a high hazard zone unless the council offers to purchase the property at market value and the landowner agrees.

The NZCPS provides some clear directives on avoiding redevelopment and land use change in coastal hazard areas. However, there is no similar direction for how councils are to address natural hazards outside the coastal environment. In addition, the policies in the NZCPS may have been undermined (at least in practice) by the much more directive provisions of the NPS-UD.

The NPS-UD appears poorly configured to fully address natural hazards. Although providing for natural hazards as qualifying matters, when required density levels are reduced, the regime structure effectively discourages councils from taking a strategic long-term approach to addressing cumulative and compounding risks through reducing density. It does however leave open the option for regional plans to address density in hazard areas. This bias for short-termism could be addressed when national policy is brought under the NPF.

The NBEB and SPB should improve the current situation. The NPF is required to provide direction on how to address natural hazards across the entire country and not just within the coastal environment. Regional spatial strategies will provide strategic direction on areas subject to significant natural hazard risks and measures for reducing those risks and increasing resilience. This provides an opportunity to identify areas where development should be excluded at a strategic level. The NBEB provides a stronger tool to acquire affected land, when it is to be downzoned, albeit with a requirement for market value compensation.

Collapse of Waikare Bridge after floods (Waka Kotahi)

Summary of statutory provisions which can prevent development in areas subject to natural hazards

Statute or Policy	Effect
Building Act	Can prevent building in areas subject to natural hazards by refusing to issue building consents. *Limitation:* Building consents can only be refused where the building does not comply with the Building Code and there is a risk of loss of life.
Resource Management Act	Councils can refuse to grant a subdivision consent where there is a significant risk from natural hazards but are not required to do so. Councils can rezone land in a district plan to make future development a prohibited or non-complying activity. *Limitation:* Rezoning can be successfully challenged where the zoning would render the land incapable of reasonable use and the council does not acquire the land under the Public Works Act (with compensation) by agreement with the land owner.
New Zealand Coastal Policy Statement	Requires councils to avoid redevelopment or land use change that would increase the risks of adverse effects from coastal hazards. *Limitation:* The NZCPS only applies within the coastal environment. It is also reliant on being implemented in regional and district plans. There is no national policy on natural hazards concerning other parts of the country.
National Policy Statement for Urban Development	Directs territorial authorities to provide for more intensive development in urban areas. *Limitation:* Although natural hazards can be used as a qualifying factor to reduce density, the policy creates significant hurdles to doing this.
National and Built Environment Bill	The NPF is required to provide direction on the management of natural hazards, potentially filling the current gap in national direction under the RMA. Land can be rezoned in a Natural and Built Environment Plan to make future development a prohibited activity. Where the zoning would render the land incapable of reasonable use, this can only be done where the council offers to acquire the land under the Public Works Act (with compensation).
Spatial Planning Bill	Regional spatial strategies must provide strategic direction on areas subject to significant natural hazard risks, and measures for reducing those risks and increasing resilience, so can provide a strategic planning approach to avoiding new development in risky areas.

7 Undertaking adaptation planning

A key component of a managed retreat process is adaptation planning which enables a community to design a response to growing natural hazard and climate change risks. A planning approach increasingly used in contexts of uncertainty and risk is Dynamic Adaptive Pathways Planning (DAPP). This identifies options and future response pathways, which can be adopted dependant on how the risk evolves in the future.

The Climate Change Response Act requires the preparation of a national adaptation plan in response to each six yearly risk national risk assessment. Local authorities must have regard to it when preparing RMA plans. The new national planning framework under the NBEB must not be inconsistent with it.[11] However, there is currently no statutory provision for regional and local adaptation planning in Aotearoa. The LGA provides local authorities with a broad framework of consultation principles and decision-making requirements, but there is no explicit provision for implementation of an adaptation plan, including the provision of funding.

The new regional spatial strategies under the SPB should provide a spatial framework for adaptation planning. Statutory planning under the RMA (and NBEB) provides a vehicle for implementing parts of an adaptation plan, such as through providing a policy and rule framework for land use, but does not comprise adaptation planning itself.

The RMA and proposed NBEB provide several "hooks" for Māori adaptation planning to influence the statutory plans, but such linkages are not as strong under the LGA.

Summary of statutory provisions for adaptation planning

Statute or Policy	Effect
Climate Change Response Act	The Minister must prepare a national adaptation plan in response to the six-yearly national climate change risk assessment.
Local Government Act	Provides consultation principles and decision-making requirements for councils. Councils must prepare long term plans (time frame of at least 10 years) incorporating an infrastructure strategy (time frame of at least 30 years) and financial strategy. *Limitation*: No explicit framework for the implementation of DAPP plans.
Resource Management Act	The NZCPS provides a high level policy framework for managed retreat. Councils must prepare regional policy statements, regional plans and district plans which have at least a 10 year time horizon. When preparing plans councils must *take into account* relevant iwi planning documents lodged with them. Local authorities must have regard to the national adaptation plan when preparing regional and district plans under the RMA. *Limitation:* No explicit provision for development or implementation of adaptation plans.
National and Built Environment Bill	The NPF must not be inconsistent with the national adaptation plan. The first generation will likely incorporate the high level policy guidance in the NZCPS. Regional planning committees must prepare natural and built environment plans which have at least a 10 year time horizon. The Mana Whakahone a Rohe must record the agreement of the parties about how they will work together "on matters relating to climate change adaptation and natural hazards". A regional planning committee must *have particular regard to* any relevant planning document recognised by an iwi authority which could include a tribal climate adaptation strategy or plan. An iwi or hapū may provide a statement on te Oranga o te Taiao to the relevant planning committee at any time.
Spatial Planning Bill	Regional spatial strategies must provide strategic direction on areas subject to significant natural hazard risks and measures for reducing those risks and increasing resilience so can provide a strategic planning approach to responding to natural hazards.

8 Rezoning land

As part of the relocation process, local authorities may decide to rezone or reclassify land so that it cannot be occupied for residential purposes in the future. We have already discussed the available statutory powers to 'rezone' land to prevent future development. We now turn our focus on the ability to apply more restrictive rules to developed land to prevent residential use from continuing. This raises the issue of the ability to remove what is termed 'existing use rights'.

The RMA is protective of existing use rights. Section 10 provides that land may be used in a manner that contravenes a rule in a district plan, so long as the use was lawfully established prior to the rule becoming operative (or a proposed plan being notified), and the effects of the use are of a similar character, intensity and scale. This means that it is not currently possible to exclude existing uses in a high hazard zone through changing the rules framework in a *district* plan. However, the protection of existing uses does not apply to rules in a *regional* plan.

That said, these rules are still subject to the section 85 restrictions on rendering land incapable of reasonable use (as discussed in section 6 above), so could potentially be successfully challenged on this basis by existing occupiers, in the same way that future developers can challenge restrictions on future development. This has yet to be tested in the courts.

The equivalent of section 10 of the RMA, which protects existing use rights, is carried over in clause 26(1) of the NBEB. It applies to plan rules within the jurisdiction of the territorial authority (so those contained in the former district plans). However, a new qualifying provision (clause 26(2)) has been added which requires an existing land use to comply with a plan rule that gives effect to the NPF as it relates to the "reduction or mitigation of, or adaptation to, the risks associated with" natural hazards and climate change.

This means that existing uses are no longer protected from plan changes required to reduce climate change risks including changing use. Notably, this only applies if the NPF expressly states that it applies, and is subject to the reasonable use requirement (as discussed in section 6 above) under clause 139.

Summary of statutory provisions which can extinguish existing use rights in areas subject to natural hazards

Statute or policy	Effect
Resource Management Act	Changing rules in a district plan cannot extinguish existing use rights. Changing rules in a regional plan, for the purpose of the avoidance or mitigation of natural hazards, can extinguish existing use rights. *Limitation:* The plan provisions are still subject to the section 85 qualification regarding reasonable use of land so may not be implementable in practice.
Natural and Built Environment Bill	Rezoning land in a Natural and Built Environment Plan, through a rule within the jurisdiction of a territorial authority, can extinguish existing use rights if it gives effect to the NPF, relates to the "reduction or mitigation of, or adaptation to, the risks associated with" natural hazards and climate change, and the NPF expressly states that it can do so. Rezoning land in a Natural and Built Environment Plan, through a rule within the jurisdiction of a regional council, can extinguish existing use rights if it is for the avoidance or mitigation of natural hazards. *Limitation:* The above powers are still subject to the reasonable use requirement under clause 139.

9 Acquiring properties and providing compensation

Any managed relocation policy will almost certainly require public bodies to voluntarily or compulsorily acquire private properties. We now review legal powers of acquisition as well as provisions relevant to compensation.

The Public Works Act provides strong powers for government and councils to compulsorily acquire land as well as to undertake voluntary purchases. What is unclear is whether the Act would apply to the purchase of land to effect managed retreat. In addition, the compensation requirements of current market value at the time of property transfer, are not well suited to the circumstances of managed relocation.

Although the Public Works Act enables Māori land to be compulsorily acquired, any use of this power in the context of managed retreat would need to be undertaken with extreme care, given the long history of Māori land dispossession in Aotearoa. In general, any acquisition of Māori land subject to natural hazards would need to be undertaken through a bespoke process, ideally led by the affected iwi, hapū or whanau.

The Land Act provides broader powers for land acquisition which might suit managed relocation. However, the powers can only be exercised by the Commissioner for Crown Lands (and not local authorities) and land can only be acquired on a voluntary basis. The amount of compensation paid is left to negotiations with the property owner but needs to be informed by a valuation.

Local authorities can acquire land on a voluntary basis using their general powers under the LGA. To do so they must follow the decision-making requirements under the Act, which include assessing alternatives in light of interested and affected parties' preferences, and taking into account the relationship of Māori with ancestral land and taonga. There are no additional requirements for the amount of compensation offered.

While the more recent Urban Development Act 2020 has strong land acquisition powers, they are designed for creating new urban settlements, not for removing existing settlements due to hazards. Historically, land has also been acquired under special legislation, a recent example being the offers made to property owners in the Christchurch red zone under the auspices of the Canterbury Earthquake Recovery Act 2011.

In summary, there is a gap in the legislative framework, in providing fit for purpose tools to compulsorily acquire land, and in providing a framework for compensation which accounts for the circumstances of managed relocation.

Summary of statutory provisions for property acquisition and compensation

Statute/Policy	Effect
Public Works Act	Enables compulsory acquisition. Will apply when land is downzoned under the RMA (or NBEB) but only for property acquisition with landowner agreement. *Limitations:* Act may not apply to managed retreat as unclear whether this would be captured in the definition of "work". Provisions basing the quantum of compensation on current market value are likely inappropriate for managed retreat.
Te Ture Whenua Māori Act	Seeks to retain Māori land in Māori ownership and enable its utilisation for the benefit of its owners, their whanau, and their hapū, implying that Māori land should only be acquired in exceptional circumstances.
Land Act	Could apply to managed retreat but only enables the Commissioner of Crown Lands to acquire land, not local authorities. *Limitation:* Does not authorise compulsory acquisition.
Local Government Act	Local authorities have broad powers to acquire property under the Act but need to comply with a prescribed decision-making process. *Limitation:* Does not authorise compulsory acquisition.
Urban Development Act	The Minister of Land Information can voluntarily and compulsorily acquire property under the Act. *Limitation:* Only for the purposes of facilitating urban development, not removing settlements.
Special legislation (Canterbury Earthquake Recovery Act – now repealed)	Gives the Crown very broad powers to voluntarily and compulsorily acquire land which apply to managed retreat. *Limitation:* Like the Public Works Act, provisions basing the quantum of compensation on current market value are inappropriate for managed retreat (and were not used in practice as all land purchase was voluntary).

10 Relocation and development of new settlements

The process of relocating people, buildings and infrastructure raises some difficult issues as does providing new settlements for people who have relocated from high risk areas. Major issues include the potential withdrawal of utilities and services, excluding people from occupying properties in hazardous areas, and opening up new places for people to live.

There is no obligation on councils to protect private property from coastal erosion or to maintain existing coastal protection works. The situation is somewhat different for flood protection works managed under the Soil Conservation and Rivers Control Act 1941 where the regional council is effectively required to keep them under good repair or be liable for property damage.

With the exception of water services, it is possible for councils to withdraw most services (including roading), so long as they follow the correct decision-making process. Water services are more difficult to withdraw, which is understandable given the public health and welfare implications of their removal.

There are strong statutory provisions for moving people away from unsafe homes and buildings, particularly in the context of an emergency.

However, they are designed to be short term measures and are not well configured for managed relocation, especially if it is pre-emptive.

The Urban Development Act provides a set of powerful tools to undertake urban development in an integrated manner. These tools could be deployed to provide new settlements for those relocating away from hazardous areas. Such development could also potentially be undertaken under the Land Act, through Land Information New Zealand (LINZ) although its provisions are dated and not as well configured for this purpose.

Summary of statutory provisions for relocation and development of new settlements

Statute or policy	Effect
Local Government Act (2002)	All decisions to significantly alter the intended level of service for a significant activity need to be explicitly provided for in a council's long term plan and be consulted on. Where a council currently supplies water services to its communities it must continue to do so (unless it services 200 or less residents and a set of robust criteria are met).
Soil Conservation and Rivers Control Act	Councils must effectively maintain existing flood control works or be liable for resultant property damage
Local Government Act (1974)	Councils have the *power* to construct, upgrade and repair roads but have no obligation to do so.
Resource Management Act	There is no duty on councils to protect properties from coastal erosion or to maintain existing coastal protection works.
Civil Defence Emergency Management Act	People can be directed to evacuate premises or places where necessary for the preservation of human life during a state of emergency.
Building Act	Councils must adopt a policy on dangerous and insanitary buildings within their districts. Councils can prevent entry into buildings that are considered dangerous or insanitary. This is primarily to protect human life and safety rather than the buildings themselves.
Health Act	Councils and the Director-General of Health can require repairs to be undertaken on buildings unfit for human habitation, and if they are not done, prohibit use of the building for residential use.
Urban Development Act	Land can be acquired, developed and disposed of to facilitate new urban settlements. Kāinga Ora can manage the development process (including the provision of infrastructure and funding), standing in the shoes of the council, and subject to a development plan
Land Act	Land can be voluntarily acquired and development by LINZ but the provisions of the Act are somewhat outdated and not entirely fit for purpose.

11 Clearing vacated land and undertaking ongoing land management

Once people have moved from a hazardous area, the land will need to be cleared and arrangements made for its ongoing management. Land can be cleared and rehabilitated under various statutes. The Building Act controls demolition, and roads can be stopped under the Local Government Act 1974, provided they are no longer needed for access. The NZCPS provides a framework for the restoration of coastal land.

The cleared land could be managed by councils and/or other entities such as iwi/hapū under the Reserves Act (although there is no specific reserve category for restoration or managed retreat/realignment) or by the Department of Conservation (DOC) under the Conservation Act. Land could also be placed in the Treaty Settlement Landbank in the interim. It would be useful to have a specific category of land, perhaps under the Reserves Act, that is focused on restoration and rehabilitation of natural ecosystems.

Summary of statutory provisions for clearance and ongoing management of land

Statute or policy	Effect
Building Act	Manages building demolition through the requirement to obtain a building consent.
Local Government Act (1974)	Enables roads to be stopped, but, in practice, only when they are no longer required for public access.
Reserves Act	Provides for the classification and management of reserve land "for the benefit and enjoyment of the public" by a range of parties which could include iwi/hapū entities. *Limitation:* Does not include a reserve that has as its purpose rehabilitation or managed realignment/ managed relocation.
Conservation Act	Provides for the management of conservation land for conservation purposes by DOC.
Land Act	Provides for land management by LINZ. *Limitation:* Has no purposes or principles to guide management decision-making.
Resource Management Act (New Zealand Coastal Policy Statement)	Unlike other statutory provisions, provides for the restoration and rehabilitation of natural character. *Limitation:* Only applies in the coastal environment and not throughout the rest of Aotearoa.

PART THREE: SUMMARY OF WEAKNESSES AND GAPS IN CURRENT LAW

12 Weaknesses and gaps in current law

We have brought together the conclusions from the analysis in previous chapters to identify some considerations when addressing gaps and weaknesses in the current legal and statutory framework for management retreat and designing the Climate Adaptation Act. These are:

1. Tikanga is the first law of Aotearoa. It provides key underlying principles which could usefully underpin climate adaptation policy and law.

2. Local authorities, specifically territorial authorities, could potentially be liable in common law negligence for granting building and resource consents for development in high hazard zones without due diligence. This potential liability could be reduced by statute on public policy grounds.

3. There is a long history of dispossession of Māori land in Aotearoa that forms the backdrop to any managed retreat policy. Māori currently own very little land which can make finding suitable sites for managed retreat problematic. Government assistance in securing new safe locations may be required.

4. Although freehold title in land is strongly protected in law, there is no general statutory protection against the taking of land for public purposes, although fair compensation will generally be expected.

5. Te Tiriti principles of partnership and active protection require the Crown to actively support Māori in adapting to climate risks including the managed retreat of marae.

6. Any managed retreat policy must honour fundamental human rights including the right to life, the right not to be subjected to degrading treatment, and the right to natural justice.

7. Although there is a robust framework for the preparation and communication of a regular national climate risk assessment, by an independent agency, there is not similar rigour at a regional or local level. Under current law, outside the coastal environment, there is no obligation on any agency to regularly collect and make available natural hazard and climate risk information.

8. The current legal framework is not well configured to prevent development in hazard zones. Only the Building Act can be relied on to achieve this through the refusal of building consents, but only when the safety of people is at stake.

9. Councils can refuse to grant subdivision consent under the RMA when there is a significant risk from natural hazards, but they are not required to do so

10. It will usually not be possible to 'downzone' land in a high hazard zone, to exclude development, unless the council offers to purchase the property at market value and the landowner agrees.

11. The NZCPS provides some clear directives on avoiding redevelopment and land use change in coastal hazard areas. However, there is no similar direction for how councils are to address natural hazards outside the coastal environment.

12. The NPS-UD appears poorly configured to avoid development in high hazard zones. Although it provides for natural hazards as qualifying matters, the regime effectively discourages councils from taking a strategic long-term approach to addressing cumulative and compounding risks.

13. Although the Climate Change Response Act requires the preparation of a national adaptation plan, there is currently no specific statutory provision for regional and local adaptation planning. Councils can choose to undertake such planning as part of their broad capacities under the LGA, but there is no *explicit* provision for implementation including assigning responsibilities and securing funding.

14. No legislation is well configured for acquiring land exposed to hazard in the circumstances of anticipatory managed retreat. The Public Works Act and Urban Development Act are likely unsuitable. The Land Act (through the Commissioner of Crown Lands) or the LGA (through local authorities) could enable a mechanism for voluntary purchase, but neither would provide a suitable framework for compensation.

15. There is no obligation on councils to protect private property from coastal erosion or to maintain existing coastal protection works. However regional councils may be required to maintain flood protection works.

16. With the exception of water services, it is possible for councils to withdraw most services (including roading) from a site facing managed retreat, so long as a proper decision-making process has been undertaken.

17. In the context of an emergency, there are strong statutory provisions for moving people away from unsafe homes and buildings. However, they are designed to be short term measures and are unsuitable for managed retreat, especially if it is pre-emptive.

18. The Urban Development Act provides a set of powerful tools to undertake urban development in an integrated manner to provide new settlements for those who need to retreat from areas exposed to natural hazards. Such development could also potentially be undertaken under the Land Act, although its provisions are dated and not as well configured for this purpose.

19. The cleared land could be managed by councils and/or other entities such as iwi/hapū under the Reserves Act or by DOC under the Conservation Act. Land could also be placed in the Treaty Settlement Landbank. There is currently no specific category of land under the Reserves Act that is focused on restoration and rehabilitation of natural ecosystems.

Clearly that there are a number of gaps in the statutory framework for managed retreat. In Working Paper 3 we will be exploring options to fill them.

Endnotes

1 Ministry for the Environment, 2022, *Adapt and thrive: Building a climate resilient New Zealand: Draft national adaptation plan: Managed retreat*, New Zealand Government, Wellington

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8 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112

9 See Williams B, 2015, *The struggle for sovereignty,* Bridget Williams Books, Wellington

10 For components see also Olufson S E, 2019, *Managed retreat components and costing in a coastal setting*, Masters of Science thesis, Victoria University of Wellington

11 Natural and Built Environment Bill 2022, schedule 6 clause 21

1 Introduction

Flooding of the road at Piha

In June 2022, the Environmental Defence Society (EDS) commenced a project titled *Aotearoa New Zealand's Climate Change Adaptation Act: Building a Durable Future* to develop recommendations for the content of a new Climate Adaptation Act. This was in response to the expressed government intention to develop new law to address the complex and distinctive issues associated with managed relocation such as funding, compensation, land acquisition, liability and insurance.[1]

In February 2023, EDS released its first working paper for the project. Titled *Principles and Funding for Managed Retreat*, the paper focused on conceptualising managed relocation and exploring what principles might underpin a new system and how it might be funded.[2]

This second working paper focuses on describing and evaluating the adequacy of the current law and rights-based systems applicable to managed retreat. Working Paper 3, the final in the series, will present a series of options to include in a new statute designed to address gaps in the current system. The final report, which is due in late 2023, will contain concrete recommendations for the design of the Climate Adaptation Act.

The working papers are designed to seek feedback on work in progress as we develop up ideas for incorporation into the final synthesis report. This working paper seeks feedback on the adequacy of the current legal and policy framework to support managed retreat and what weaknesses and gaps might need to be addressed by the proposed Climate Adaptation Act.

1.1 Managed 'relocation' versus 'retreat'

As we outlined in Working Paper 1, 'managed' retreat involves the purposeful and coordinated movement of people and assets out of an area subject to significant hazard risk. Ideally it is pre-emptive, taking place before damage occurs. We note that from now on we use the term managed 'relocation' interchangeably with managed 'retreat'. We consider that 'relocation' better describes the process we are concerned with but also acknowledge that managed 'retreat' is the term currently used by government and others to describe the process.

Our project is focused on developing a legal and policy framework for relocating people out of harm's way and to a safe place. The word 'retreat' connotates defeat where troops might retreat or withdraw while under fire from the enemy (which in this case is increasing climate risk). Such negative associations may not be helpful. It is important that communities feel empowered when they decide to move, and that they can see a pathway forward to a positive future. While no term is perfect, we

consider the term 'relocation' better represents such a positive approach to the process.

In addition, under a retreat scenario, the immediate imperative is to leave the current location, with the ultimate destination being a secondary consideration. Where people move *to* is as important to consider as where they move *from*. This is to ensure that the places people resettle are safe and sustainable in the long term thus avoiding a repeating cycle of build and then abandon.

1.2 Climate adaptation policy now urgent

The Auckland Anniversary floods in January 2023, and Cyclone Gabrielle hitting the country a few weeks later, are a recent reminder of the urgency to consider managed relocation ahead of increasing climate risks. During the cyclone, around 225,000 homes were without power, and thousands of people were displaced. The flash flooding and slips that resulted destroyed houses, roads, rail tracks and crops. Tragically 11 people lost their lives. During the Auckland floods Mangere received 849 per cent of its normal rainfall and, during Cyclone Gabrielle, Napier received over 600 per cent.[3] By late March the insurance bill for the two events had reached $890 million.[4] Treasury estimated that the damage caused by the two events could cost the country between $9 and $14.5 billion, with about half of this related to central and local government infrastructure.[5]

In the media reporting on the impact of the Auckland floods, *Stuff* reporters revealed that there are some 55,000 houses located in flood zones in Auckland and, since the start of 2016, the Council had granted resource consent for 9,220 new houses to be built in flood plains.[6] Clearly the policy settings have been inadequate regarding climate adaptation and the mitigation of risk. Any new climate adaptation policy will need to address this.

1.3 Structure of working paper

The structure of this working paper is as follows:

- *Part One* describes the current property and rights framework that will underpin any managed relocation policy in Aotearoa New Zealand (Aotearoa).
- *Part Two* describes the legal and policy framework that currently applies to managed retreat as well as the impact of current reforms to that framework.
- *Part Three* summarises the key weaknesses and gaps in the current system which will need to be addressed either in the new Climate Adaptation Act or through other legislative amendments.

Endnotes

1 Ministry for the Environment, 2002, *Adapt and thrive: Building a climate resilient New Zealand: Draft national adaptation plan: Managed retreat*, New Zealand Government, Wellington

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3 Anon, 2023, 'Paying for adverse weather events', *POLITIKToday*, 28 April

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2 Common law

Coastal erosion impacting houses at Hahei

In Part One of this working paper we explore common law, land law, Treaty rights and human rights relevant to managed relocation.

At the very core of many controversies over climate adaptation and managed relocation is the relationship people have with land. This is because land-based property rights underpin our society and economy. There is also a history of dispossession of Māori land in Aotearoa which colours contemporary discussion of managed relocation policy.

Land can provide a place to live, an investment opportunity and/or a place to do business. Around 64 per cent of all households in Aotearoa are home owners[1] and more than half of all household wealth (57%) is invested in land and houses.[2] Unsurprisingly, issues that impact residential property values are hotly contested. For many people, most of their life savings are tied up in their home.

Climate risk, adaptation and managed relocation challenge many of the assumptions that people have long held about property, that it is a solid and secure investment. After all, the phrase 'safe as houses' is used to refer to something that has little or no risk. With climate driven erosion and flooding, many houses will no longer be a safe investment, and they may eventually become unsaleable and uninhabitable.

For many people land is much more than an investment. Many Māori perceive their association with land in terms of belonging rather than ownership. This is reflected in the Māori word for land – "whenua" – which also means placenta and the term for people – "tangata whenua" – which literally means "born of the earth's womb".[3] Over time, Māori have named places of significance, and developed narratives, waiata, haka and other art forms which become part of the make-up of the tangata whenua and their inherent connection with the land. The loss of land can lead to a loss of connection, a loss of mana and a loss of cultural well-being. What happens to land impacts what happens to people.

Any statutory framework for managed relocation must overlay existing common law (the branch of Aotearoa's law derived from custom and judicial decisions). In this section we examine tikanga and tort as two areas of common law particularly relevant to managed relocation.

2.1 Tikanga

Tikanga was the first law of Aotearoa and is part of common law today. It continues to shape and regulate the lives of Māori and some non-Māori. Tikanga includes all the "values, standards, principles and norms that the Māori community subscribe to, to determine appropriate conduct".[4] It is comprised of both practice and principle including manaakitanga and whanaungatanga; mana; tapu; utu; noa and ea; whakapapa; and kaitiakitanga which form an interconnected matrix "and cannot be defined in isolation or translated by a simple English word".[5] The Supreme Court has confirmed that:

> … tikanga has been and will continue to be recognised in the development of common law in Aotearoa/New Zealand in cases where

it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.[6]

Tikanga is therefore relevant in developing a new climate adaptation statute, both in terms of informing approaches to addressing climate risks to Māori, and in determining broader principles to underpin climate adaptation policy. The latter could include, for example, showing respect, generosity and care for people affected by climate risks (manaakitanga); maintaining relationships between people and a sense of community when seeking to move households out of harm's way (whanaungatanga); and recognising the need to care for the natural environment when considering managed retreat options (kaitiakitanga).

As Justice Glazebrook noted in the *Ellis case*, tikanga principles and values can "provide a new vocabulary or new way of thinking about new concepts of law or a new intellectual framework for those concepts".[7]

2.2 The tort of negligence

Tort is a branch of common law that provides remedies for civil wrongs. It is based on the underlying premise that when parties undertake a wrongful act that causes demonstrable loss or harm to others, they should be liable to pay compensation.

Climate risks can result in a reduction of property values and/or actual damage to land and buildings. People may seek to recover such losses under the tort action of negligence where it can be shown that the conduct of one party (such as the local council) results in a loss by another (a property owner). While untested on the specific facts of climate change, the action could be based on the 'neighbour principle' which is that people must take reasonable care to not injure others who could be foreseeably affected by their action or inaction. The loss does not need to be physical damage to property as such, but can be loss of value, so long as it is proven and can be attributed to a defendant that has a duty of care to mitigate it.[8]

To illustrate the elements of negligence it is useful to examine the foundational case, *Donoghue v Stevenson.* This decision by the United Kingdom House of Lords, in 1932, cemented the concept of 'duty of care' in the modern law of negligence (see spotlight below).[9] At a broad level, the case illustrates the two necessary ingredients to establish a negligence claim. Firstly it shows that the harm to the injured party (the plaintiff Donoghue) needs to be foreseeable by the allegedly negligent party (the defendant Stevenson). Secondly, it discusses how the relationship between the defendant and the plaintiff must be sufficiently proximate.

A spotlight on the foundational negligence case – *Donoghue v Stevenson*

In the Scottish town of Paisley, Mrs Donoghue went to a café to meet up with a friend. She ordered a ginger beer which arrived in a dark brown bottle. The waiter poured the ginger beer into a glass and Donoghue drank it. Upon refilling her glass, Donoghue was shocked to see the remains of a snail fall out of the bottle and into the glass. Shortly thereafter, Donoghue fell ill. She sought a remedy from Stevenson who was the ginger beer manufacturer.

In a landmark decision, the House of Lords found that the manufacturer owed Donoghue a duty of care and that the duty had been breached, as it was reasonably foreseeable that a failure to ensure the product safety of the ginger beer could harm people who consumed it. The judges also found that there was a sufficiently proximate relationship between a manufacturer and the consumer of its goods to found a case in tort. Donoghue was awarded damages.

The obligation to exercise due care, if it is foreseeable that someone might be harmed if such due care is not taken, is a central tenant of the tort of negligence. It remains critical in modern discussion concerning the responsibility of local government to protect property owners and residents in the face of cascading climate hazards.

Since *Donoghue v Stevenson,* the common law action of negligence has continued to evolve in Aotearoa and it has been extended to local councils. In some part, this is because common law (being judge-made rather than created by statute) by its very nature, is constantly evolving. But it also reflects the ability of common law to adapt to reflect changes in public sentiment and public policy. As stated by Lord Berwick in the *Hamlin* case (see spotlight below) "The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations".[10] This is because a decision to hold councils so liable could 'open the barn door' to claims which would effectively render the ratepayer an insurer and indemnifier against loss.[11]

A spotlight on council duty of care

There is a long line of cases which have held councils liable for damages caused by failure to take a duty of care in authorising and inspecting buildings, which we discuss below. The *Brown* case is particularly pertinent to climate risk as it involved a property at risk of flooding.

Brown v Heathcote County Council

The Browns sought to build a house on a property which had been owned by Mrs Brown's family and used as an orchard. The property was situated on the banks of the Heathcote River, and had previously flooded on several occasions when the river breached its banks. In 1973, Mr Brown applied for a building permit to construct a house on a part of the property that he thought (after consulting Mrs Brown) was above flood level. The council referred the application to the Drainage Board which in turn sent an inspector to the site. The inspector reported that the site was satisfactory. The Drainage Board subsequently approved the building permit without any comment on flood danger. This was despite previous floods having exceeded the proposed ground floor level of the house.

Mr and Mrs Brown moved into their new house in 1974. The house flooded in 1975, 1976 and 1977. In response, the Browns raised the level of their ground floor by 1.8 metres. They then sought to recover the cost of doing so from the Council and the Drainage Board. The Browns alleged negligence on the basis that the agencies had failed to warn them about the danger of flooding and had also failed to require the house to be built above known flood levels. Both the Court of Appeal and Privy Council found in the Browns' favour holding the Drainage Board liable for the costs.

Liability was found despite the Drainage Board having no statutory obligation to check the flood levels of properties when consent was sought. It had also not received any specific request from the Council to do so in respect of the Browns' building consent application. The duty of care was based on evidence that the Drainage Board had established a practice of checking flood danger when considering building consent applications and the Council (and the Browns) were entitled to rely on this.

The Privy Council noted that the Browns were the authors of their own misfortune, to some extent, because they had relied on Mrs Brown's memory of flood levels rather than seeking advice from the Drainage Board which held actual flood records. The Browns should therefore have been liable for contributory negligence. However, this was not initially pleaded by the other parties so was not granted by the court. This is of some interest as contributory negligence may be an issue where property owners knowingly build in high hazard zones.

Invercargill City Council v Hamlin

Hamlin had a house built in 1972. Soon after he moved in, the doors started jamming and cracks appeared in the walls. In 1979, a door stuck so badly that Hamlin commissioned an engineer to assess the building. The engineer concluded that the foundations needed to be replaced as they had not been built to an acceptable standard. In 1980, Hamlin commenced proceedings against the Invercargill City Council and the house builders for the cost of repairing the foundations. The builders were no longer in business, so the case relied on establishing a claim of negligence against the Council. Hamlin alleged that the building inspector had been negligent in carrying out his inspection.[12] The case went all the way to the Privy Council.

In finding in Hamlin's favour, Lord Berwick explained that "In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws."[13] This picked up on Justice Richardson's observations in the Court of Appeal that New Zealand's home owning social circumstances and habits, and reliance on regulatory protections, justified a departure from the way the law had developed in England where council liability had been excluded.[14] Recognition by the courts in Aotearoa, that there is a public expectation that territorial authorities be held liable concerning foreseeable risk to property owners, has significant implications for liability for damage due to climate hazards.

Spencer on Byron

The *Spencer on Byron* case[15] was part of a long line of leaky building disputes which sought to hold councils liable for approving building consents for buildings that subsequently failed. This case was notable because it considered council liability for losses associated with commercial (rather than residential) buildings.

The developer applied to North Shore City Council for building consent for a 23-floor building known as Spencer on Byron. The

building was to be primarily a hotel, with 249 units individually owned as unit titles, but being leased back to the hotel manager for at least 10 years. The six penthouse apartments were excluded from the leaseback arrangements. The Council issued the required building permits before construction and codes of compliance once the building was erected. The building subsequently leaked with remedial costs exceeding $19 million. The building owners sought to hold the Council liable for the costs. The case turned on whether the Council owed a duty of care to the owners of a primarily commercial building.

The Court of Appeal initially dismissed the claim on the basis that the duty of care in respect of inspection and certification for building code compliance only applied in the case of residential properties. The Supreme Court overturned this position finding that the duty of care could exist irrespective of the type of building. This was because there was sufficient proximity between councils and building owners to ground a duty of care regardless of the nature of the premises.

The case opened up potential council liability for losses on multi-million dollar commercial buildings and this could potentially extend to buildings affected by climate risk where the council is found to have acted negligently.

In 2011, following a series of leaky building cases, the government amended the Building Act 2004 to place a ten year limitation on the bringing of civil proceedings relating to building work after the act or omission occurred (ie the date the code of compliance was issued). This served to limit the quantum of liability to some extent, and indicates the potential to relieve councils of liability through statutory intervention such as through the proposed Climate Adaptation Act.[16]

It is not yet clear the extent to which an action in negligence could succeed on the basis that a council authorised development in a high risk zone, without undertaking due diligence, as such a case has yet to be brought. However, it seems probable that a duty of care would be found in some cases. A key question is whether such liability issues should be left to be determined by the Courts, which will almost certainly continue to develop this branch of the law, or whether they are better addressed by Parliamentarians in statute, such as the proposed Climate Adaptation Act. Specific liabilities of relevant parties could be codified in legislation, or the statute could state that parties are not liable in relation to certain aspects of climate change cascading hazards.

Slip-damaged houses at Piha

Endnotes

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3 Kingi T, 2008, 'Maori landownership and land management in New Zealand', in Australian Agency for International Development, *Making land work, Volume two case studies on customary land and development in the Pacific*, Commonwealth of Australia, at 134

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5 *Ellis v The King* [2022] NZSC 114, Appendix: Statement of Tikanga, at [29] and [30]

6 *Ellis v The King* [2022] NZSC 114, at [19]

7 *Ellis v The King* [2022] NZSC 114, at [118]

8 *Hedley-Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 562 (HL)

9 *Donoghue v Stevenson* [1932] UKHL 100

10 *Invercargill City Council v Hamlin* 1 NZLR 513 (Privy Council), at 521

11 *Christchurch Drainage Board v Brown* [1987] 14 Privy Council, at 7

12 *Invercargill City Council v Hamlin* 1 NZLR 513 (Privy Council)

13 *Invercargill City Council v Hamlin* 1 NZLR 513 (Privy Council), at 521

14 *Body Corporate v North Shore City Council* 2 NZLR 297 (Supreme Court) 2012, at [7]

15 *Body Corporate v North Shore City Council* 2 NZLR 297 (Supreme Court) 2012

16 Building Act 2004, section 393(2)

3 Land law

Onuku Marae

In this section we explore the different categories of land which may be affected by managed relocation policies including Māori land and general freehold land. We also examine the current law regarding the 'taking' of land which will be relevant if government seeks to change the zoning of land or acquire it, either for the purpose of moving people out of high hazard areas, or to create new settlement areas in safer locations.

3.1 Māori land

Prior to colonisation, land in Aotearoa was communally held and managed based on tikanga. Land was either claimed by right of discovery (whenua taunaha), confiscation (whenua raupatu) or gift (whenua tuku). Land rights were confirmed by occupation and use, referred to as 'maintaining the home fires' (take ahi kā).

A small amount of land is still held on such a communal basis (around 38 blocks of land comprising some 1,204 hectares)[1] and is called "Māori customary land". Under section 145 of the Te Ture Whenua Māori Act 1993, such land cannot be alienated. It is land that has remained in the possession of its original holders since before the signing of te Tiriti o Waitangi/Treaty of Waitangi (te Tiriti) in 1840.

As explained by the Court of Appeal in the *Ngāti Apa* case:

> When the common law of England came to New Zealand its arrival did not extinguish Māori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not therefore acquire wholly unfettered title to all the land in New Zealand. Land held under Māori customary title became known in due course as Māori customary land.[2]

After the signing of te Tiriti, the Crown acquired large areas of Māori land both through purchase and later confiscation under the New Zealand Settlements Act 1863 (particularly in Taranaki, Waikato, South Auckland and Hawkes Bay). This amounted to around two-thirds of the entire land area of Aotearoa after just two decades. Further land was lost to Māori after the individualisation of land title under the Native Lands Act 1862. This also led to the fragmentation of ownership interests and blocks of land.[3] As highlighted by the Waitangi Tribunal in its Muriwhenua report, such broad scale land dispossession was undertaken with little thought for the wellbeing of Māori:

> In all, the Muriwhenua claims are about the acquisition of land under a show of judicial and administrative process. They concern Government programmes instituted to relieve Māori of virtually the whole of their land, with little thought being given to their future wellbeing or to their economic development in a new economy. There is little difference between that and land confiscation in terms of outcome, for in each case the long-term economic results, the disintegration of communities, the loss of status and political autonomy, and despair over the fact of dispossession are much the same.[4]

Currently only about 5 per cent of the country (some 1.47 million hectares) is "Māori land" and this is mainly held as "Māori freehold land".[5] Such land has never been out of Māori ownership, but customary interests have been converted into freehold land title by the Māori Land Court or its predecessors. This land is predominately located in the Bay of Plenty, East Coast and Manawatu/Wanganui/Taranaki.[6] Other categories of Māori land include "General land owned by Māori" which is privately owned freehold land (see below) beneficially owned by Māori, and "Crown land reserved for Māori". Administration of Māori land is overseen by the Māori Land Court under the Te Ture Whenua Māori Act with the objective of retaining Māori land in Māori ownership, facilitating its occupation, use and development, and protecting wāhi tapu.[7]

Any proposals for managed relocation need to be sensitive to this history of Māori land dispossession. It has left some Māori communities with trauma and a fear of moving off their whenua and losing mana whenua (customary authority) status. For some, the depth of connection to the whenua on which their homes or marae sit, and fear of losing mana whenua status, far outweighs the imminent risk posed by climate change. Any managed retreat policy will need to recognise the importance, as highlighted in the Te Ture Whenua Māori Act, of retaining Māori land in Māori ownership. Another implication of land dispossession is that many Māori kin communities threatened by climate change hazards, and seeking to relocate, may have nowhere to go within their rohe (area of tribal authority). This raises the issue of whether land may need to be acquired by the Crown to assist such communities.

3.2 General land

General land title in Aotearoa stems from concepts deeply embedded in English common law. These are in turn derived from Anglo-Norman feudal doctrines where land was granted by the Crown in return for feudal services. Under English common law, land is ultimately held by the sovereign with the underlying or ultimate title of the Crown referred to as the 'radical title'.[8] Landowners can only hold land as tenants under grant from the Crown.[9]

This approach was reflected early on in the Native Land Act 1909, with a memorandum to the Native Land Bill explaining that "Customary land, since it has never been Crown-granted, belongs to the Crown…".[10] However, as described above, this approach has more recently been debunked, with customary title now recognised as being unaffected by English common law.

Today, non-customary property rights are still subject to the Crown's underlying title. The rights granted by the Crown relating to the use of land and associated chattels are called "estates".[11] There are four main types of estate in Aotearoa: freehold, leasehold, unit title and cross lease. The basic rights of freehold estate in fee simple are possession, use and enjoyment, and alienation.[12] In contrast, leasehold is a contractual tenancy of land for a period of time. [13] Land held by the government is known as Crown land and does not usually have a land title issued (on the basis that the Crown holds the radical title so does not need to issue a fee simple title to itself).[14] Much Crown land is managed by the Department of Conservation (DOC) as part of the conservation estate.

The importance placed on the ownership of land in Aotearoa is highlighted by the concept of indefeasibility of title, where the registered owner of land (as shown on the property title) is protected against all claims that are not so registered, as well as a state guarantee as to the accuracy of the registered rights.[15] No other form of property right is backed up with such state protections. However, this does not mean that the state cannot 'take' land from property owners.

3.3 'Taking' of land

Compulsory acquisition of land by government is likely one of the most controversial issues in managed relocation. That the state may acquire land through compulsion, for a public purpose, is an old concept in law with many variations dating back as far as Ancient Rome.[16] The current and conventional economic rationale rests on the argument that in a voluntary system, without state capacity to compel acquisition, the owner of land required for a public purpose could hold the state to ransom by demanding an extortionate price.[17] An oft-cited example is the expansion of railroads in 19th century Britain, where owners of the land needed for rail construction leveraged their position to charge exorbitant amounts of money for the land, thereby taking the taxpayer for a ride.[18] In response, the state resorted to compulsory acquisition, taking the land at market price based on a "free and fair" trade.

The premise of a 'taking' in law is that government action based on the public interest can legitimately interfere with the right of individuals to enjoy and use their own property.[19] It can take the form of acquisition or a lesser action which still has a physical or economic effect on the owner of the land. This gives rise to the issue as to whether the owner must be compensated for such a 'taking'.

In the *Estate Homes Limited* case, the Supreme Court determined that the there is no general right in Aotearoa to compensation where land has been taken, stating that: [20]

> *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.* The principal general measure of constitutional protection is under the Magna Carta which requires that no one "shall be dispossessed of his freehold … but by … the law of the land". *One of the effects of this measure is to require that the power to expropriate is conferred by statute*, and the statutory practice is to confer entitlements to fair compensation where the legislature considers land is being taken for public purposes under a statutory power. Furthermore, as Professor Taggart has pointed out, the courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid. (emphasis added)

This makes it clear that property could be compulsorily acquired for managed retreat purposes, without compensation, so long as the acquisition was authorised under statute. However, where the statute leaves room for any doubt, the courts will infer an obligation to pay fair compensation. Whether it would be advisable or politically achievable to legislate to acquire land without compensation is another, separate issue.

Flooded contractor's yard, Hawkes Bay (Waka Kotahi)

The *Estate Homes Limited* case involved the construction of an arterial road as part of a subdivision. The developer sought compensation from the council for constructing a portion of a road that was additional to what was required to meet the needs of the subdivision. When determining whether requiring the road to be built (and the privately owned land on which it was located to be vested in the council), as part of the subdivision consent, amounted to a 'taking' of land, the Supreme Court noted that:

> [47] In general, *where permission to develop land is refused, with the consequence that it is greatly reduced in value, the courts have … treated what has happened as a form of regulation rather than a taking of property.* This explains why New Zealand planning legislation restricts, without compensation, the right to develop land and requires approval of all subdivisions.
>
> [48] *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*…." (emphasis added)

This principle is reiterated in section 85(1) of the Resource Management Act 1991 (RMA) which states that "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". This is important when it comes to zoning hazardous land to prevent future development, and where other provisions of the Act come into play. We discuss this in more detail in section 6.

Endnotes

1 https://communitylaw.org.nz/community-law-manual/chapter-2-maori-land/status-of-maori-land/

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3 Controller and Auditor General, 2004, *Māori land administration: Client service performance of the Māori Land Court Unit and the Māori trustee*, The Audit office, Wellington, at 23

4 Waitangi Tribunal, 1997, *Muriwhenua land report (WAI 45)*, Waitangi Tribunal, Wellington, at 7

5 https://communitylaw.org.nz/community-law-manual/chapter-2-maori-land/status-of-maori-land/

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19 Corfield F and R J A Carnwath, 1978, *Compulsory acquisition and compensation*, Butterworth and Co Publishers Limited, London at 160

20 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, at [45]

4 Other rights

Okahu Bay

This section explores two other categories of rights which must be considered when designing managed relocation law, rights under te Tiriti and human rights.

4.1 Te Tiriti rights of partnership and active protection

Te Tiriti is a foundational constitutional document in Aotearoa's legal system which establishes and guides the ongoing relationship between the Crown and Māori.[1] While te Tiriti is not directly enforceable in domestic law, it has "great political and moral force" and is applicable to the exercise of most public powers. Additionally, the courts generally prefer an interpretation of statutes that is consistent with te Tiriti principles.[2]

In seeking to apply te Tiriti to modern usage, the courts have sought to capture the underlying spirit and intention of the two different versions (English and Māori), in a set of principles, which focus on the underlying mutual obligations and responsibilities of the Treaty partners. We discussed these principles in Working Paper 1 but here focus specifically on the principles of partnership and active protection. These principles are highly relevant in a context of cascading climate hazards threatening both people and geographic locations that are culturally or historically significant:

> Many Māori communities are in locations that are particularly vulnerable to the effects of climate change on their homes, infrastructure and sites of cultural significance including marae, urupā (burial grounds), wāhi tapu (sacred sites) and mahinga kai (food gathering sites).[3]

4.1.1 Protecting tino rangatiratanga

As the Waitangi Tribunal has stated, "at the heart of the Treaty relationship is partnership between kāwanatanga and tino rangatiratanga".[4] The Tribunal has further clarified that "rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner".[5] As explained in Sir Hirini Moko Mead's book 'Tikanga Māori':[6]

> The concept of rangatiratanga has been discussed extensively in relation to the Treaty of Waitangi... The word appears in article 2 of the Māori text. In these discussions rangatiratanga is associated with political issues such as sovereignty, chieftainship, leadership, self-determination, self-management and the like.

Protecting rangatiratanga in a climate change context would see iwi, hapū and whanau leading, and being supported to undertake, the development and implementation of adaptation strategies for their own land, taonga and communities.

A spotlight on the impacts of infrastructure on hazard risk at Ōkahu Bay

A bustling Ngāti Whātua ki Ōrakei papakāinga once sat on the land behind Ōkahu Bay in Tāmaki Makaurau, supplied by its surrounding farms and provisioned by the productive harbour on its waterfront. Then, in around 1908, government started constructing the Ōrakei sewerage works. A large concrete sewer pipe, 2.6 metres high and 1.7 metres wide, ran around the edge of the entire bay, cutting off the papakāinga from the foreshore, and leading to an outfall on the north-eastern headland. As a result of the pipe and accompanying retaining wall, the view of the sea from the papakāinga was lost, as was access to the sea for people and vessels. In addition, the concrete structure obstructed drainage of the land and so when it rained the papakāinga flooded and turned into a swampy marsh.[7]

After the works became operational, raw sewerage started discharging into the marine area adjacent to the bay, contaminating the shellfish beds.[8] The flooding of the papakāinga became worse, in 1921, when a road was built along the beachfront over the sewer pipeline. By 1924, most people had left the settlement and the government was keenly acquiring land parcels there. More adequate drainage was only installed 30 years later when the land had been acquired by government and turned into a public domain.[9] However, the urupā is still impacted by frequent flooding. This history of damage to the whenua raises the issue of what role government should play in supporting hapū to mitigate such natural hazard risks which will be exacerbated by the impacts of climate change.

4.1.2 Supporting managed relocation of marae

Marae are central to Māori culture and wellbeing. They are a key cultural infrastructural node providing a centre for hapū and iwi to connect to place. While a marae complex houses physical buildings such as the wharenui and wharekai, the significance of the site is not limited to the boundary fence. Pepeha can provide insight into the area that iwi and hapū identify with by expressing key visible landmarks and geographical locations that encompass their territory as expressed in 'Mai i Ngā Kurī a Whārei ki Tihirau' and 'Mai i Maketū ki Tongariro'. This worldview is much broader than Western paradigms of boundaries.

Many marae are located in coastal/floodplain areas and are susceptible to coastal erosion and/or flooding. Where marae are surrounded by privately owned land this can create difficulties for Māori communities needing to relocate (see spotlight on Tangoio Marae below). It raises the issue of whether the government's duty of active protection under te Tiriti includes assisting Māori to access land required for managed relocation.

A spotlight on managed retreat of Tangoio Marae

The Tangoio Marae in Hawke's Bay houses a wharenui, wharekai and ablution block, with an urupā located across the road. The marae has been prone to flooding for many years including being impacted by Cyclone Bola in 1988. In response to the evident natural hazard risk, a committee of whānau commissioned a geo-technical report to explore relocation or hazard reduction options for the marae. Although three sites were identified as potential options for relocation, private owners were unwilling to sell them. So the committee explored prevention opportunities with whānau and hapū, and a decision was made to rebuild the existing stop bank by increasing its height, width and length.[10]

Devastatingly, the marae was severely damaged in Cyclone Gabrielle, with the buildings being flooded and the floors left coated in metres of mud.[11] All the marae buildings were red stickered, apart from the wharenui which was yellow stickered, and are being demolished.[12] The profound affect this has had on the Tangoio hāpori (community) is felt in a comment by Pereri King, "That's my life, that's who I am. That's my symbol of strength, and it's smashed."[13]

4.1.3 Retaining connections

Whakapapa is the connection Māori people have with each other, and to the land, which may be impacted if Māori are required to move. Relocation has a wide reach into Māori culture. For some hapū, their whenua reaches down to rivers or the coastline where they have access to kai gathering areas. The implications of relocating these hapū are multifaceted. Displacement of communities can mean that access to significant landmarks or mātauranga associated with them is impacted. There may be negative impacts on the ability of hapū to feed their communities and whānau, as well as to provide for large numbers of people at tangi. Kōrero and wānanga about connection to the whenua and whakapapa, and how that will be maintained during any managed retreat process, will be essential in facilitating understanding, buy-in and participation.

4.1.4 Adequately resourcing iwi and hapū

Appropriately resourcing iwi and hapū to engage with local and central government speaks to the partnership intended by te Tiriti. Engagement could happen at a iwi or hapū level, where the kōrero can then be filtered down to the hapū and whanau respectively. Some iwi and hapū, that are more established in their post-settlement phase, may have access to resources (such as a specialised environmental manager) and have climate adaptation management plans and strategies in place. Groups that lack such resources might need to be supported by the Crown.

A spotlight on the Ngāi Tahu climate change strategy

He Rautaki Mō te Huringa o te Āhuarangi, Ngāi Tahu's climate change strategy, provides direction across the whole spectrum of Ngāi Tahu interests, assets and activities. It includes embedding Ngāi Tahu within key climate change response structures and programmes working with central and local government so that:[14]

- Te Rūnanga is represented on the Government's Climate Commission and other key statutory bodies informing and managing climate change response.
- Papatipu Rūnanga actively influence regional and local government processes to develop climate change responses.
- Climate change impacts on Settlement assets and tribal lands and resources are reviewed, and mechanisms established that enable at risk assets, lands and resources to be transferred, replaced or compensated.

4.2 Human rights

Managed retreat policy must consider potential impacts on human rights. There is a growing body of literature on human rights, ethical considerations and access to justice in the context of climate change and adaptation.[15] That said, the literature on how international human rights directly interact with the topic of loss and damage is still developing.[16]

The fundamental civil and political rights of those in Aotearoa are provided for in the New Zealand Bill of Rights Act 1990.[17] Many of the rights enumerated in the Act are re-iterations of those in the International Covenant on Civil and Political Rights (ICCPR) which outlines basic civil freedoms afforded to persons. The preamble to the covenant places the recognition of human dignity at the root of political liberties.[18] Article 12 outlines a general freedom to choose residence.[19] The International Covenant on Economic Social and Cultural Rights outlines the general human right to "the highest attainable standard of physical and mental health".[20]

At the broadest public safety level, the right not to be "deprived of life" is codified in section 8 of the New Zealand Bill of Rights Act.[21] While government action on climate change adaptation is unlikely to deprive people of life in a way that clashes with this obligation, section 8 grounds a general duty on authorities to preserve life, or at least to refrain from activities that would endanger people. The right not to be subjected to degrading or disproportionately severe treatment is found in section 9.[22] A further relevant right is the section 27 right to natural justice and a right to judicial review and civil proceedings.[23]

A spotlight on human rights in the wake of the Christchurch earthquakes

In 2013, the Human Rights Commission released the findings of its investigation into human rights in the Canterbury earthquake recovery. The Commission undertook the investigation because, although much had been done to ensure the rights of people, "the earthquakes resulted in challenges to the realisation of a range of economic and social rights, such as the right to housing, to an adequate standard of living, health, education and to property." Civil and political rights such as rights to participation or access to information were also affected.[24] The Commission also reported on the potential implications posed by withdrawal of services, and praised the postal service for its flexibility in the novel circumstances.[25]

The Commission subsequently became an intervenor in the Supreme Court hearing of the *Quake Outcasts* case,[26] which involved a group of property owners in the Christchurch red zone, who were offered a lower amount for the buyout of their properties on the basis that they were uninsured. The Commission contended that the differential treatment given to the 'Quake Outcasts' might not be congruent with Government's broader international human rights obligations. In the case, the Quake Outcasts had claimed that:

> ...the unequal treatment of the uninsured (and the delays in making decisions about their position) is unlawful, an abuse of power and inconsistent with the earthquake recovery purposes of the Canterbury Earthquake Recovery Act. Even if the lack of

> insurance is a relevant point of differentiation for some of the Quake Outcasts groups, the dramatic nature and effect of the different treatment is oppressive, disproportionate and unreasonable, especially as there has been no consideration of the individual circumstances of the affected persons.[27]

A major question considered by the Court was whether the diminished offer for the uninsured was justified on policy grounds in light of the overarching recovery objective for the area.[28] In particular, it was argued that the approach towards the Quake Outcasts was tantamount to abandonment, and the Court agreed, stating:[29]

> The Crown argues that owners in the red zone are free to decide not to sell and that they may remain in the red zone if they wish to do so. However, the reality is that the red zone is no longer suitable for residential occupation. We accept the Human Rights Commission's argument that the red zone decisions meant that residents in the red zone were faced with either leaving their homes or remaining in what were to be effectively abandoned communities, with degenerating services and infrastructure. In light of that stark choice, Pankhurst J, in his judgement, termed this a "Hobson's choice". We agree.

Overall, there is a wide range of property, cultural and human rights in Aotearoa that will need to be considered when developing a new Climate Adaptation Act. We now turn to the current statutory framework and how it provides for the various stages of managed relocation.

Endnotes

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11 Johnstone S and D Laing, 2023, 'Cyclone Gabrielle: Locals say Tangoio Marae protected its people from the impacts of the storm', *Hawkes Bay Today*, 20 February

12 O'Callaghan J, 2023, "Cyclone-damaged Tangoio Marae needs home for piles of silt', *Stuff*, 2 March

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14 Ngāi Tahu, 2018, He rautaki mō to huringa o te āhuarangi: Climate change strategy, Ngāi Tahu, Christchurch, at 21

15 For an excellent and topical example see E Ellis, 2018, *How should the risk of sea-level rise be shared?*, Deep South National Science Challenge, Wellington

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17 New Zealand Bill of Rights Act 1990, part 2

18 International Covenant on Civil and Political Rights, UNGA 2200A, adopted December 1966, entry into force 23 March 1976, Preamble

19 International Covenant on Civil and Political Rights, UNGA 2200A, adopted December 1966, entry into force 23 March 1976, article 12

20 International Covenant on Economic Social and Cultural Rights, UNGA 2200A (XXI), adopted 16 December 1966, entry into force 3 January 1976, article 12

21 New Zealand Bill of Rights Act 1990, section 8

22 New Zealand Bill of Rights Act 1990, section 9

23 New Zealand Bill of Rights Act 1990, section 27

24 Human Rights Commission, 2013, *Monitoring human rights in the Canterbury earthquake recovery*, Human Rights Commission, Wellington, at 10

25 Human Rights Commission, 2013, *Monitoring human rights in the Canterbury earthquake recovery*, Human Rights Commission, Wellington, at 34 and see also 140; and see also *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1, at [99]

26 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1

27 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1, at [245]

28 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1, at [177-178]

29 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1, at [176]

5 Identifying and communicating climate risk

Clarks Beach seawall

Currently there is no for-purpose system in legislation to effect managed relocation. Instead, there is a complicated bundle of statutory provisions that government agencies and local authorities must navigate *ad hoc* in order to relocate people away from areas exposed to natural hazards. For the purposes of our legislative review we have identified seven key tasks involved in undertaking managed retreat as follows:[1]

1 Identifying risk and communicating it to the public

2 Preventing development in hazard prone areas

3 Undertaking adaptation planning

4 Rezoning land to prevent occupation

5 Acquiring properties and providing compensation

6 Relocating people, buildings and infrastructure, and developing new settlements

7 Clearing vacated land and undertaking ongoing land management

The relevant legislation ranges from provisions concerning climate risk assessments, to zoning land, to sanitation standards for houses, and to powers to move people during national emergencies. There are many relevant statutes. We do not claim to provide an exhaustive list of them (and we have not reviewed, for example, the Land Transport Act 1988, the Railways Act 2005 or the Marine and Coastal Area (Takutai Moana) Act 2011) but rather we have made an initial effort to provide an integrated sense of a body relevant law.

A summary of the relevant legislation we have reviewed is contained in Figure 1.

Flooding at Piha campground

Legislation (in date order)	**Agency**	**Relevance to managed retreat**
Soil Conservation and Rivers Control Act 1941	Regional councils	Construction and maintenance of flood protection works
Land Act 1948	Land Information New Zealand	Acquisition, disposal and management of Crown owned land
Health Act 1956	Territorial authorities Director of Health	Requires properties to have adequate potable water and facilities for the disposal of wastewater Enables buildings to be closed where they are likely to cause injury to health or are unfit for human habitation
Local Government Act 1974	Territorial authorities	Management and stopping of roads
Reserves Act 1977	Territorial authorities Other management entities	Classification and management of reserve land by a range of parties
Public Works Act 1981	Land Information New Zealand Local authorities	Compulsory acquisition of land for public works and payment of compensation
Local Government Official Information and Meetings Act 1987	Territorial authorities	Preparation of Land Information Memoranda for individual properties which can include information on climate risk
Conservation Act 1987	Department of Conservation	Designation and management of conservation land
Resource Management Act 1991	Regional councils Territorial authorities	Management of land, water, air and coastal marine area; planning and consenting for activities including subdivision and urban development
Te Ture Whenua Māori Act 1993	Māori Land Court	Classification, protection and management of Māori land
Climate Change Response Act 2002	Climate Change Commission	Preparation of a national risk assessment and national adaptation plan every six years
Local Government Act 2002	Regional councils Territorial authorities	Sets out consultation principles and decision-making requirements. Provides for 10-year long term plans, 30-year infrastructure strategies and financial strategies
Civil Defence Emergency Management Act 2002	Director of Civil Defence Emergency Management Local Authorities	Provides broad powers to respond to emergencies
Building Act 2004	Territorial authorities	Ensures compliance of buildings with the building code
Urban Development Act 2020	Kāinga Ora	Separate regime for specified development projects including compulsory acquisition of land
Water Services Entities Act 2022	Water Services Entities	Must identify and manage natural hazard risks affecting water assets

Figure 1: List of current legislation relevant to managed retreat

Below we describe and analyse how key legislation enables the various elements of managed relocation to be undertaken. This is to help identify the extent to which Aotearoa has adequate legal and policy tools to undertake managed retreat. We also describe the likely impact of current proposed reforms. In doing so, we aim to both provide a broad big picture of the overarching system and identify potential gaps.[2]

"Information on climate risks that is of high quality and is trusted, decision-relevant, and widely disseminated is foundational for adaptation planning and is urgently needed."[3]

Identifying and communicating risk effectively is essential to any meaningful adaptation planning and managed relocation process. Such a process will need to be informed by a robust scientific assessment of risk to communities and property. This risk must then be effectively communicated to those affected, including property owners and the broader community, if they are to be enabled to respond to the risk. The information needs to be reliable and trusted and reflect the most up to date science.

A spotlight on mātauranga Māori and climate adaptation

Mātauranga Māori is an indigenous knowledge system and way in which the Māori world is understood. Rangi Mātāmua believes mātauranga Māori and Western science can work symbiotically, especially when it comes to responding to our changing climate, as "our knowledge systems are not separated from our cultural practices, from our actual everyday practices, and even from our spirituality".[4] Understanding environmental change informed the way in which life was lived by Māori.

The design of climate adaptation legislation will need to carefully consider mātauranga Māori, tikanga, te reo Māori and te ao Māori concepts and aspirations in a way that is led and explored by Māori. A pressing issue is the ongoing stewardship of this knowledge. Māori data sovereignty is becoming increasingly important, at a time when iwi and hapū are being asked for their knowledge and stories, which are then being deployed to help combat the effects produced by a different knowledge system. Rangatiratanga by Māori over Māori data is an important matter to be addressed.

5.1 National climate risk assessment

The current approach to identifying and communicating risk is multi-layered. At the national level, the Climate Change Response Act provides for the preparation of a 'national climate risk assessment'. This assessment must both "assess the risks to New Zealand's economy, society, environment, and ecology from the current and future effects of climate change" and "identify the most significant risks to New Zealand, based on the nature of the risks, their severity, and the need for co-ordinated steps to respond to those risks in the next 6-year period".[5]

The Climate Change Commission is tasked with preparing the risk assessment every six years. The Commission is an independent Crown entity, established in 2019, which provides expert advice to Government. It also monitors and reviews Government's progress towards meeting its adaptation and emissions reduction goals.[6] The Commission must provide the risk assessment to the Minister, and make it publicly available, along with any evidence commissioned to support its preparation.[7] In this way the document serves as a tool to both assess risk and communicate it to the public.

The first national climate risk assessment was released in August 2020. It was prepared by consultants to the Minister for the Environment (rather than the Climate Commission) due to work commencing prior to the Commission being established. Future risk assessments will be prepared by the Commission itself. The first assessment identified 43 priority risks across five value domains (natural environment, human, economy, built environment and governance). It then highlighted 10 risks considered to be the most significant (see Figure 2).[8]

In terms of Māori, the risk assessment highlights some specific risks (but only in general terms) with were rated as having extreme consequences, including:[9]

- Risks to Māori social, cultural, spiritual and economic wellbeing from loss and degradation of lands and waters, as well as cultural assets such as marae, due to ongoing sea-level rise, changes in rainfall and drought.
- Risks to Māori social, cultural, spiritual and economic wellbeing from loss of species and biodiversity, due to greater climate variability and ongoing sea-level rise.

Domain	Risk	Rating	
		Consequence	Urgency (44-94)
Natural Environment	Risks to coastal ecosystems, including the intertidal zone, estuaries, dunes, coastal lakes and wetlands, due to ongoing sea-level rise and extreme weather events.	Major	78
	Risks to indigenous ecosystems and species from the enhanced spread, survival and establishment of invasive species due to climate change.	Major	73
Human	Risks to social cohesion and community well being from displacement of individuals, families and communities due to climate change impacts.	Extreme	88
	Risks of exacerbating existing inequities and creating new and additional inequities due to differential distribution of climate change impacts.	Extreme	85
Economy	Risks to governments from economic costs associated with lost productivity, disaster relief expenditure and unfunded contingent liabilities due to extreme events and ongoing, gradual changes.	Extreme	90
	Risks to the financial system from instability due to extreme weather events and ongoing, gradual changes.	Major	83
Built Environment	Risk to potable water supplies (availability and quality) due to changes in rainfall, temperature, drought, extreme weather events and ongoing sea-level rise.	Extreme	93
	Risks to buildings due to extreme weather events, drought, increased fire weather and ongoing sea-level rise.	Extreme	90
Governance	Risk of maladaptation across all domains due to practices, processes and tools that do not account for uncertainty and change over long timeframes.	Extreme	83
	Risk that climate change impacts across all domains will be exacerbated because current institutional arrangements are not fit for adaptation. Institutional arrangements include legislative and decision-making frameworks, coordination within and across levels of government, and funding mechanisms.	Extreme	80

Figure 2: Ten most significant climate risks in Aotearoa based on urgency *(source: Ministry for the Environment, 2020)*

Figure 2 shows how the risks have been identified at a high (national level) and not in a way that applies directly to individuals or communities. The national assessments are therefore more significant in indicating the *kinds* of matters that need to be considered in any managed retreat policy, and providing a national context for it, rather than informing how such policy might be implemented in any particular case. Interestingly, the Urban Development Act 2020 includes direct reference to such publicly available documents prepared under the Climate Change Response Act, requiring Kāinga Ora to "identify" such reports where relevant to the proposed project area when assessing a potential urban development project.[10] However, it seems unlikely that the reports will be relevant to identifying constraints and opportunities associated with a particular development site, in more than a general sense.

There is no similar requirement at the regional and/or local level for the assessment of climate risk, or making the results of such assessment publicly available. Any responsibility to do so must be implied from other provisions. That said, many regional and district climate change risk assessments have been undertaken or are underway, as are other assessments for different central government portfolios (such as health, education and conservation). The challenge will be to 'join up' all this work in a coordinated manner, at place.

5.2 Land Information Memorandum

A spotlight on flood disclosure laws in Texas, USA

Under Texas law, which took effect from 1 January 2022, landlords are required to provide written notice to prospective tenants if a rental property has been flooded within the previous five years and/or if it is in a 100-year floodplain. This is in response to Hurricane Harvey which caused $140 billion of property damage to Houston in 2017.[11]

The Local Government Official Information and Meetings Act 1987 (LGOIMA) determines what shall be included in Land Information Memorandum (LIM) reports. LIMs relate to individual property titles, are mainly requested by potential purchasers of land, and are prepared by territorial authorities on the request of any party. Section 44A(2) of the Act requires that the LIM shall include a range of information including identifying "potential erosion, avulsion [sudden loss of land from the flow of a river/stream], falling debris, subsidence, slippage, alluvion [sediment deposit], or inundation".[12]

However, this information only needs to be included if it "is known to the territorial authority" thereby not placing any explicit responsibility on councils to undertake the work to identify the risk in the first place. In addition, the information only needs to be included in the LIM if it is "not apparent" from the district plan.[13] This assumes that members of the public are generally familiar and literate with district plans (which can be very long and complex documents even for subject matter experts) and are able to find within them specific risk information affecting their property of interest.

A spotlight on the inclusion of hazard information in LIMs

The issue of what hazard information should be included in a LIM has been considered by the High Court in the context of the Kapiti Coast. The area is subject to high rates of erosion, exacerbated by the land sinking by around 3.5-5mm a year, and climate change.[14] In 2005, to assist with managing this significant risk, the Kapiti Coast District Council commissioned a coastal hazard erosion assessment. In response to the study's conclusions, the Council decided to place lines on its cadastral maps which predicted the possible extent of coastal erosion in 50 and 100 years' time. The lines, which affected some 1,800 coastal properties, reflected what could happen under a worst case scenario.[15]

The Council also considered itself obliged to include this information on any LIMs it issued. This was because section 44A of LGOIMA required it to include information identifying each potential feature or characteristic of the land, including potential erosion, where that information was known to the council.

The inclusion of coastal hazard information in the LIMs was challenged by property owners, who were concerned about the impact on their property values. They argued that the lines produced by the coastal scientist were no more than speculative, as they did not identify the probability of the hazard occurring, and did not take into account property specific factors such as land contour or accretion history. The High Court did not accept this argument and confirmed that "a worst case scenario objectively identified and evidentially based, must, by definition, be a reasonable possibility – albeit the worst one". It also confirmed that a site-by-site analysis did not need to be undertaken stating:

> The analysis … is unquestionably about erosion as a special feature or characteristic of all coastal land along the Kapiti Coast, and therefore of every individual property fitting the description. Here, the Council is trying to warn the market about the potential local effects of a global phenomenon. It would be inconsistent with the purpose of S 44A if that could not be done because a far more expensive site-by-site analysis is required but unaffordable."[16]

However, the Court did emphasise that the information contained in the LIM needed to be "accurate, state the position fairly, and it must not mislead".[17] The decision confirmed the LIM as an important document in informing the market (in the form of prospective property buyers) about the potential natural hazard risks associated with a particular property.

A LGOIMA Amendment Bill, currently before the House, seeks to strengthen these provisions. First it is more explicit about how hazard information is to be set out in LIMs which must include information about each hazard or impact that affects the land, each *potential* hazard or impact "to the extent that the authority is satisfied that there is a reasonable possibility that the hazard or impact may affect the land concerned (whether now or in the future)", and the cumulative or combined effects of those hazards or impacts. The hazard information is to relate to both natural hazards and the impacts of climate change that exacerbate them.[18]

This information will be required irrespective of whether it is also contained in the district plan, which is a positive change, and means that all the relevant information on a property will be provided in one document. That said, the amended provisions still contain the qualifier that the information need only be provided "to the extent that it is known to the territorial authority" without any obligation on that authority to undertake hazard assessment work.

The proposed amendments will create a new obligation for regional councils to provide territorial authorities with natural hazard information but only to the extent that "it is known" to the regional council.[19] This will help ensure that any hazard information held by the regional council is passed onto the territorial authority, but still does not ensure that the information is gathered in the first place.

Lastly, there is a provision that removes from territorial authorities and regional councils any civil or criminal liability if the information is provided "in good faith"[20] thereby excluding any action in tort on the basis that the information provided was not accurate. In theory this should help encourage councils to make more hazard information available even if it contains uncertainties.

5.3 Resource management plans

In a similar vein, although the RMA has regard to natural hazards and climate change, it does not place an explicit obligation on any party to identify and/or communicate risk. The provision that comes closest to this, is section 35(5)(j), which requires local authorities to keep "records of natural hazards to the extent that the local authority considers appropriate for the effective discharge of its functions". But this is a passive 'keeping records' obligation rather than an active and anticipatory requirement to seek out important hazard and climate change information.

An obligation to collect natural hazard information could be implied from the functions of councils under the RMA. After all, it is arguably not possible to carry out a function adequately without the requisite information to inform decision-making. In this regard, regional councils have the function to "control the use of land for the purpose of the avoidance or mitigation of natural hazards"[21] and territorial authorities have the function to control "any actual or potential effects of the use, development, or protection of land" for the purpose of "the avoidance or mitigation of natural hazards".[22]

These functions must be considered in the context of Part Two of the RMA and the requirement for all decision-makers (including councils) to "recognise and provide for … the management of significant risks from natural hazards"[23] and to "have particular regard to … the effects of climate change".[24] These provisions further emphasise the need to consider and manage risk, but still fall short of imposing a positive obligation on councils to undertake a regional and/or local risk assessment to inform their planning and decision-making.

At first glance, councils appear to have overlapping natural hazard responsibilities under the RMA. However, under section 62(1)(i)(i) the

Coastal erosion damage to public walkway at Snells Beach (Neale Wills)

regional policy statement must state "the local authority responsible in the whole or any part of a region for specifying the objectives, policies, and methods for the control of the use of land to avoid or mitigate natural hazards or any group of hazards". If the regional policy statement fails to deal with the matter, there remains some ambiguity as to the dividing line between regional council and territorial authority roles, which risks leading to gaps or duplication in effort.

A spotlight on council responsibilities for management of natural hazards in the Bay of Plenty

Change 2 to the Bay of Plenty Regional Policy Statement clarifies responsibilities between councils for addressing natural hazards. Under the policy statement, the regional council is to have responsibility for *hazard susceptibility mapping* for volcanic activity, earthquakes, tsunami, coastal erosion and inundation and flooding outside urban areas with reticulated stormwater networks. The regional council is also to have responsibility for undertaking *area-based natural hazard risk analysis and evaluation* for a narrower risk of hazards comprising volcanic activity, liquefaction and tsunami. Territorial authorities have responsibility for *hazard susceptibility mapping* for urban flooding, landslip and debris flow and *natural hazard risk analysis and evaluation* for those matters not within the responsibilities of regional councils (so including earthquakes, coastal erosion and inundation and flooding).[25]

The New Zealand Coastal Policy Statement 2010 (NZCPS) provides more direction on identifying hazards within the coastal environment (but not elsewhere). It requires the identification of "areas in the coastal environment that are potentially affected by coastal hazards (including tsunami), giving priority to the identification of areas of high risk of being affected".[26] The assessment of hazard risks is to be over at least 100 years. The NZCPS identifies a long list of matters that must be given attention to when assessing hazard risks, such as physical drivers and processes, natural dynamic fluctuations and geomorphological character. The NZCPS is to be given effect to in regional policy statements and regional and district plans[27] meaning that their provisions should be based on an assessment of coastal hazard risk. DOC has prepared a useful guidance note as to how the policy is to be applied.[28]

Under Policy 24 of the NZCPS, "national guidance and the best available information on the likely effects of climate change on the region or district" are be taken into account. [29] This reference to national guidance, rather than incorporating it directly into the NZCPS, enables the material to be readily updated as new information on climate change and coastal hazards becomes available. Various national guidance documents have been produced by the Ministry for the Environment on coastal hazards and climate change. The latest are the 2017 *Coastal hazards and climate change: Guidance for local government* and the 2022 *Interim guidance on the use of new sea-level rise projections* which is designed to reflect the latest sea-level rise scenarios.

A spotlight on national planning standards and natural hazards

The RMA provides for the promulgation of national planning standards to set out requirements for the "structure, format, or content of regional policy statements and plans" in order to achieve national consistency amongst other things.[30] The first set of national planning standards was published in November 2019 and updated in February 2022. They set out a common structure for policies and plans which include a chapter on "hazards and risks" in the regional policy statement and chapters on "natural hazards" in regional and district plans. Coastal hazards are to be included in a coastal environment chapter. Both the natural hazard and coastal hazards chapters in district plans are identified as district-wide matters.[31]

The national planning standards also identify spatial layers for district plans and these include zones which spatially identify and manage "an area with common environmental characteristics or where environmental outcomes are sought" and overlays which spatially identify "distinctive values, risks or other factors which require management in a different manner from underlying zone provisions".[32] This indicates that overlays are to be the prime method for spatially identifying the location of natural hazard risks in district plans.

The Government is in the process of repealing the RMA and replacing it with a Spatial Planning Act and Natural and Built Environment Act. These two pieces of legislation are currently before the House in Bill form – the Spatial Planning Bill 2022 (SPB) and Natural and Built Environment Bill 2022 (NBEB). Our discussion of them refers to the content of those Bills as introduced into the House.

Under the SPB, regional planning committees preparing regional spatial strategies "must ensure that the strategy is – based on robust and reliable evidence and other information, including mātauranga Māori, that is

proportionate to the level of detail required in the particular context".[33] This should require councils to collect natural hazard and climate risk information that is at least sufficient to inform high level regional spatial planning. However, the clause leaves considerable discretion as to what level of detail will be deemed 'sufficient'.

The NBEB effectively carries over the respective natural hazard functions of regional councils and territorial authorities from the RMA.[34] However, it does have more specific provisions referencing natural hazards and climate risks. The system outcomes, which the national planning framework (NPF) and all plans must provide for, include "in relation to climate change and natural hazards, achieving – the reduction of risks arising from, and better resilience of the environment to, natural hazards and the effects of climate change".[35]

A requirement to reduce risks implies a need to identify them in the first place and one could therefore expect the work undertaken to prepare combined Natural and Built Environment Plans (which will span a region) to include risk identification at a regional level, to the extent this has not already been undertaken to inform the regional spatial strategy. It will also be important to identify what level of risk reduction might be required in any particular place, and the extent to which this might be achieved through defence (ie through constructing seawalls and stopbanks) as opposed to retreat. The NPF could usefully provide a framework for how such issues should be addressed in plans.

The NPF may also "direct regional planning committees and local authorities to collect or publish specified information in order to achieve the provisions of the national planning framework".[36] Coupled with a requirement for the NPF to provide direction for each system outcome[37] (including that referring to natural hazards and the effects of climate change) this clearly provides a power for national direction to require the collection and publishing of natural hazard and climate risk information. However the ability to provide such direction is no surety that it will actually be produced.

5.4 Infrastructure strategies

Local authorities also have natural hazard information obligations under the Local Government Act 2002 (LGA), but these are expressed mainly in general terms. Natural hazard risk only explicitly features in the preparation of 30-year infrastructure strategies, which must "provide for the resilience of infrastructure assets by identifying and managing risks relating to natural hazards and making appropriate financial provision for those risks".[38] A similar provision has been included in the new Water Services Entities Act 2022[39] which applies to water services infrastructure managed by the new water services entities when they are established.

5.5 Overall assessment

A summary of the current and proposed statutory provisions relating to the identification and communication of climate risk information is shown in Figure 3. Overall, although there is a robust framework for the preparation and communication of a regular national climate risk assessment, by an independent agency, there is no requirement of similar rigour at a regional or local level. Under current law, outside the coastal environment, no agency is obliged to regularly collect and make available natural hazard and climate risk information.

While proposed amendments to the LGOIMA regarding the information presented on LIMs, should make these documents more informative, they will only contain the information that the territorial authority holds. Broadly speaking, they also only communicate information to prospective property purchasers, and only to those who can afford the not insignificant cost typically charged to prepare a LIM. Current property owners do not typically order a LIM so may remain ignorant of new hazard information. The LGA effectively places an obligation on councils to identify natural hazard risks affecting infrastructure assets owned by them, which is important, but it does not extend to risks affecting assets owned by other parties.

The proposed new SPB and NBEB have the potential to result in more climate risk assessments being undertaken at a regional level. However they fall short of placing a direct obligation on any particular agency to undertake regular regional risk assessments in a similar manner provided for at a national level in the Climate Change Response Act. They also provide no guidance as to how such assessments might be undertaken and on what basis. Such matters have been left to the NPF rather than being provided in the legislation itself.

The NZCPS will be superseded by the NPF in the new resource management system. It is unclear to what extent its provisions may be retained or modified. The Ministry for the Environment has indicated that the first generation NPF will largely consist of existing national direction transitioned into a combined document.[40] The NZCPS's approach of referring to national guidance documents appears to be sound. It means they can be regularly updated, and councils and regional planning committees required to follow the latest approaches to risk assessment.

Statute or policy	Effect
Climate Change Response Act	National risk assessment to be prepared 6-yearly by independent body and made public.
Local Government Official Information and Meetings Act	Inclusion of risk information on LIMs. Proposed amendments clarify and strengthen requirement to include risk information on LIMs, require regional councils to provide territorial authorities with the natural hazards information they hold, and reduce council liability associated with the provision of information. *Limitation:* No requirement to gather natural hazard information in the first place.
Resource Management Act	The NZCPS requires the identification of areas of the coastal environment potentially affected by coastal hazards over 100 years. It also requires national guidance and the best available information to be taken into account when doing so. The national planning standards require regional and district plans to include a chapter on natural hazards with coastal hazards to be included in a coastal environment chapter. Overlays are to be the prime spatial tool to identify risks in district plans *Limitation:* No explicit obligation for collection or communication of risk information although arguably this can be implied from council functions and prescribed content of plans.
Spatial Planning Bill and National and Built Environment Bill	Have stronger provisions around collection of information to inform strategies/plans, and further direction can be provided in the NPF. *Limitation:* The statutory provisions fall short of requiring regular regional risk assessments and providing minimum requirements for how they should be undertaken and what should be included in them.
Local Government Act Water Services Entities Act	Councils must identify and manage natural hazard risks affecting their infrastructure assets when preparing 30-year infrastructure strategies.

Figure 3 Summary of statutory provisions for identifying and communicating climate risk

Given the growing size and urgency of the climate emergency, there could be a legal obligation to prepare and make public regular climate risks assessments at a regional level, potentially in the new Climate Adaptation Act. Such risk assessments could be required to follow national guidance which is regularly updated as new information on climate risks comes to hand. They will need to be comprehensive, addressing all relevant climate risks to communities, and not just focus on council owned and managed assets.

Endnotes

1 For components see also Olufson S E, 2019, *Managed retreat components and costing in a coastal setting*, Masters of Science thesis, Victoria University of Wellington

2 For a general framing of the interdisciplinary questions posed by climate change induced damage and loss see generally Natarajan U, 2021, 'Measuring the immeasurable: Loss and damage from climate change in international law', in M Doelle and S L Seck (eds), 2021, *Research handbook on climate change law and loss & damage*, Elgar Publishing, Cheltenham, at 60

3 Chair of the Council of Economic Advisers, 2023, *Economic report of the President*, The White House, Washington, at 293

4 Harris K, 2023, 'How mātauranga Māori is being rolled out in schools, Rangi Mātāmua explains the knowledge system', *New Zealand Herald*, 7 March

5 Climate Change Response Act 2002, section 5ZP

6 Climate Change Response Act 2002, section 5B

7 Climate Change Response Act 2002, section 5ZQ

8 Ministry for the Environment, 2020, *National climate change risk assessment for Aotearoa New Zealand: Main report – Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa*: *Pūrongo whakatōpū*, Ministry for the Environment, Wellington, at 9

9 Ministry for the Environment, 2020, *National climate change risk assessment for Aotearoa New Zealand: Main report – Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa*: *Pūrongo whakatōpū*, Ministry for the Environment, Wellington, at 60

10 Urban Development Act 2020, section 32(2)(b)

11 Frank T, 2022, 'Texas enacts nation's strongest flood disclosure law', *Climatewire*, 6 January

12 Local Government Official Information and Meetings Act 1987, section 44A(2)(a)

13 Local Government Official Information and Meetings Act 1987, section 44A(2)(a)

14 https://takutaikapiti.nz/articles/the-science-timeline/

15 *Weir v Kapiti Coast District Council* [2013] NZHC 3516, at [3] and [4]

16 *Weir v Kapiti Coast District Council* [2013] NZHC 3516, at [58]

17 *Weir v Kapiti Coast District Council* [2013] NZHC 3516, at [68]

18 Local Government Official Information and Meetings Amendment Bill 2022, clause 8 (new section 44B)

19 Local Government Official Information and Meetings Amendment Bill 2022, clause 8 (new section 44C)

20 Local Government Official Information and Meetings Amendment Bill 2022, clause 8 (new section 44D)

21 Resource Management Act 1991, section 30(1)(c)(iv)

22 Resource Management Act 1991, section 31(1)(b)(i)

23 Resource Management Act 1991, section 6(h)

24 Resource Management Act 1991, section 7(i)

25 Change 2 (Natural Hazards) to the Bay of Plenty Regional Policy Statement, policy NH 12C

26 New Zealand Coastal Policy Statement 2010, Policy 24(1)

27 Resource Management Act 1991, sections 62(3), 67(3)(b) and 75(3)(b)

28 Department of Conservation 2017, *Coastal hazards: NZCPS 2010 guidance note*, Department of Conservation, Wellington

29 New Zealand Coastal Policy Statement 2010, Policy 24(1)

30 Resource Management Act 1991, section 58B(1)

31 Ministry for the Environment, 2019, *National planning standards*, Ministry for the Environment, Wellington, at 9, 13, 15 and 34

32 Ministry for the Environment, 2019, *National planning standards*, Ministry for the Environment, Wellington, at 50

33 Spatial Planning Bill 2022, clause 28(a)

34 See Natural and Built Environment Bill 2022, clauses 644(a)(v) and 646(a)(i)

35 Natural and Built Environment Bill 2022, clause 5(b)(iii)

36 Natural and Built Environment Bill 2022, clause 60(1)(f)

37 Natural and Built Environment Bill 2022, clause 57(1)(a)

38 Local Government Act 2002, section 101B(3)(e)

39 Water Services Entities Act 2002, section 158(4)(e)

40 https://environment.govt.nz/publications/our-future-resource-management-system-overview/

6 Stopping development in hazard prone areas

New build in hazard area, Matarangi

"The most important thing we can do is ensure people are not being placed in harm's way and do not suffer the loss and disruption caused by a flood event. Avoiding the impact on lives and people's wellbeing must be the priority." Amanda Whiting, CEO, IAG New Zealand

It is imperative that we prevent new or intensified development occurring in high risk areas. Allowing an increase in the number of people, structures and assets located in risky areas will result in more people being exposed to harm (and in the worst cases death), unnecessary damage to property, and ultimately a need to relocate them out of harm's way. However, it is clear that councils are still allowing new buildings to be constructed in risky areas.

Coastal erosion, Haumoana

The extent to which new development has been occurring in areas subject to natural hazard risk, in the Auckland region, came to light as a result of media inquiries in the wake of the Auckland Anniversary floods. Since the beginning of 2016, Auckland Council has granted resource consent for 9,220 new dwellings in flood plains and a further 4,295 dwellings in flood prone areas.[1]

When asked why development was still going ahead in flood zones, Climate Change Minister James Shaw identified several possible reasons including there being "no national direction to councils not to authorise construction on flood plains", a housing crisis so "councils are feeling the pressure to expand housing stock", and poor council resources where "a lot of council planning capability was built in a world where we didn't have the effects of climate change being felt as markedly as we are now".

A spotlight on state houses built on flood-prone land

Of the 70,000 homes managed by Kāinga Ora, just over 15 per cent (over 10,000 homes) are in flood-prone areas and at least a further 500 are exposed to coastal flooding. New homes are continuing to be built in hazard-prone areas with 16 per cent of planned investments being in flood-prone areas and 1.7 per cent in areas at risk of sea level rise.[2]

In this section we examine the extent to which current legal tools enable councils to say 'no' to new development, or intensification of existing development, in areas subject to natural hazards and climate risks.

6.1 Building consents

On the face of it, the Building Act 2004 prevents a building consent being issued for building in a hazardous area. Section 71(1)(a) states that "A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if – (a) the land on which the building work is to be carried out is *subject or is likely to be subject to 1 or more natural hazards*". "Natural hazard" is then defined to include erosion, falling debris, subsidence, inundation and slippage.[3]

However, this clear statement designed to avoid development on risk-prone sites is then undermined (no pun intended) by a subsequent qualifying section of the Act which provides for a waiver. This states, in section 72, that the territorial authority *must* grant a building consent if the building consent authority considers that the building work "*will not accelerate, worsen, or result in a natural hazard* on the land" or any other property and "*it is reasonable to grant a waiver* or modification to the building code in respect of the natural hazard concern".

What is "reasonable" is not explained, and there are no qualifiers to it (apart from making the hazard worse), thereby providing wide discretion to grant consent. There are also few precedents to guide decision-makers.[4] Overall, such discretion must be exercised within the ambit of the purpose of the Act which includes ensuring that "people who use buildings can do so safely and without endangering their health".[5] This focuses on physical danger to people ("life safety"),[6] rather than on whether the building itself might be subject to damage.

Another factor which facilitates the grant of waivers is the exemption from liability under section 392. This provision states that the building consent authority cannot be held liable in any civil proceedings for issuing a building consent while knowing that the land on which the building will be situated "was, or was likely to be, subject to damage arising, directly or indirectly, from a natural hazard".

If a section 72 waiver is granted then the natural hazard concerned needs to be notified to the Register-General of Land, so it can be noted against the land title.[7] This at least helps to inform future property purchasers of the risk.

Auckland Council has issued a Practice Note setting out its approach to consenting building work on land subject to natural hazards including granting waivers under section 72. The Practice Note indicates that a waiver is able to be granted for a range of hazards including coastal erosion (on the basis that it is a gradual process which will allow people to evacuate safely); subsidence and slippage (so long as this is moderate or minor and people would survive the event without risk to life or injury); and inundation (so long as the process is gradual and people are able to leave or be evacuated safely).[8]

Where there is dispute about whether such a section 72 waiver should be granted the matter is determined by the chief executive of the Ministry of Business, Innovation and Employment (MBIE) on application by any party.[9] Such determinations relating to natural hazards came under particular scrutiny in Haumoana and Matatā as described in the spotlights below.

A spotlight on refusal of building consents at Haumoana due to risks from coastal erosion

In 2005, the Hastings District Council refused to grant a building consent for a house to be built on the seafront at Haumoana. The coastal edge at Haumoana had been retreating for some decades, with one assessment indicating that the stretch of coast on which the house was to be built had already retreated by some 40 metres since 1930.[10] The house was to be constructed on piles and connected to an existing old-style septic tank. The property owner claimed that the house would be removed when coastal erosion brought mean high water springs within 10 metres of the property, this distance effectively acting as a trigger point.

The matter was referred to determination by the Chief Executive of the then Department of Building and Housing. It focused on whether or not the house plans complied with the Building Code on the basis that, where a proposal complied with the Building Code "throughout its specified intended life", a building consent must be issued under section 72 (ie a waiver must be granted).[11] This reasoning effectively meant that section 72 only came into play (ie consent could be withheld) when the Building Code was not met.

The determination concluded that the building *could* comply so long as the structure was removed once a trigger point was reached in terms of coastal erosion (ie the intended life of the building was

defined by a trigger point). But as this was not specified in the application itself (which indicted a 40-year intended lifespan) it *did not in fact* comply with the Building Code. On this basis, the Chief Executive supported the Council's decision to refuse building consent, but left it open for the property owner to come back with a differently worded application (but no actual change to the proposal) which would then be granted.[12]

The approach taken to the interpretation of section 72 in this determination placed strong reliance on the Building Code being adequate to avoid inappropriate building in hazard zones.

A spotlight on refusal of building consents at Matatā due to risk from debris flows

In May 2005, Matatā, a small coastal settlement in the Eastern Bay of Plenty, was inundated by two debris flows (rapid flows of water and sediment) which deposited around 300,000 cubic metres of silt, logs and boulders onto the settlement. Twenty-seven homes were destroyed, and 87 other properties damaged, but fortunately no-one was killed. The greatest damage occurred on the Awatarariki stream fanhead. It later became apparent that the town had been built on a series of historic debris flows, so this was not a one-off event.[13]

After an initial recovery period, the Whakatāne District Council commissioned an engineering firm to investigate risk mitigation options for properties located in the potential path of future debris flows. In late 2006, as a result of this work, the Council decided to proceed with constructing a 17 metre high debris dam in the catchment to reduce the risk to the 57 worst affected properties.[14]

The Council also served notices on eight houses in the high risk zone, under section 124 of the Building Act (which applies to a building that is "dangerous, affected, or insanitary"), requiring them not to be reoccupied. This was not due to any damage to the houses per se (they had fortunately escaped damage from the 2005 event) but because of the future risk from a debris flow in the event of heavy rainfall. The notices were challenged by affected property owners who wished to reoccupy their houses at their own risk. This led to the matter being referred to the Chief Executive of the then Department of Building and Housing for a determination.

The determination was not specifically about the grant of a section 72 building consent waiver, but the Council used it as a basis for subsequently granting waivers in order to issue building consents for houses on the fanhead. The reasoning in the determination is therefore of relevance to the issue of building consents for construction in high risk areas.

At the outset, the determination stated that preventing people from occupying their houses was such a severe restriction of property rights that it was only justifiable if "injury or death is likely in the ordinary cause of events".[15] It then went on to review the nature of the risk, as set out in relevant technical reports, to determine whether injury or death was "likely". The technical reports indicated that the 2005 debris flow event had a 200 to 500 return period.

The determination concluded that injury or death was "likely" in a storm with a return period of 500 years, and "might be likely" in a storm with a return of 200 years, but that such long return periods did not constitute the "ordinary course of events".[16] It therefore overturned the Council's decision to issue the notices and permitted the houses to be reoccupied. Interestingly, there was no mention of the impacts of climate change potentially reducing the return periods.

Further investigations into the viability of constructing a debris dam eventually led to the conclusion, in 2012, that engineering solutions to reduce the risk were not feasible. By this time building consents had been issued and six houses rebuilt or relocated in the high risk area.

When it became clear that the risk could not feasibly be engineered away, the Council started declining building consents in the high risk area. In 2014, its decisions were challenged by two property owners who were seeking to rebuild their holiday homes. They sought a second determination under the Building Act, which this time directly focused on the application of section 72 and therefore necessitated a different test for risk.

The determination found that the land was "likely" to be subject to a natural hazard on the basis that a debris flow, smaller than the 2005 event, had a probability of every 35 years or so. However, it concluded that the 500 year return for an event of the same scale as the 2005 debris flow did not constitute "likely".[17] It also found that the new buildings could "worsen" the effects of a natural hazard on other property, as the buildings could become mobilised by the debris flow

and damage other structures. This was even where the increased impacts were marginal in the context of a major event.[18] The determination also concluded that the buildings would not comply with the Building Code, as there was not the required low probability that the houses would become unstable during their intended life, due to the removal of support by debris flow or loads imposed by water.

When determining whether the grant of a waiver was "reasonable" the determination focused on whether non-compliance with the Building Code would reduce life safety (and not whether it would increase property damage). The determination held that there was a high probability of loss of life, non-compliance with the Building Code and a lack of any mitigating factors which meant that it was not reasonable for a waiver to be granted.[19]

Although this decision addressed potential loss of life, it implies that where this is a high risk of property damage from a natural hazard, but not directly of loss of life, a waiver should be granted thereby enabling construction of homes and structures in areas where they will potentially be subject to damage.

The application of the section 72 waiver can clearly enable homes and structures to be built in high hazard zones so long as there is little risk to human life. Arguably this is not in the public interest, as it can result in structures being built in hazard zones where damage can occur, and where managed retreat might be needed in the future. The building consent system is currently under review with MBIE issuing a public discussion document in July 2022.[20] However the review has a focus on improving the mechanics of the system (ie institutions, practice and management), rather than the substantive outcomes.

The impacts of recent storm events have highlighted that a significant number of houses have been inappropriately built in hazard-prone areas. It is timely to review the operation of the Building Act in terms of addressing risks from natural hazards and climate change to ensure that the outcomes are in the broader public interest.

6.2 Restrictive rules in RMA plans

From the outset, a territorial authority (the district or city council) *may* refuse to grant a subdivision consent under the RMA, or impose conditions if it considers there is a "significant risk from natural hazards". However, a council is not *required* to refuse consent in such a situation. To definitively conclude that there is a significant risk the territorial authority must make a combined assessment of the likelihood of the hazard occurring, the material damage to land or structures that would result, and any likely subsequent use of the land that would accelerate, worsen or result in such material damage.[21]

Under the RMA it may be possible to include restrictive rules in a plan, which apply to land situated in a high hazard area, to prevent future development. These could take the form of rules attached to a particular hazard overlay or zone that identify future incompatible development as a non-complying or prohibited activity. If prohibited, this would mean that a resource consent could not be sought or granted.[22] Such provisions would be consistent with the council's obligation to recognise and provide for the management of significant risks from natural hazards under section 6(h).

There are limits to the extent that restrictive rules can be placed on land under the RMA. If they would render an interest in land "incapable of reasonable use" the landowner may challenge the plan provision in the Environment Court. "Reasonable use" is defined in the Act as including "the use or potential use of 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".[23]

If a plan provision is challenged on this basis, the Environment Court determines if it does in fact render the land incapable of reasonable use and whether it "places an unfair and unreasonable burden on any person who has an interest in land".[24] Where the challenge is successful the Environment Court may direct the local authority to either modify or delete the offending plan provision, or acquire the land under the Public Works Act, but only if the owner agrees. If the owner does not agree to land acquisition the offending plan provision will be removed.

A proposal to 'downzone' land in a high risk area, from residential to open space/coastal protection for example, would arguably be caught by these provisions. This means that the imposition of restrictive rules could only take place if the land owner agreed to the land being acquired by the territorial authority, and the territorial authority provided compensation based on the market value of the land as required under the Public Works Act.[25] This is a significant disincentive to preventing future development on land already zoned for it (such as residential or commercial), particularly if multiple properties are involved.

A spotlight on the use of overlays in the Porirua proposed district plan

The Porirua proposed district plan provides an example of how overlays have been used to spatially identify areas within the city that are (or are modelled to be) subject to natural hazards. An associated planning framework manages activities based on their sensitivity to those risks. For example, residential units, hospitals, educational facilities and visitor accommodation are identified as hazard-sensitive activities which are non-complying in high hazard overlay areas. In contrast, park facilities, parks furniture and buildings associated with temporary activities are identified as being less-hazard-sensitive activities and so are permitted in high hazard overlay areas.

The proposed reforms under the NBEB make subtle (but important) changes to the RMA provisions. Clause 139 enables land owners to challenge a planning provision rendering their interest in land incapable of reasonable use on a similar basis as under the RMA. The tests the Environment Court applies to such a challenge are essentially the same. However, an addition has been inserted stating that in determining whether the grounds set out are met "the court may assess and take into account the risks or future risks (if any) identified as relevant to the land in question".[26] Presumably this is so the court can take into account the actual and forseeable impacts of natural hazards on the ability of the owner to use the land irrespective of the zoning.

Under the NBEB (as with the RMA), if the grounds for challenging the plan provision are established, the Court can direct that the plan provision be removed/modified or that the local authority should acquire the land under the Public Works Act so long as the landowner agrees *and* the local authority meets the cost of the acquisition. However, the NBEB has included a further important provision. Where any offer to purchase the land is made by the local authority, but is not accepted by the landowner, the proposed provisions in the plan remain in force.[27]

Although, strictly speaking, this does not enable compulsory acquisition as landowners must agree to the purchase, practically speaking they are given little choice in the matter. Failing to agree will result in the land being downzoned so it cannot be developed in any event. The NBEB therefore provides a potent tool to exclude further development from land which is currently zoned for it. That said, local authorities will need to be willing and able to provide compensation at current market values. This would undoubtedly operate as a considerable barrier where more than a few properties are affected.

6.3 New Zealand Coastal Policy Statement

As indicated above, the NZCPS provides guidance on how to address coastal hazards within the coastal environment under the RMA. It must be given effect to in council RMA policies and plans, which in turn provide the policy and rule framework for consenting. Objective 5 of the NZPCS sets out clearly what is intended. This is "To ensure that coastal hazard risks taking account of climate change, are managed by – locating development away from areas prone to such risks…".

Policy 25 directly addresses the issue of avoiding new subdivision and development in coastal hazard zones. It states that "In areas potentially affected by coastal hazards over at least the next 100 years: – (a) *avoid* increasing the risk of social, environmental and economic harm from coastal hazards; (b) *avoid* redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards" and "(d) *encourage* the location of infrastructure away from areas of hazard risk where practicable."

House subject to coastal erosion, Hahei

The use of "avoid" in subclauses (a) and (b) is significant. The Supreme Court in the *King Salmon* case determined that "avoid" means "not allow" or "prevent the occurrence of".[28] Applied in the given context of NZCPS Policy 25, new development that increases risk of adverse effects from hazards is not to be permitted in the coastal environment. Planning documents under the RMA must give effect to Policy 25, and therefore should contain appropriate policies and rules. However, if a plan fails to do so such development may be consented, as consenting authorities need only "have regard to" Policy 25 alongside a range of other matters when determining resource consents.

The requirement to consider hazards *over at least the next 100 years* under the NZPCS (and consequently the RMA) highlights an incongruency with the Building Act which only considers hazards over the intended life of the building which is *50 years or less if specified*[29] (although many building last much longer than that).

Erosion along Buffalo Beach, Whitianga

DOC's guidance note on Policy 25 highlights a number of important aspects. The requirement to avoid increasing the risk of "social, environmental and economic" harm means "that decision-makers should take a broad view and consider the potential harm to biodiversity, natural character, public space, public access and amenity values, as well as to settlements and infrastructure."[30] The requirement to avoid redevelopment or changes in land use that increases risks, means that more development or more expensive redevelopment should be avoided unless incorporating measures that reduce overall risk.

These directives are clear but there are two weaknesses in the regime. The first is the extent to which district plans, and consequently consenting, reflect these directives. A second more serious weakness is that the directives only apply to natural hazards within the coastal environment and not elsewhere in Aotearoa where communities are threatened by flooding, land slips and other natural hazard events.

National policy statements, such as the NZCPS, are indirect tools for achieving change. They rely on councils changing their plans to give effect to them. This can take some years, and there is no independent assurance that even if the plans are changed in a timely manner, that they will give effect to national documents unless the matter is taken to the Environment Court by a party. *This suggests that for something as important as avoiding new development in high hazard areas, direct statutory provision is to be preferred.*

National direction on managing natural hazard risk under the RMA only exists for the coastal environment. This leaves the rest of the country vulnerable to new development in high hazard areas. IAG New Zealand has recently called for the *implementation of a National Policy Statement to stop development in flood-prone locations*.[31] This could be included in the new NPF under the NBEB.

Under the proposed reforms, the NBEB will identify as a system outcome "the reduction of risks arising from, and better resilience of the environment to, natural hazards and the effects of climate change.[32] The NPF is required to "include content that provides direction for each system outcome"[33] meaning that the NPF will need to provide the direction on the management of natural hazards which is currently missing under the RMA.

6.4 National Policy Statement on Urban Development

At the same time as we lack clear national policy to prevent new development in high hazard zones outside the coast, the NPS on Urban Development 2020 (NPS-UD) directs councils to promote more development (both up and out) in urban areas. This contributes to the issue of permitting development in risky areas (see Policy 3 below).

Policy 3: In relation to tier 1 urban environments [which includes Auckland, Hamilton, Tauranga, Wellington and Christchurch], regional policy statements and district plans enable:

(a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and

(b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and

(c) building heights of at least 6 storeys within at least a walkable catchment of the following:

(i) existing and planned rapid transit stops

(ii) the edge of city centre zones

(iii) the edge of metropolitan centre zones; and

(d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services

As can be seen above, there is no mention of suitability of land, or risks of natural hazards in Policy 3. These are dealt with as "qualifying matters" in section 3.32. The qualifying matters relevant to natural hazard risk include a matter of national importance under section 6, in this case "the management of significant risks from natural hazards" for which there is no current national direction; and a matter required to give effect to the NZCPS, in this case the requirement to "avoid" redevelopment or change in land use that would increase the risk of adverse effects from coastal hazards.

Even if such qualifying matters relevant to natural hazard risk are identified, the NPS-UD puts significant hurdles in the way of councils addressing them:

1. The council must "consider that it is necessary" to specify alternative heights and densities than are required by Policy 3 in order to provide for the matter (section 3.31(2))

2. The council must identify "by location" where the qualifying matter applies (section 3.31(2)(b))

3. The building heights and densities under Policy 3 must only be modified "to the extent necessary" to accommodate the qualifying matter (Policy 4)

4. The council's section 32 evaluation report "must demonstrate" why the council considers that area subject to the qualifying matter

5. The report "must demonstrate" why the council considers the qualifying matter incompatible with the level of development directed by Policy 3

6. The report "must assess" the impact of limiting development capacity, height or density on the provision of development capacity

7. The report "must assess" the costs and broader impacts of imposing those limits.

When assessed as a whole, these requirements seem likely to discourage councils from limiting the density of development in areas with qualifying matters (including high hazard zones) unless the council is extremely determined to do so. In addition, the requirements in items 6 and 7, for councils to undertake assessments, appear unnecessary. If the land is subject to significant natural hazards then a more appropriate starting point might be that it is not intensified irrespective of the impact on provision of development capacity or other broader costs.

In 2021, provisions were inserted into the RMA requiring territorial authorities to also incorporate medium density residential standards into every residential zone.[34] Similar qualifying matters are provided for.[35] It should be noted that qualifying matters only apply to specific provisions that effect density standards (such as building height and coverage) or

the density of urban form enabled by the medium density residential standards and Policy 3. In addition, the density requirements only apply to district plans, and not regional plans, leaving open the possibility of regional plans managing hazard risks through restricting development density in hazard areas.

A spotlight on the implementation of the NPS-UD in Hutt City

Hutt City is located within the Hutt Valley which is subject to multiple natural hazard risks. Foremost, the Wellington Fault Line runs along the western edge of the valley. A significant portion of the urban area is subject to a high risk of liquefaction, particularly areas close to the coast including Petone and other southern suburbs of Lower Hutt.[36] The area is also at risk from land subsidence in the event of an earthquake, which is predicted to be as much as 1.9 metres in Petone which is close to the southern end of the fault line.

The southern parts of the Hutt Valley also feature significant tsunami risk with plans in place for residents to evacuate if such an event occurs. These exposures, combined with climate change induced storm surges and sea level rise, mean that Petone is at considerable risk of inundation by the sea as well as flooding from the Hutt River. Lower Hutt is also at risk from landslides due to the very steep slopes running along the edge of the Valley, slippage which can be generated by earthquakes and/or high rainfall.[37]

In August 2022, to give effect to the NPS-UD, the Hutt City Council introduced Plan Change 56 to enable intensification in residential and commercial areas. Despite the evident multiple hazards, the plan change zoned the majority of Petone as 'High Density Residential' which provided for buildings of at least six storeys. Some hazard qualifying matters were included. The plan change included hazard overlays for the Wellington fault hazard, flood hazard, tsunami and coastal inundation. Not included, however, were hazard overlays for liquefaction or slope stability so these risks were not incorporated into the zoning provisions.

An exclusion zone of 20 metres for residential buildings was placed around the Wellington Fault. Buildings in the flood hazard overlay needed to have floor levels above the predicted 1 per cent flood annual exceedance (ie 100 year flood). Properties in the high coastal hazard area (which in Petone was only mapped by council to include a very small strip along the coastal frontage) could intensify from one to two residential units as a permitted activity, with additional units being non-complying. This appears to be in direct conflict with Policy 25 of the NZCPS which directs councils to "*avoid*", not reduce (and certainly not *increase* such as the case here) redevelopment or change of land use that would increase the risk of adverse effects from coastal hazards.

These exclusions addressed some specific risks (but not all), and still allowed intensification (albeit less than in other areas) in the high coastal hazard areas. More concerning is that they do not appear to factor in the multiple risks that Petone is exposed to, which when taken together, would indicate that the area is not suitable for intensification at all. As stated by Toku Tū Ake Earthquake Commission (EQC) in its submission on the Plan Change:[38]

> Given the current level of risk from multiple natural hazards, and the likelihood that the risk will increase in the near future with climate change, Toku Tū Ake opposes long term planning for high-density residential intensification in Petone … there are other areas of Lower Hutt which offer similar benefits for intensification, and do not put residents at the same level of risk to life and property.
>
> Rather than allowing further development in Petone and Eastbourne, further development should be avoided (prohibited) in the High Coastal Hazard Zone, so the risk is not increasing, and legacy planning issues avoided in the future.

In addition, the EQC submitted that the High Coastal Hazard Zone should be extended to cover most of Petone (rather than only a narrow coastal strip) as most of the area would be subject to storm surge and inundation in the event of a 1.4-1.5 metre sea level rise (with sea level rise very likely to reach 1.3 metres by 2100). The submissions will be heard in April 2023.

The NPS-UD seems to be poorly configured for an increasingly riskier environment under a climate changing world where it is even more important to stop new development in areas at high risk from natural hazards. The policy pushes strongly in the other direction which seems unwise in the light of the impacts of the Auckland Anniversary floods and Cyclone Gabrielle on urban properties.

The NPS-UD should be amended to make it clear that intensification must not happen on land subject to significant natural hazards. This could be achieved through modifications when it is brought into the NPF under the NBEB. The NPF will also need to clarify how conflicts between achieving a reduction of risks arising from "natural hazards and the effects of climate change"[39] on the one hand, and promoting "the ample supply of land for development" and "housing choice and affordability"[40] on the other, should be resolved.

Under the SPB, regional spatial strategies must provide strategic direction on "areas that are vulnerable to significant risks arising from natural hazards, and measures for reducing those risks and increasing resilience".[41] This should enable a strategic approach to be taken to identifying risky areas where development should be avoided, particularly where multiple and cumulative risks are at play. However the SPB falls short of requiring areas that should not be developed, as a result of natural hazard risk, to be identified or areas where affected communities could be relocated to. Natural and built environment plans prepared under the NBEB must be consistent with regional spatial strategies thereby bringing through the strategic direction into land use rules.[42]

6.5 Overall assessment

The current legal framework is not well configured to stop development in hazard zones. The Building Act can be relied on to achieve this, to some extent, but only through the refusal of building consents when the safety of people is at stake. Its provisions do not enable building consent to be withheld when buildings alone might be subject to hazard damage. The Act is currently under review, but the scope of that exercise does not currently include hazard issues.

Under the RMA, councils can refuse to grant subdivision consent when there is a significant risk from natural hazards, but they are not required to do so. It will usually not be possible to exclude development and downzone land in a high hazard zone unless the council offers to purchase the property at market value and the landowner agrees. This acts as a considerable barrier to downzoning, particularly if the council lacks the requisite funds to buy out properties and/or landowners to do not want to sell their land.

The NZCPS provides some clear directives on avoiding redevelopment and land use change in coastal hazard areas. However, there is no similar direction for how councils are to address natural hazards outside the coastal environment. In addition, as can be seen in the Hutt City spotlight above, the policies in the NZCPS appear to have been undermined (at least in practice) by the much more directive provisions of the NPS-UD.

The NPS-UD appears poorly configured to fully address natural hazards. Although providing for natural hazards as qualifying matters, the regime structure effectively discourages councils from taking a strategic long-term approach to addressing cumulative and compounding risks through reducing density. It does however leave open the option for regional plans to address density in hazard areas. This bias for short-termism could be addressed when national policy is brought under the NPF.

The NBEB and SPB should improve the current situation. The NPF is required to provide direction on how to address natural hazards across the entire country and not just within the coastal environment. Regional spatial strategies will provide strategic direction on areas subject to significant natural hazard risks and measures for reducing those risks and increasing resilience. This provides an opportunity to identify areas where development should be excluded at a strategic level. The NBEB provides a stronger tool to acquire affected land, when it is to be downzoned, albeit with a requirement for market value compensation.

Statute or Policy	Effect
Building Act	Can prevent building in areas subject to natural hazards by refusing to issue building consents. *Limitation:* Building consents can only be refused where the building does not comply with the Building Code and there is a risk of loss of life.
Resource Management Act	Councils can refuse to grant a subdivision consent where there is a significant risk from natural hazards but are not required to do so. Councils can rezone land in a district plan to make future development a prohibited or non-complying activity. *Limitation:* Rezoning can be successfully challenged where the zoning would render the land incapable of reasonable use and the council does not acquire the land under the Public Works Act (with compensation) by agreement with the land owner.
New Zealand Coastal Policy Statement	Requires councils to avoid redevelopment or land use change that would increase the risks of adverse effects from coastal hazards. *Limitation:* The NZCPS only applies within the coastal environment. It is also reliant on being implemented in regional and district plans. There is no national policy on natural hazards concerning other parts of the country.
National Policy Statement for Urban Development	Directs territorial authorities to provide for more intensive development in urban areas. *Limitation:* Although natural hazards can be used as a qualifying factor to reduce density, the policy creates significant hurdles to doing this.
National and Built Environment Bill	The NPF is required to provide direction on the management of natural hazards, potentially filling the current gap in national direction under the RMA. Land can be rezoned in a Natural and Built Environment Plan to make future development a prohibited activity. Where the zoning would render the land incapable of reasonable use, this can only be done where the council offers to acquire the land under the Public Works Act (with compensation).
Spatial Planning Bill	Regional spatial strategies must provide strategic direction on areas subject to significant natural hazard risks, and measures for reducing those risks and increasing resilience, so can provide a strategic planning approach to avoiding new development in risky areas.

Figure 4 Summary of statutory provisions which can prevent development in areas subject to natural hazards

Collapse of State Highway 5 due to flooding, Hawkes Bay (Waka Kotahi)

Endnotes

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2 Strang B, 2023, 'Kāinga Ora has thousands of state houses on flood prone land, with more going up', *Radio New Zealand*, 26 April

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4 Gardiner J, 2006, *Regarding the authority's refusal to grant a section 72 waiver for two building consents for proposed buildings on land subject to a natural hazard in Matata, Bay of Plenty*, Determination 2016/34, Ministry of Business, Innovation and Employment, Wellington, at para 8.3.9

5 Building Act 2004, section 3(a)(i)

6 See Gardiner J, 2006, *Regarding the authority's refusal to grant a section 72 waiver for two building consents for proposed buildings on land subject to a natural hazard in Matata, Bay of Plenty*, Determination 2016/34, Ministry of Business, Innovation and Employment, Wellington, at para 8.4.1

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16 Gardiner J, 2006, *Dangerous building notices for houses in Matata, Bay of Plenty*, Determination 2006/116, Department of Building and Housing, Wellington, at paras 5.2.10 and 5.3.1

17 Gardiner J, 2006, *Dangerous building notices for houses in Matata, Bay of Plenty*, Determination 2006/116, Department of Building and Housing, Wellington, at para 8.2.5

18 Gardiner J, 2006, *Dangerous building notices for houses in Matata, Bay of Plenty*, Determination 2006/116, Department of Building and Housing, Wellington, at para 8.3.4

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20 MBIE, 2022, *Review of the building consent system: Issues discussion document*, New Zealand Government, Wellington

21 Resource Management Act 1991, section 106

22 Resource Management Act 1991, section 87A(6)

23 Resource Management Act 1991, section 85(6)

24 Resource Management Act 1991, section 85(3B)

25 Public Works Act 1981, section 62

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28 *Environmental Defence Society v* New Zealand *King Salmon* [2014] NZSC 38, at paras 92-97

29 Building Act 2004, section 113

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31 IAG New Zealand, 2022, *IAG seeks three step plan for natural hazard prone New Zealand homes – commits to being part of the solution*, media release, 18 August, at https://www.iag.co.nz/newsroom/news-releases/iag-seeks-three-step-plan-for-natural-hazard-prone-new-zealand-homes

32 Natural and Built Environment Bill 2022, clause 5(b)(iii)

33 Natural and Built Environment Bill 2022, clause 57

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36 Earthquake Commission – Toka Tū Ake, 2022, *Submission on Proposed Plan Change 56 to the Lower Hutt District Plan*, Hutt City Council, Lower Hutt

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41 Spatial Planning Bill 2022, clauses 16(1)(c)(i) and 17(1)(i)

42 Natural and Built Environment Bill 2022, clause 104

7 Undertaking adaptation planning

Community discussion, Wainui Beach

A key component of a managed retreat process is adaptation planning which enables a community to design a response to growing natural hazard and climate change risks. A planning approach increasingly used in contexts of uncertainty and risk is Dynamic Adaptive Pathways Planning (DAPP). DAPP identifies options and future response pathways, which can be adopted dependant on how the risk evolves in the future. Such planning includes the identification of preferred and alternative pathways for adaptation and triggers associated with their implementation.

A DAPP plan will normally include a range of short and long term actions. They may include maintaining the *status quo* (with no further development or intensification) until a certain level of risk is reached, investing in protection (assuming retreat or enhanced protection may be required at some future time), and preparing to retreat once the risk has become intolerable. An important component of DAPP is monitoring to enable effective implementation. This includes tracking relevant information to identify when trigger points are being approached.[1]

The Ministry for the Environment (MFE) guidance on coastal hazards for local government, which is in the process of being updated, currently identifies five steps in the adaptation decision cycle (or DAPP) which are (see Figure 5):[2]

- building a shared understanding of processes, hazards and community resilience.
- exploring the future and how communities are affected by changing hazard risk in coastal areas.
- building adaptive pathways for a sustainable future.
- implementing the strategy in practice over time.
- monitoring the strategy using early signals and triggers (decision points) for adjusting between pathways.

Establishing when a risk might become "intolerable" is not a straightforward exercise. What is an acceptable risk to one person might be considered intolerable to another and a person's risk tolerance can change over time. There are no established criteria in Aotearoa for determining such risk levels. In some overseas jurisdictions a risk of 10^{-4} per annum (or 1 person in every 10,000 at risk of being killed each year) is considered the boundary between tolerable and unacceptable risk.[3] It means that if a person lived in the risky location for their entire life (of 80 years) they would have slightly less than a 1 in 100 chance of being killed by the hazard.[4]

Instead of defining different levels of risk (ie acceptable, tolerable and intolerable) the national climate change risk assessment adopted urgency categories as used in the United Kingdom's national climate risk assessment. The highest urgency category "more action needed" was defined as "new, stronger or different government policies or implementation activities – over and above those already planned – are needed in the next five years to reduce long-term vulnerability to climate change".[5]

We examine the extent to which the statutory framework makes provision for adaptive planning below.

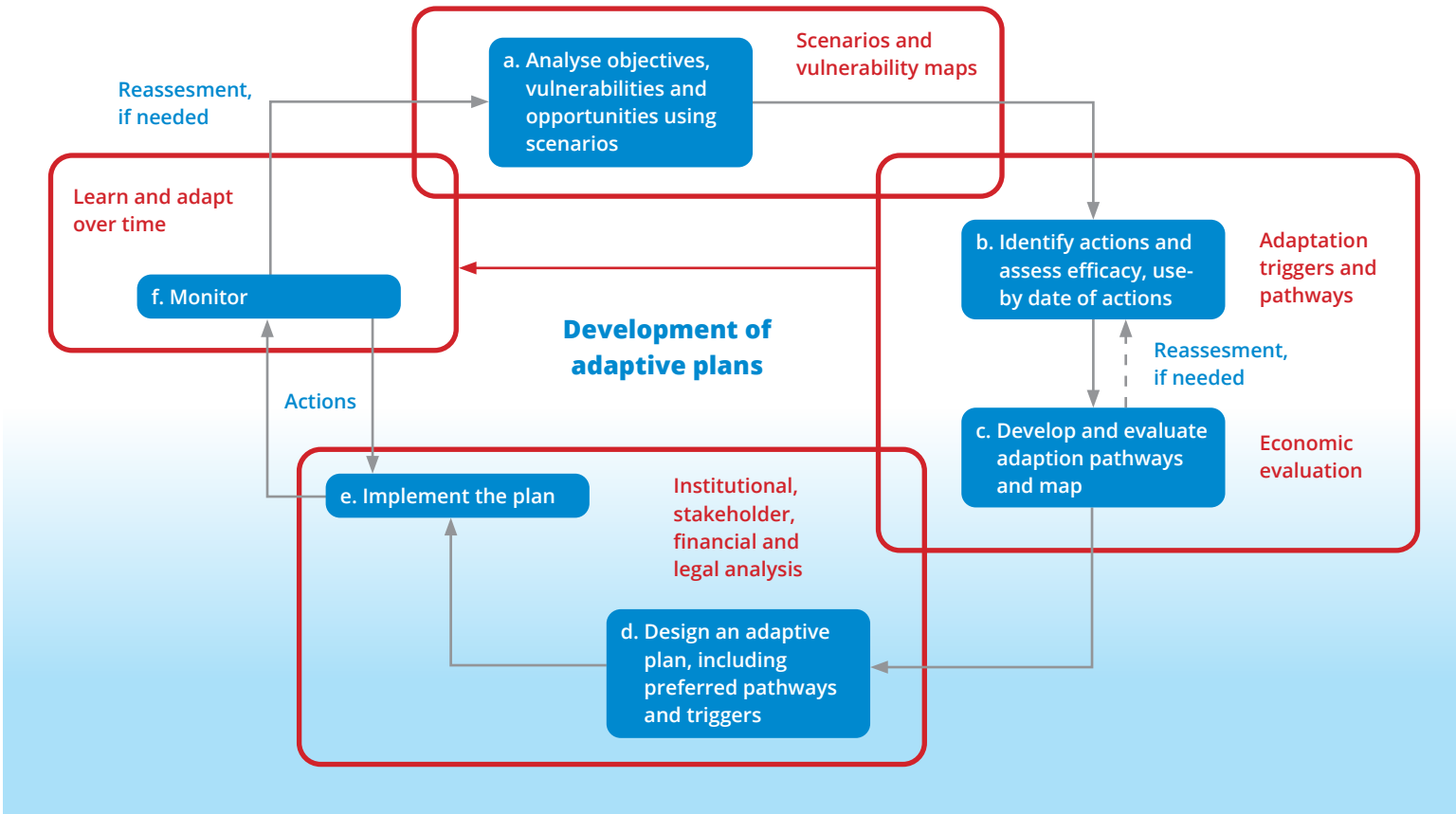


Figure 5 Dynamic adaptive pathways planning approach[6]

7.1 National adaptation planning under the Climate Change Response Act

Under the Climate Change Response Act, the Minister must prepare a national adaptation plan in response to each six-yearly national climate change risk assessment.[7] The plan must set out the Government's objectives for adapting to climate change, strategies, proposals and policies for meeting those objectives, timeframes for implementation and measures and indicators for monitoring progress.[8]

The first national adaptation plan was released in August 2022.[9] Its purpose was articulated as being "to enable New Zealanders to prepare for and adapt to the impacts of climate change". Its goals included to "reduce vulnerability", "enhance adaptive capacity" and "strengthen resilience" to climate change.[10] The plan sets out a range of actions that the Government intends to take. These actions include producing guidance on DAPP for central and local government within the first two years, guidance on integrating mātauranga Māori into adaptive planning and working with mana whenua in years 3 to 4, and guidance in preparing adaptation plans in years 1 to 4.[11] Such documents will likely be useful, but fall short of providing statutory backing for DAPP processes.

When preparing regional and district plans under the RMA (see below), councils must have regard to the national adaptation plan.[12] In the NBEB, this linkage is moved up to the national policy level with a requirement that the Minister ensures that his or her decision on the final content of the NPF is "not inconsistent" with any relevant provisions in a national adaptation plan.[13] This indicates that future national adaptation plans should be prepared with their applicability to the preparation of natural and built environment plans in mind.

7.2 Consultative processes under the Local Government Act

The LGA anticipates that councils will become involved in a wide range of planning processes with their communities. For this reason, in section 82 it sets out specific requirements for council consultation and decision-making. The principles of consultation include that:

- Affected and interested parties should be provided with "reasonable access to relevant information"
- They "should be encouraged to present their views to the local authority"
- They "should be given clear information" concerning "the purpose of the consultation and the scope of decisions to be taken"
- They "should have a reasonable opportunity to present their views to the local authority"
- Those views should be received with "an open mind" and be given "due consideration"
- The submitters should have access to "a clear record or description of the relevant decisions" and explanatory material including reports.

A local authority must also "ensure that it has in place processes for consulting with Māori in accordance with" the above requirements.[14]

When making decisions councils must also, under section 77, "seek to identify all reasonably practicable options for the achievement of the objective of the decision" and "assess the options in terms of their advantages and disadvantages". Additionally, where significant decisions in relation to land or a body of water are involved (which would usually be the case with adaptive planning and managed retreat) they must "take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, wāhi tapu, valued flora and fauna, and other taonga".[15]

The LGA also provides for the development of a long term plan which has relevance to climate adaptation. However the long term plan only covers at least 10 years , but it must include an infrastructure strategy (which must be over at least 30 years) and a financial strategy.[16]

The provisions of the LGA provide a clear overall framework for councils to undertake adaptive planning in consultation with the community. That said, they do not provide a framework for the various stages of DAPP.

A spotlight on the Clifton to Tangoio Coastal Hazards Strategy 2120

Hawkes Bay is an area of multiple risks. It borders on the Hikurangi subduction zone, situated just off the coast, which creates significant earthquake and tsunami risks. Much of Napier is built on low-lying land uplifted by the 1931 earthquake, with nearly 8,000 homes being less than 1.5 metres from mean high water springs The Heretaunga Plains, in which Napier and Hastings sit, is also subject to flooding with a network of pump stations and 248 kilometres of stopbanks designed to mitigate the risk. High groundwater around Napier, and soils subject to liquefaction, also create significant further risks factors.[17]

When Cyclone Gabrielle impacted the region, in February 2023, the nature of this risk hit the national consciousness. The event marked the "most significant weather event to hit Hawkes Bay since regional council records began". Rainfall levels were 500 per cent above normal for the region and river flows averaged more than 1,000 per cent above normal. Five kilometres of the stopbank network was breached during the flooding. Tragically eight people lost their lives, 87 homes were red stickered and 1,034 homes yellow stickered.[18] Many farms and orchards were damaged.

Although the damage from Cyclone Gabrielle stemmed largely from very high rainfall and rivers breaching their banks, it was the coastal erosion hazard that had previously preoccupied the attention of the three councils in the region. Napier City Council, Hastings District Council and Hawkes Bay Regional Council had come together in 2014 to prepare a coastal hazards strategy. The strategy incorporated a DAPP methodology.[19]

The process started with the councils commissioning a technical assessment, to help define the problem, which considered coastal hazards across 16 coastal units. This was followed by the formation of multiple 'assessment panels' representing the interests of communities, tangata whenua and the relevant agencies. The panels developed responses to the coastal hazards. Their work was informed by the technical assessments, a cultural values assessment and a social impact assessment and valuation. These responses were then brought together into a series of recommended actions. These included,

for the nine priority areas, a mix of the status quo, beach renourishment, control structures, inundation protection and sea walls. Despite the significant risks, managed retreat was only contemplated for three out of the nine areas, and then only after at least 50 years.[20]

It was during implementation that the councils started to encounter significant roadblocks in the planning process. First, the total cost of the works was high, in 2016 costed at $130-$285 million over the 100 year planning horizon. Secondly, there was little national guidance on who should fund such works let alone undertake the ongoing maintenance and repairs.[21]

The councils looked to establish a fund to offset some of these future costs, particularly the 'public good' component of the works. They proposed targeted rates (of around $30 per property per annum) to collect the remaining costs off the beneficiaries. But this has not proceeded due to the councils disagreeing on who should collect the targeted rates. More fundamentally, the councils disagreed on who should take the lead role in coastal adaptation in the region.[22]

This case illustrates that without a stronger framework for adaptation planning, specifically concerning responsibilities and sources of funding, plans developed by the community will likely struggle to be implemented.

7.3 Statutory planning under the Resource Management Act

The RMA provides for a range of policies and plans including national policy statements (and the NZCPS). Regional policy statements inform the integrated management of the natural and physical resources of the whole region. Regional plans then assist regional councils to undertake their functions including control of the use of land for the avoidance or mitigation of natural hazards. District plans assist territorial authorities to carry out their functions including the control of the effects of land use to avoid or mitigate natural hazards.

The NZCPS provides high level policy for adaptation planning which must be given effect to in council RMA policies and plans. Policy 25(c) specifically requires councils "in areas potentially affected by coastal hazards over at least the next 100 years" to "encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, *including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances*, and designing for relocatability or recoverability from hazard events" (emphasis added). This policy statement will be incorporated into the first generation national planning framework under the NBEB.

Under the NBEB the various RMA plans will be combined into regional natural and built environment plans. The SPB requires new regional spatial strategies to provide strategic direction on key matters including:[23]

> areas that are vulnerable to the effects of climate change both now and in the future, and measures for addressing those effects and increasing resilience in the region, including indicative locations for—
>
> (i) major new infrastructure that would help to address the effects of climate change in the region; and
>
> (ii) areas that are suitable for land use changes that would promote climate change mitigation and adaptation:

All these planning documents must be reviewed every 10 years, a relatively short time horizon. The new regional spatial strategies will provide a broad spatial framework for adaptation planning. The regional and district plans (and replacement natural and built environment plans) provide a rules-based framework for consenting, and therefore are different to a DAPP plan, but could be used to implement such a plan. For example, a pre-determined trigger in the DAPP plan, could initiate a RMA plan change to implement the preferred adaptation pathway at that point. Or alternatively, DAPP could be pre-built into the planning framework, such as through providing for a different activity status to kick in when a trigger point has been reached (eg development becomes non-complying or prohibited when coastal erosion reaches a pre-determined distance from affected properties).

7.4 Māori adaptation planning

Many Māori communities are in the process of undertaking and/or implementing climate change adaptation planning. There are several hooks for such planning to be recognised and implemented through statutory processes. The RMA provides for Mana Whakahone a Rohe which are designed to set out how tangata whenua, through their iwi authorities, can participate in resource management and decision-making processes under the Act.[24] In addition, when preparing plans councils must "take into account" relevant planning documents recognised by iwi and lodged with the council.[25]

These provisions have been strengthened under the NBEB. The Mana Whakahone a Rohe must record the agreement of the parties about how they will work together "on matters relating to climate change adaptation and natural hazards".[26] A regional planning committee must "have particular regard to" any relevant planning document recognised by an iwi authority[27] which could include a tribal climate adaptation strategy or plan. Also, an iwi or hapū may provide a statement on te Oranga o te Taiao to the relevant planning committee at any time.[28] All this enables iwi, hapū and whanau to use their own adaptation planning to influence other statutory planning documents.

Coastal erosion at Clifton

A spotlight on the Ngā Rauru Kiitahi climate change strategy

This climate change strategy begins with a whakatauaakii "Ka mate kāinga tahi, ka ora kāinga rua" which can be roughly translated to mean "when place of abode retires, another as prepared, emerges". It embodies concepts such as preparedness, agility, resilience and forward thinking.[29] The strategy covers a wide range of topics including climate risk, impacts on Ngā Rauru Kiitahi iwi, biodiversity, food security, water, managed retreat, energy, infrastructure, whenua and hauora. The core underlying principle is "achieving *balance within us, among us and with the environment as an extension of who we ar*e."[30] The strategy's managed retreat section includes a range of actions such as:

- Developing and implementing a detailed managed retreat plan
- Developing marae strategy and guidelines appropriate to the specific locations, including flood protection, relocation and establishing alternative power
- Investigating suitable land for relocation
- Exploring the history of potential new sites through a cultural investigation
- Identifying funding options to cover the costs of relocating and re-establishing ecosystems in the new community locations[31]
- Developing the capacity of the iwi to understand the complexities of managed retreat and effectively participate in national and local managed retreat forums.[32]

7.5 Overall assessment

The Climate Change Response Act requires the preparation of a national adaptation plan in response to each six yearly national climate change assessment. Local authorities must have regard to it when preparing RMA plans. The new national planning framework under the NBEB must not be inconsistent with it.[33] However, there is currently no statutory provision for regional and local adaptation planning in Aotearoa. The LGA provides local authorities a broad framework of consultation principles and decision-making requirements, but there is no explicit provision for implementation, including funding.

There is also the issue of how well a DAPP planning approach will fit into the three-yearly council electoral cycle and preparation of long term plans (with their 10 year time horizon). However, if the triggers in the DAPP are set well in advance, long term plans could include funding provision for whatever pathway is to be adopted.

The new regional spatial strategies under the SPB should provide a spatial framework for adaptation planning. Statutory planning under the RMA (and NBEB) provides a vehicle for implementing parts of an adaptation plan, such as through providing a policy and rule framework for land use, but does not comprise adaptation planning in itself. The RMA and proposed NBEB provide several "hooks" for Māori adaptation planning to influence the statutory plans, but such linkages are not as strong under the LGA.

Statute or Policy	Effect
Climate Change Response Act	The Minister must prepare a national adaptation plan in response to the six-yearly national climate change risk assessment.
Local Government Act	Provides consultation principles and decision-making requirements for councils. Councils must prepare long term plans (time frame of at least 10 years) incorporating an infrastructure strategy (time frame of at least 30 years) and financial strategy. *Limitation*: No explicit framework for the implementation of DAPP plans.
Resource Management Act	The NZCPS provides a high level policy framework for managed retreat. Councils must prepare regional policy statements, regional plans and district plans which have at least a 10 year time horizon. When preparing plans councils must *take into account* relevant iwi planning documents lodged with them. Local authorities must have regard to the national adaptation plan when preparing regional and district plans under the RMA. *Limitation:* No explicit provision for development or implementation of adaptation plans.
National and Built Environment Bill	The NPF must not be inconsistent with the national adaptation plan. The first generation will likely incorporate the high level policy guidance in the NZCPS. Regional planning committees must prepare natural and built environment plans which have at least a 10 year time horizon. The Mana Whakahone a Rohe must record the agreement of the parties about how they will work together "on matters relating to climate change adaptation and natural hazards". A regional planning committee must *have particular regard to* any relevant planning document recognised by an iwi authority which could include a tribal climate adaptation strategy or plan. An iwi or hapū may provide a statement on te Oranga o te Taiao to the relevant planning committee at any time.
Spatial Planning Bill	Regional spatial strategies must provide strategic direction on areas subject to significant natural hazard risks and measures for reducing those risks and increasing resilience so can provide a strategic planning approach to responding to natural hazards.

Figure 6 Summary of statutory provisions for adaptation planning

Endnotes

1 Bell R, J Lawrence, S Allan, P Blackett and S Stephens, 2017, *Coastal hazards and climate change: Guidance for local government*, Ministry for the Environment, Wellington, at 197-199

2 Bell R, J Lawrence, S Allan, P Blackett and S Stephens, 2017, *Coastal hazards and climate change: Guidance for local government*, Ministry for the Environment, Wellington, at 193-194

3 Tonkin & Taylor Limited, 2013, *Quantitative landslide and debris flow hazard assessment: Matatā escarpment*, report to the Whakatāne District Council, at 77

4 See https://ehq-production-australia.s3.ap-southeast-2.amazonaws.com/905f6120ffdae2d20891b68cd3977cd550597a79/original/1637702323/ccb63e9f47a9c5f7bc700338b3fefdec_QLDC_Gorge_Road_Natural_Hazards_A0_Info_Board_TWO_C_Nov21_WEB.pdf?X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIA4KKNQAKIOR7VAOP4%2F20230411%2Fap-southeast-2%2Fs3%2Faws4_request&X-Amz-Date=20230411T214246Z&X-Amz-Expires=300&X-Amz-SignedHeaders=host&X-Amz-Signature=e9940f0ef2e569a364f2a696f6c111d0ff1f8c8202d6e67647f5d89beaeb6dc9

5 Ministry for the Environment, 2019, *Arotakenga huringa āhuarangi: A framework for the national climate change risk assessment for Aotearoa New Zealand*, Ministry for the Environment, Wellington, at 78-79

6 Bell R, J Lawrence, S Allan, P Blackett and S Stephens, 2017, *Coastal hazards and climate change: Guidance for local government*, Ministry for the Environment, Wellington, at 198

7 Climate Change Response Act 2002, section 5ZS(1)

8 Climate Change Response Act 2002, section 5ZS(2)

9 Ministry for the Environment, 2022, *Aotearoa New Zealand's first national adaptation plan*, Ministry or the Environment, Wellington

10 Ministry for the Environment, 2022, *Aotearoa New Zealand's first national adaptation plan*, Ministry or the Environment, Wellington, at Figure 1

11 Ministry for the Environment, 2022, *Aotearoa New Zealand's first national adaptation plan*, Ministry or the Environment, Wellington, at 51-52

12 Resource Management Act 1991, sections 66(2)(g) and 74(2)(e)

13 Natural and Built Environment Bill 2022, clause 21(3)(b)

14 Local Government Act 2002, section 82

15 Local Government Act 2002, section 77

16 Local Government Act 2002, sections 101A and 101B

17 Ministry for the Environment and Hawkes Bay Regional Council, 2020, *Case study: Challenges with implementing the Clifton to Tangoio coastal hazards strategy 2020*, Ministry for the Environment, Wellington, at 7

18 Pocock J, 2023, 'Cyclone Gabrielle: One month on from Hawke's Bay's "most significant" recorded weather event', *Hawkes Bay Today*, 13 March

19 Ministry for the Environment and Hawkes Bay Regional Council, 2020, *Case study: Challenges with implementing the Clifton to Tangoio coastal hazards strategy 2020*, Ministry for the Environment, Wellington, at 9

20 Ministry for the Environment and Hawkes Bay Regional Council, 2020, *Case study: Challenges with implementing the Clifton to Tangoio coastal hazards strategy 2020*, Ministry for the Environment, Wellington, at 9-10

21 Ministry for the Environment and Hawkes Bay Regional Council, 2020, *Case study: Challenges with implementing the Clifton to Tangoio coastal hazards strategy 2020*, Ministry for the Environment, Wellington, at 12-13

22 Ministry for the Environment and Hawkes Bay Regional Council, 2020, *Case study: Challenges with implementing the Clifton to Tangoio coastal hazards strategy 2020*, Ministry for the Environment, Wellington, at 14

23 Spatial Planning Bill 2022, clause 17(1)(j)

24 Resource Management Act 1991, section 58M

25 Resource Management Act 1991, sections 66(2A)(a) and 74(2A)

26 Natural and Built Environment Bill 2022, clause 682(1)(c)(iv)

27 Natural and Built Environment Bill 2022, clause 107(1)(c)

28 Natural and Built Environment Bill 2022, clause 106

29 Te Kaahui o Rauru and the Ministry for the Environment, 2021, Ka mate kaainga tahi, ka ora kaainga rua: the Ngaa Rauru Kiitahi climate change strategy, at https://environment.govt.nz/assets/publications/ngaa-rauru-kiitahi-climate-change-strategy.pdf, at 1

30 Te Kaahui o Rauru and the Ministry for the Environment, 2021, Ka mate kaainga tahi, ka ora kaainga rua: the Ngaa Rauru Kiitahi climate change strategy, at https://environment.govt.nz/assets/publications/ngaa-rauru-kiitahi-climate-change-strategy.pdf, at 5

31 Te Kaahui o Rauru and the Ministry for the Environment, 2021, Ka mate kaainga tahi, ka ora kaainga rua: the Ngaa Rauru Kiitahi climate change strategy, at https://environment.govt.nz/assets/publications/ngaa-rauru-kiitahi-climate-change-strategy.pdf, at 44

32 Te Kaahui o Rauru and the Ministry for the Environment, 2021, Ka mate kaainga tahi, ka ora kaainga rua: the Ngaa Rauru Kiitahi climate change strategy, at https://environment.govt.nz/assets/publications/ngaa-rauru-kiitahi-climate-change-strategy.pdf, at 45

33 Natural and Built Environment Bill 2022, schedule 6, clause 21

8 Rezoning land

Coastal erosion at Haumoana

As part of the relocation process, local authorities may decide to rezone land so that it cannot be occupied for residential purposes in the future. We have already discussed the available statutory powers to rezone land to prevent future development. We now turn our focus on the ability to rezone developed land to prevent residential use from continuing. This raises the issue of the ability to remove what is termed 'existing use rights'.

The RMA is protective of existing use rights. Section 10 provides that land may be used in a manner that contravenes a rule in a district plan, so long as the use was lawfully established prior to the rule becoming operative (or a proposed plan being notified), and the effects of the use are of a similar character, intensity and scale. This means that it is not currently possible to exclude existing uses in a high hazard zone through changing the zoning in a *district* plan.

However, the protection of existing uses does not apply to rules in a *regional* plan. Under the RMA, regional councils have as a function "the control of the use of land for the purpose of the avoidance or mitigation of natural hazards".[1] This makes it clear that regional councils do have a role in restricting land use in high hazard zones, and other provisions of the Act enable them to do so through rules in a regional plan.[2]

That said, such rules are still subject to the section 85 restrictions on rendering land incapable of reasonable use (as discussed in section 6 above), so could potentially be successfully challenged on this basis by existing occupiers in the same way that future developers can challenge restrictions on future development. This has yet to be tested in the courts.

The equivalent of section 10 of the RMA, which protects existing use rights, is carried over in clause 26(1) of the NBEB. It applies to plan rules within the jurisdiction of the territorial authority (so those contained in the former district plans). However, a new requirement (clause 26(2)) has been added which requires an existing land use to comply with a plan rule that gives effect to the NPF as it relates to the "reduction or mitigation of, or adaptation to, the risks associated with" natural hazards and climate change.

This means that existing uses are no longer protected from plan changes required to reduce climate change risks including changing use. Notably, this only applies if the NPF expressly states that it applies, and it is subject to the reasonable use requirement (as discussed in section 6 above) under clause 139.

A spotlight on downzoning land at Matatā to exclude residential use

In 2018, Whakatāne District Council notified Plan Change 1 to the Whakatāne District Plan. This identified areas on the fanhead of the Awatarariki Stream as high, medium and low risk. The high risk area was proposed to be rezoned from residential to coastal protection. Residential activities would be prohibited from 31 March 2021. However, this would only affect future uses as a change to a district plan could not extinguish existing uses including the occupation of existing houses.

As rules in a regional plan can extinguish existing uses, the District Council lodged a private plan change with the Bay of Plenty Regional Council seeking to amend the Regional Natural Resources Plan in order to prevent residential activities continuing in the high risk area after 31 March 2021. This affected 21 properties. The private plan change request was lodged after the Regional Council declined to initiate the plan change itself.

Plan Change 17 was notified in 2018 and eight submissions and two further submissions were received. These were heard by an Independent Hearings Panel in March 2020, and a decision was notified in April 2020, upholding the plan changes. An Environment Court appeal was then lodged by some residents but an agreement was eventually reached to settle the appeal. In its decision on the proposed settlement, issued in December 2020, the Environment Court found that the proposed plan changes were justified. The changes became operative in March 2021.

Despite reference to the reasonable use provisions in section 85, the Environment Court did not explore their application to the circumstances at Matatā. This was on the basis that the parties had reached a voluntary agreement for the residents to retreat on the basis that they were offered compensation for their properties.[3]

Statute or policy	Effect
Resource Management Act	Changing rules in a district plan cannot extinguish existing use rights. Changing rules in a regional plan, for the purpose of the avoidance or mitigation of natural hazards, can extinguish existing use rights. *Limitation:* The plan provisions are still subject to the section 85 qualification regarding reasonable use of land so may not be implementable in practice.
Natural and Built Environment Bill	Rezoning land in a Natural and Built Environment Plan, through a rule within the jurisdiction of a territorial authority, can extinguish existing use rights if it gives effect to the NPF, relates to the "reduction or mitigation of, or adaptation to, the risks associated with" natural hazards and climate change, and the NPF expressly states that it can do so. Rezoning land in a Natural and Built Environment Plan, through a rule within the jurisdiction of a regional council, can extinguish existing use rights if it is for the avoidance or mitigation of natural hazards. *Limitation:* The above powers are still subject to the reasonable use requirement under clause 139.

Figure 7 Summary of statutory provisions which can extinguish existing use rights in areas subject to natural hazards

Endnotes

1 Resource Management Act 1991, section 30(1)(c)(iv)

2 See *Awatarariki Residents Inc v Bay of Plenty Regional Council* [2020] NZEnvC 215, at [10]

3 *Awatarariki Residents Inc v Bay of Plenty Regional Council* [2020] NZEnvC 215, at [13] and [14]

9 Acquiring properties and providing compensation

Red stickered homes at Piha

Any managed relocation policy will almost certainly require public bodies to voluntarily or compulsorily acquire private properties. We now review legal powers of acquisition as well as provisions relevant to compensation.

9.1 Property acquisition under the Public Works Act

The Public Works Act empowers the Minister of Land Information to acquire any land (including Māori land) required for a Government work and empowers local government to acquire any land required for a local work for which it has financial responsibility.[1] A "Government work" is defined in the Act as:[2]

> a work or an intended work that is to be constructed, undertaken, established, managed, operated, or maintained by or under the control of the Crown or any Minister of the Crown for any public purpose … even where the purpose of holding or acquiring the land is to ensure that it remains in an undeveloped state.

Clearly this means that the Crown can acquire land under the Act to stop it being developed (ie for conservation purposes). However, the key question is whether the Act enables the Crown to acquire developed land in a high hazard zone in order to revert it back into an undeveloped state by removing buildings and structures. A local work has a similar definition being "a work constructed or intended to be constructed by or under the control of a local authority, or for the time being under the control of a local authority".[3] However this term lacks the specific reference to acquiring land to either deconstruct existing structures or ensure it remains undeveloped.

The definition of "work" under the Act is very wide and applies to "every use of land" which the Crown or local authority is authorised to "construct, undertake, establish, manage, operate or maintain by or under this Act or any other Act". This appears to contemplate the public entity building something or operating some works, rather than removing buildings in high risk areas to return land to an undeveloped state.

Such acquisition can be by agreement, or the land can be taken compulsorily. If the land sought for acquisition by agreement is Māori freehold land (and is beneficially owned by more than four persons and is not vested in a trustee), the Māori Land Court deals with the matter on behalf of the owners.[4] At this point the Te Ture Whenua Māori Act would come into play. This Act sets out in the preamble its underlying purpose, which is to retain Māori land in Māori ownership. This emphasises the complicated issues around whether Māori land should or could be acquired for managed retreat, with the primary objective of the Māori Land Court being to promote and assist in achieving the retention of Māori land ownership.[5] The preamble states:

> And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation,

development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu:

If general land is to be taken compulsorily, the landowner can object to the Environment Court[6] with the Court tasked with deciding "whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken".[7]

The Public Works Act sets out how compensation is to be determined for land that is taken either voluntarily or compulsorily. It provides a clear starting point that where land is taken "the owner of the land shall be entitled to full compensation".[8] This question is then how to value full compensation. The Act provides that the value of the land taken is to be "the amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date [the date the land vests in the public authority] might be expected to realise".[9]

The obvious problem with applying this method of valuation is that the market value of land when it is acquired for managed retreat may be very low, or even non-existent, due to the land being in a high hazard zone and/or being damaged as a result of a natural hazard. This is the reason why compensation in the case of Matatā and the Christchurch red zone were based on values prior to the hazard occurring (see spotlights below).

A second issue is that the requirement for full compensation does not contemplate other compensation formula which government might seek to apply to managed retreat (as set out in Boston 2023)[10] and which may not amount to "full" compensation. It also does not contemplate more innovative approaches such as acquisition of property and then leaseback to the former owner for a period of time until the risk becomes intolerable (referred to as a 'climate lease').[11]

Another issue with land acquisition under the Public Works Act is the requirement to offer it back to the previous owner (ie the parties who the land was acquired from in the first place) if the land is subsequently disposed of. This is a requirement unless the Chief Executive of Land Information New Zealand (LINZ) considers it "would be impracticable, unreasonable, or unfair to do so" or "there has been a significant change in the character of the land".[12] There are also rights of first refusal incorporated into many Treaty settlements which might apply depending on when the Crown acquired the land.

A spotlight on Treaty settlement right of first refusal

In the context of Treaty settlement deeds, the right of first refusal is the right of the iwi or hapū concerned to be given the opportunity to purchase land being disposed of by the Crown ahead of any other prospective purchaser. For example, the Ngāi Tahu Claims Settlement Act 1998 provides that the Crown may not dispose of land within the Ngāi Tahu claims area without first notifying Te Rūnanga o Ngāi Tahu and offering to sell the land to the tribe first.[13] However, this only applies to land that was vested in the Crown when the statute was enacted (1998) so would not apply to land subsequently acquired for the purposes of managed retreat.

It should also be noted here, as discussed in section 8 above, that where a council wishes to downzone a property to exclude existing uses and/or future development, and this renders it incapable of reasonable use, it can be directed by the Environment Court (under the RMA) to acquire the property with agreement from the land owner. In such a case, the provisions of the Public Works Act apply to the acquisition, including the amount of compensation to be paid.

Wharenui, Whakarewarewa

9.2 Property acquisition under the Land Act

With approval of the Minister, the Commissioner of Crown Lands is able to purchase land (including Māori land) for "any government purpose" under the Land Act.[14] "Any government purpose" is not defined but would be broader than a "government work" under the Public Works Act. Land acquisition under the Land Act can only be undertaken on a voluntary basis.

In practice, LINZ needs to obtain approval of the Commissioner before commencing negotiations to purchase any land. To obtain approval, LINZ provides the Commissioner with a detailed 'submission' setting out property details, the reasons for the proposed purchase, a valuation of the land, a check of all risks and liabilities associated with it and other relevant information. The Act does not set the basis for the price to be paid for the land, leaving that up to negotiations. It does require the Commissioner to obtain a valuation from a "competent valuer" but does not prescribe a basis for the valuation.[15]

Spotlight on the purchase of residential property in Huntly East under the Land Act

The Huntly East Subsidence Policy 1997 provides for the Crown's purchase of properties which suffer the effects of subsidence caused by the Crown's mining of the south section of the Huntly East coal mine.[16] The policy requires the Crown to purchase properties that are irreparably damaged at a price based on the current market value as if no subsidence had occurred or was expected to occur. Owners of an affected property can try to sell their property on the market first, but if this is unsuccessful because of public concern about subsidence, then the Crown must purchase the land instead. In accordance with the policy, over 200 houses were purchased by the Crown under the Land Act – mostly in the 1990s and early 2000s when land subsidence was most active.

Land acquired for managed relocation under the Land Act could be set apart as reserve land. The Act includes provision for Crown land to be set apart as reserve if that outcome is desirable in the public interest[17] and provides that land held for State Housing under the Housing Act 1955 can be made reserve land.[18]

The power to acquire land may also have utility for broader climate adaptation purposes including providing room for indigenous species and habitats to adapt. Many of our endemic species are already at risk from climate change related effects and may require new habitats in order too adapt. In future, the Crown may see value in acquiring strategically located land which could be restored as biodiversity retreats for species affected by climate change, or as ecological corridors to enable the movement of those species to more suitable habitats. Such land could be acquired under the Public Works Act or Land Act.

Dune vegetation, Waikawau Bay

9.3 Property acquisition under the Local Government Act

Local authorities can acquire land from willing sellers under their general powers provided in the LGA. Under section 12(2) of the Act, local authorities have "full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction" which would include land purchase. These powers must be exercised within their broad purpose which is "to promote the social, economic, environmental and cultural well-being of communities in the present and for the future".[19]

All local authority decisions must be made in accordance with procedures set out under the Act. These include identifying all reasonable practicable options and assessing the options in terms of advantages and disadvantages. Where it involves a significant decision in relation to land or a body of water (as in the case of managed retreat) councils must "take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga".[20] The views and preferences of interested and affected persons must be considered.[21] In addition, Māori must be given the opportunity to contribute to the decision-making process.[22]

A spotlight on the purchase of residential property at Matatā under the Local Government Act

When exploring options to purchase properties located in the high risk area in Matatā, the Whakatāne District Council decided not to do so under the Public Works Act. A preparatory assessment had concluded that providing property owners "with an opportunity to relocate away from an environment with a high life safety risk" was not a "public work".[23] This conclusion was apparently based on legal advice the council received to the effect that the Public Works Act could not be used for managed retreat and the subsequent conversion of the land to a public reserve.[24]

Instead, the Council decided to negotiate with land owners directly using its broad powers under the LGA. Compensation was offered based on independent valuations of current market value that did not account for the impacts of the hazard. Contributions were also made towards legal fees, relocation costs (where the property was the principal place of residence) and any mortgage break fees. The cost of the buyout was shared equally between central government, the Whakatāne District Council and the Bay of Plenty Regional Council.

9.4 Property acquisition under the Urban Development Act

The Urban Development Act provides for land acquisition on a voluntary or compulsory basis. Under the Act, the Minister for Land Information can acquire or take land for a "specified work" if requested by Kāinga Ora. Such taking of land must be in accordance with the Public Works Act provisions.[25] However, alternative compensation can be agreed outside the provisions of that Act, so that the property owner receives compensation of "any amount, and in any form".[26]

Certain categories of land are protected from acquisition and development under the Act. These categories include:

- Reserves and national parks
- Māori customary land
- Māori reserve land
- Land subject to customary marine title or protected customary rights
- Land forming part of a natural feature that has been declared a legal entity (eg Te Urewera), and Tāmaki Makaurau maunga
- Other categories of Māori land that can only be acquired by agreement[27]

The purpose of the Urban Development Act, which is to "facilitate urban development"[28] along with its orientation towards undertaking integrated urban development projects, presents the main obstacle for using the Act's provisions to acquire land intolerably exposed to natural hazard.[29] For this reason it is more suited to developing new settlements for people who are moving from high hazard areas as discussed in section 10 below.

9.5 Property acquisition under special legislation

In response to the Christchurch earthquakes, the government passed special legislation to enable the acquisition of properties in areas where it was unsafe to rebuild. This took the form of the Canterbury Earthquake Recovery Act 2011 (now repealed) which provided for both voluntary[30] and compulsory[31] acquisition of land. The only requirement was that "the Minister considers that land should be taken in the name of the Crown."[32]

Where land was to be compulsorily acquired, the Act provided that the person who suffered loss was entitled to compensation from the Crown and could make a claim for it. The Minister then determined whether compensation was payable and the amount owing, having regard to current market value and in accordance with the Public Works Act.[33] This has the same problems as noted for the Public Works Act, in section 9 above, in that the current market value after the damage has occurred will be much less than a prior market value.

The Christchurch recovery saw no land compulsorily acquired under the Act. However, the government did make various offers to voluntarily buy-out land in the red zone. These were not based on the then current (2011) market value but on the most recent rating valuation which dated back to 2007. In this way, compensation was not based on current market valuation but on a pre-damage/risk value.

Not all property owners were offered the full 2007 rating value. The government distinguished between different categories of property owners based on type of use and insurance status. The policy to base compensation largely on insurance status was later overturned by the Supreme Court (see spotlight below).

A spotlight on the level of compensation offered to property owners in the Christchurch red zone

After significant earthquakes in 2010 and 2011 which hit the Canterbury region, the government classified land into zones according to the extent of damage. Areas where it was deemed unsafe to rebuild were classified 'red zones'. The government then made various offers of compensation to red zoned property owners in order to acquire their properties on a voluntary basis. The lawfulness of the compensation offered to affected property owners was considered by the Supreme Court in the *Quake Outcasts* case.[34]

In 2011, owners of insured properties in the Christchurch red zone were offered 100 per cent of the most recent (2007) rating valuation for their entire property, or for the land component only, with the relevant insurances being assigned to the Crown. Owners of insured commercial and industrial properties were offered 100 per cent of the rating value for improvements, but only 50 per cent of the land value, reflecting the lack of EQC insurance cover for land that was not residential. Uninsured property owners were only offered 50 per cent of the 2007 rating value, and for the land only. They were offered nothing for the value of their houses or other improvements, but the owners were to retain salvage and removal rights. Owners of vacant land were also offered only 50 per cent of the rateable land value.

Owners of uninsured land joined together into a group called the 'Quake Outcasts' to judicially review the lawfulness of the reduced offer. The matter eventually ended up in the Supreme Court. A key issue considered by the Court was whether the government could lawfully base the offers made to property owners on the status of their insurance cover.

In 2015, subsequent to court proceedings being initiated and heard by the High Court and Court of Appeal, the Crown increased its offer to cover the full rateable value of vacant land; the full rateable value of both land and improvements for insured commercial properties, and the full value of the land for uninsured improved properties (but still no compensation for the loss of the building).[35]

The Supreme Court found that while the insurance status of the properties was not an irrelevant factor in determining the amount of compensation, it should not have been determinative.[36] It also found that, given that the main purpose of the Canterbury Earthquake Recovery Act was to provide for the recovery of greater Christchurch communities,[37] the need to facilitate the recovery of the red zone communities should have been also considered.[38]

After the Supreme Court decision, the government offered uninsured homeowners 100 per cent of their land value and 80 per cent of the value of improvements (ie the house) along with "a one-off payment to account for the Court's decision and extra uncertainties and costs".[39] So in the end, all property owners received pretty much the full pre-damage rateable value.

9.6 Overall assessment

The Public Works Act provides strong powers for government and councils to compulsorily acquire land as well as to undertake voluntary purchases. What is unclear is whether the Act would apply to the purchase of land to effect managed retreat. In addition, the requirement to base compensation on current market value at the time of property transfer is not well suited to the circumstances of managed relocation. In a climate change context, values will likely be severely reduced by known significant and increasing risks to the property, if there is a market for the property at all at that

stage. Government might also wish to apply different approaches to valuing compensation for managed retreat than that implied by the "full" compensation requirement under the Public Works Act.

Although the Public Works Act enables Māori land to be compulsorily acquired, any use of this power in the context of managed retreat would need to be undertaken with extreme care, given the long history of Māori land dispossession in Aotearoa. In general, any acquisition of Māori land subject to natural hazards would need to be undertaken through a bespoke process, ideally led by the affected iwi, hapū or whanau.

The Land Act provides broader powers for land acquisition which might suit managed relocation. However, the powers can only be exercised by the Commissioner for Crown Lands (and not local authorities) and land can only be acquired on a voluntary basis. The amount of compensation paid is left to negotiations with the property owner but needs to be informed by a valuation.

Local authorities can acquire land on a voluntary basis using their general powers under the LGA. To do so they must follow the decision-making requirements under the Act which include assessing alternatives in light of interested and affected parties' preferences and taking into account the relationship of Māori with ancestral land and taonga. There are no additional requirements for the amount of compensation offered.

While the more recent Urban Development Act has strong land acquisition powers, they are designed for creating new urban settlements, not for removing existing settlements due to hazards.

Historically, land has also been acquired under special legislation, a recent example being the offers made to property owners in the Christchurch red zone under the auspices of the Canterbury Earthquake Recovery Act. The Act provided strong powers to acquire land on a compulsory basis as well as voluntarily. Compensation for land compulsorily acquired was to be determined based on current market value. However, these provisions were never brought into force as all property buy-outs were on a voluntary basis.

In sum there is a gap in the legislative framework, which does not provide suitable tools to compulsorily acquire land, or provide a suitable framework for compensation which accounts for the circumstances of managed relocation.

Silt laden rural land after Esk Valley flood (Waka Kotahi)

Statute/Policy	Effect
Public Works Act	Enables compulsory acquisition. Will apply when land is downzoned under the RMA (or NBEB) but only for property acquisition with landowner agreement. *Limitations:* Act may not apply to managed retreat as unclear whether this would be captured in the definition of "work". Provisions basing the quantum of compensation on current market value are likely inappropriate for managed retreat.
Te Ture Whenua Māori Act	Seeks to retain Māori land in Māori ownership and enable its utilisation for the benefit of its owners, their whanau, and their hapū .
Land Act	Could apply to managed retreat but only enables the Commissioner of Crown Lands to acquire land, not local authorities. *Limitation:* Does not authorise compulsory acquisition.
Local Government Act	Local authorities have broad powers to acquire property under the Act but need to comply with a prescribed decision-making process. *Limitation:* Does not authorise compulsory acquisition.
Urban Development Act	The Minister of Land Information can voluntarily and compulsorily acquire property under the Act. *Limitation:* Only for the purposes of facilitating urban development, not removing settlements.
Special legislation (Canterbury Earthquake Recovery Act – now repealed)	Gives the Crown very broad powers to voluntarily and compulsorily acquire land which apply to managed retreat. *Limitation:* Like the Public Works Act, provisions basing the quantum of compensation on current market value are inappropriate for managed retreat (and were not used in practice as all land purchase was voluntary).

Figure 8 Summary of statutory provisions for property acquisition and compensation

Endnotes

1 Public Works Act 1981, section 16. Local authorities are also empowered to acquire land required for a local SPV work for which it is the responsible infrastructure authority.

2 Public Works Act 1981, section 2

3 Public Works Act 1981, section 2

4 Public Works Act 1981, section 17(4)

5 Tu Ture Whenua Māori Act 1993, section 17(1)

6 Public Works Act 1981, section 23(3)

7 Public Works Act 1981, section 24(7)(e)

8 Public Works Act 1981, section 60(1)

9 Public Works Act 1981, section 62((1)(b)

10 Boston J, 2023, *Funding managed retreat: Designing a public compensation scheme for private property losses: Policy issues and options*, the Environmental Defence Society, Auckland, chapter 7

11 See Storey B, 2017, *Conversion to leasehold as methodology to price sea level rise risk*, Dissertation for a Master of Disaster Risk and Resilience, University of Canterbury

12 Public Works Act 1981, section 40

13 See Ngāi Tahu Claims Settlement Act 1998, Part 9

14 Land Act 1948, section 40(1)

15 Land Act 1948, section 40(2)

16 Land Information New Zealand, 1997, *Land subsidence policy south section old workings: Huntly East*, Land Information New Zealand, Hamilton

17 Land Act 1948, section 167(1)

18 Land Act 1948, section 167(1A)

19 Local Government Act 2002, section 10(1)(b)

20 Local Government Act 2002, section 77

21 Local Government Act 2002, section 78(1)

22 Local Government Act 2002, section 81(1)

23 https://www.whakatane.govt.nz/residents/awatarariki-managed-retreat-programme/faqs-awatarariki-fanhead-matata-managed-retreat

24 Hanna C J, 2019, *Restraints of change: Limits to 'managed retreats' in Aotearoa New Zea*land, PhD thesis, University of Waikato, at 121

25 Urban Development Act 2020, sections 253(1)(d) and 256

26 Urban Development Act 2020, section 260

27 Urban Development Act 2020, section 17

28 Urban Development Act 2020, section 3(1)

29 See, for example, Urban Development Act 2020, section 5

30 Canterbury Earthquake Recovery Act 2011, section 53

31 Canterbury Earthquake Recovery Act 2011, section 54

32 Canterbury Earthquake Recovery Act 2011, section 55(1)

33 Canterbury Earthquake Recovery Act 2011, section 64

34 *Quake Outcasts v Minister for Canterbury Earthquake Recovery and Ors* [2015] NZSC 27

35 Canterbury Earthquake Recovery Authority, 2015, *Residential red zone offer recovery plan*, Canterbury Earthquake Recovery Authority, Christchurch, at 3

36 *Quake Outcasts v Minister for Canterbury Earthquake Recovery and Ors* [2015] NZSC 27, at [167]

37 Canterbury Earthquake Recovery Act 2011, section 3(a)

38 *Quake Outcasts v Minister for Canterbury Earthquake Recovery and Ors* [2015] NZSC 27, at [181]

39 Wagner N, 2017, *Outcasts case settled*, media release, 5 September

10 Relocation and development of new settlements

New settlement at Hobsonville

The process of relocating people, buildings and infrastructure raises some difficult issues. Providing new settlements for people who have relocated from high risk areas is a similarly difficult process. Major issues include the potential withdrawal of utilities and services, excluding people from occupying properties in hazardous areas, and opening up new places for people to live. These need to be seen within the broader social imperatives of maintaining social cohesion, reducing inequities and ensuring access to justice.

10.1 Withdrawal of services

Managed relocation could play out in a variety of ways. If authorities pursue a voluntary acquisition scheme only, there is a possibility that some people will refuse any offer and decide to stay regardless of the consequences. Such a 'halfway' or 'partial' retreat raises significant issues. Where some members of a community have moved out of an area as part of a managed retreat initiative, but other property owners have decided to stay, councils may wish to withdraw services based on considerations of cost and practicability. Ceasing to maintain services may manifest as deciding not to reinstate them after they have been damaged, stopping the supply of services and/or physically removing them.

A decision to significantly alter the intended level of service provision for any "significant activity" undertaken by or on behalf of a local authority cannot be made under the LGA unless it was explicitly provided for in its long term plan and was included in a consultation document on the proposed plan. This includes a decision to "commence or cease any such activity".[1] So long as the intention to reduce or withdraw a service is included in the plan the provisions discussed below would apply.

10.1.1 Coastal protection/stop banks

There is no general duty on territorial authorities to protect properties from coastal erosion,[2] nor to maintain existing coastal protection works. In addition, councils can clearly not be required to provide new coastal protection works as they would need to be consented under the RMA, and consent might be withheld. However, in reaching a decision not to maintain protection works or protect properties, councils must comply with the decision-making criteria in the LGA. They would also need to assess what coastal hazard response would be the best practicable option to promote the sustainable management of the area's natural and physical resources under the RMA.[3]

Many stop banks and flood protection works are managed by regional councils under the Soil Conservation and Rivers Control Act 1941. Amongst other things, the Act is designed to prevent "damage by floods".[4] Section 148 provides that no council shall be liable for property damage caused by the accidental overflowing of a watercourse or sudden breaking of a bank, dam, sluice or reservoir maintained by the council, so long as the council is not negligent. However, if a council receives notice from a property owner/occupier that such works are "weak, and requiring it to strengthen or repair the same" and the council fails to do so within reasonable time, then it will be liable for the costs of damages sustained as a result of that

failure.[5] This effectively requires regional councils to maintain existing flood protection works even when this is not the most cost effective or long term sustainable option. However, it falls short of requiring councils to upgrade flood protection works or to build new protective works in response to climate change impacts.

10.1.2 Roading

Under section 319(1)(a) of the Local Government Act 1974, councils have the power to "construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit". Importantly, simply having the *power* to carry out such works does not mean that councils have an *obligation* to do so, particularly if climate change impacts mean that it is no longer financially and/or practically feasible. Councils could decide to reduce maintenance of roads, or not reinstate a road damaged by a natural event such as flooding or coastal erosion, so long as the decision-making processes in the LGA are followed and the decision is reasonable in the circumstances. This appears to be the case, even if lack of maintenance/repairs affects access to some properties.

10.1.3 Water services

There are much stronger controls on the closure of water services (drinking water supply, sewage disposal and stormwater drainage) by councils based on public health concerns. The starting point is section 130(2) of the LGA which states that, where a local authority provides water services to communities within its district, it "must continue to provide water services" and maintain its capacity to do so. However, the Act does make provision for councils to close down a small water service "that it is no longer appropriate to maintain" but only if 200 or less residents are supplied and procedural requirements are met including a binding referendum.[6] Before closure, councils must also review the likely effect on public health and the costs and adequacy of providing an alternative service.[7]

These provisions would likely make it difficult (but not impossible) for councils to withdraw water services from remaining residents in the event of a "partial" managed relocation. However, a similar end point could possibly be achieved through user pays charging where the full costs of providing services to a small number of remaining households was charged to the users. Alternatively targeted rates could be set to cover the cost of providing water services to the affected area.[8]

Whether to provide services to those wanting to rebuild their homes in a hazard zone is a further issue. Under section 39 of the Health Act it is not lawful to rebuild a house unless there is an adequate and convenient supply of potable water, suitable provision for the disposal of refuse water and sufficient sanitary conveniences.

Spotlight on provision of services to Christchurch red zone properties

After the 2010-2011 Canterbury earthquakes, and the government offer to buy out properties in the red-zoned areas, most of the 6,000 or so original residents accepted the offer and moved out. However, some remained, refusing to accept the Crown's offer. The Christchurch City Council concluded that it was legally obligated to provide services to the remaining homes. In 2012, the Council estimated that it would cost over $16,000 per household to retain services to properties in the red zone compared to around $600 per property pre-earthquake. This assumed a 79 per cent occupancy rate with costs increasing significantly as more people moved out of the zone.[9] In 2014, the council reported that more than $3 million was spent to maintain infrastructure to red-zoned homes.[10]

By 2017 there were still 44 occupied properties left in the flat red zoned areas. The council started using large suction tankers to regularly suck sewage out of manholes, and truck it to the city's wastewater treatment plant, because the earthquake had damaged the water and sewerage network and broken essential pipes. These measures came at a cost of nearly $500,000 a year and averaged out at around $11,000 per property. The Crown covered half the cost.[11] Water was supplied through temporary pipes run above-ground.

In 2018, the council offered to buy out five red-zoned properties when the temporary above-ground water pipes were reaching the end of their useful life. This was considered cheaper than installing new services, but only one property owner accepted.[12] For another isolated property, the Council spent $74,000 to connect the house with permanent water and sewage services. By 2021, the Council had provided new water and wastewater services to nine properties in the Avon river red-zone at a cost of $371,450.[13]

Overall, the requirement to continue to provide water services to those that have chosen to remain in a hazard zone has been very costly for the Council.

10.2 Relocating people away from risky locations

People can be moved from risky properties under several statutes. During a state of emergency, the Civil Defence Emergency Management Act 2002 provides strong powers including, where "necessary for the preservation of human life", the ability to direct the evacuation of premises or places and the exclusion of persons or vehicles from them.[14] This power can be used to require people to leave their homes when there is a life-threatening risk, but only while a state of emergency is in force. It is therefore not applicable to the circumstances associated with managed relocation.

In terms of risk management, some provisions in the Building Act are also relevant. In the first instance, a territorial authority is required to adopt a policy on dangerous and insanitary buildings within its district.[15] This could include how the council will approach such buildings in a high hazard zone and after damage has occurred due to a natural hazard event. If a territorial authority is satisfied that a building is a "dangerous, affected, or insanitary building" it can restrict entry to it.[16]

During an emergency, the Building Act also provides that areas can be given a 'designation' on the basis of emergency management.[17] This can only be for a range of "necessary or desirable" public interest matters including for the protection of people from injury or death; the protection of buildings or critical infrastructure from damage or disruption to their use; and the protection of people or buildings from the effects of the insanitary condition of a building.[18] People can then be directed to evacuate a building.[19] The focus of these powers is to protect human life and safety rather than buildings per se.[20]

Similarly, under the Health Act, a council can take action when a building is "by reason of its situation or unsanitary condition, likely to cause injury to the health of any persons therein, or otherwise unfit for human habitation". The Act requires the owner to make repairs to address the situation, and failing this, prohibits the use of the building for human occupation. The Director-General of Health can also issue such an order.[21] This could be done in the situation where a house in a hazard zone is damaged and/or services to it interrupted. It would require residents to leave their homes, at least until they were made safe to inhabit.

All these powers can only be used in an emergency or where there is risk to the life or health of people. They are designed to be short term measures, in the heat of the emergency, or to address homes that are no longer habitable. In this way, they are inappropriate for a pre-emptive management retreat exercise.

10.3 Settling people in new locations

Two main pieces of legislation potentially enable the acquisition of land and development of new settlements for people who have been uprooted as a result of managed retreat; the Urban Development Act and the Land Act.

The purpose of the Urban Development Act is "to facilitate urban development that contributes to sustainable, inclusive, and thriving communities".[22] To this end it is compatible with resettling people being moved away from areas at high risk from natural hazards. The urban development projects provided for under the Act are to be undertaken by the government agency Kāinga Ora.

"Urban development" has a wide definition which includes development of housing, the development and renewal of urban environments, and the "development of related commercial, industrial, community, or other amenities, infrastructure, facilities, services or works."[23]

Kāinga Ora can apply for an urban development project to become a "special development project". This can only be declared after following a prescribed process and obtaining an Order in Council recommendation from the joint Ministers. When assessing whether a project should become a special development project, Kāinga Ora must identify its constraints and opportunities drawing on information on natural hazards, iwi planning documents and climate change reports prepared under the Climate Change Response Act, amongst other things.[24]

Kāinga Ora must undertake a declared special development project in accordance with the development plan prepared for the surrounding area. The development plan must include a structure plan and identify funding sources such as development contributions, targeted rates, infrastructure and service charges and administrative charges. It must also identify any participation arrangements or redress set out under Treaty settlements and adequately provide for the settlement of future Treaty claims.[25] It must avoid or mitigate risks from natural hazards.[26]

The development plan can override any provisions in a regional or district plan. A draft is publicly notified and any person may make a submission on it, with submissions heard by an independent hearings panel. The Minister for Land Information then approves the development plan, after which Kāinga Ora is given a wide range of powers and functions, including being the consent authority for resource management applications, and taking the place of the territorial authority when considering designations.

It may also exercise infrastructure (including roading and water-related infrastructure) and funding powers.

As described earlier, the Urban Development Act also provides for land acquisition. Once the land is acquired, Kāinga Ora can grant a lease, tenancy, licence or easement in relation to the land,[27] may transfer it to a developer (but this must be subject to a development agreement),[28] or may dispose of land.[29] That said, there are some limits on such disposal. Former Māori land which is proposed to be disposed from public ownership must first be offered back first to its former Māori owners. Where the land is potentially needed for future te Tiriti settlements Kāinga Ora must consult with the Minister for Treaty of Waitangi Negotiations prior to disposal.[30] If applicable, it must also first be offered back to the Treaty post-settlement governance entities that hold a right of first or second refusal.

Taken overall, the Urban Development Act provides a comprehensive set of powers to potentially enable the integrated provision of new urban settlements for those who are anticipatorily relocating away from hazard areas. They also provide protection for Māori land and land needed for te Tiriti settlement purposes.

The Land Act also provides all the authority necessary to prepare a strategically purchased piece of land for settlement (although the land itself can only be acquired voluntarily as discussed above). Although somewhat dated in their intention, the current provisions of the Act contemplate development for a complete community, including enabling the Commissioner to carry out the surveying, roading, subdivision, drainage, reclamation, fencing, clearing and grassing of land, the erection of buildings, the provision of power and water and other works required to make the land fit for settlement.[31] Further, the job of land preparation can be shared with any person, local authority or government department,[32] foreshadowing the possibility of private-public housing ventures.

10.4 Overall assessment

There is no obligation on councils to protect private property from coastal erosion or to maintain existing coastal protection works. The situation is somewhat different for flood protection works managed under the Soil Conservation and Rivers Control Act where the regional council is effectively required to keep them under good repair or be liable for property damage.

With the exception of water services, it is possible for councils to withdraw most services (including roading), so long as they follow the correct decision-making process. Water services are more difficult to withdraw, which is understandable given the public health and welfare implications of their removal.

There are strong statutory provisions for moving people away from unsafe homes and buildings, particularly in the context of an emergency. However, they are designed to be short term measures and are not well configured for managed relocation, especially if it is pre-emptive.

The Urban Development Act provides a set of powerful tools to undertake urban development in an integrated manner. These tools could be deployed to provide new settlements for those relocating away from hazardous areas. Such development could also potentially be undertaken under the Land Act, although its provisions are dated and not as well configured for this purpose.

Flooding of Esk Valley substation (Waka Kotahi)

Statute or policy	Effect
Local Government Act (2002)	All decisions to significantly alter the intended level of service for a significant activity need to be explicitly provided for in a council's long term plan and be consulted on. Where a council currently supplies water services to its communities it must continue to do so (unless it services 200 or less residents and a set of robust criteria are met).
Soil Conservation and Rivers Control Act	Councils must effectively maintain existing flood control works or be liable for resultant property damage
Local Government Act (1974)	Councils have the *power* to construct, upgrade and repair roads but have no obligation to do so.
Resource Management Act	There is no duty on councils to protect properties from coastal erosion or to maintain existing coastal protection works.
Civil Defence Emergency Management Act	People can be directed to evacuate premises or places where necessary for the preservation of human life during a state of emergency.
Building Act	Councils must adopt a policy on dangerous and insanitary buildings within their districts. Councils can prevent entry into buildings that are considered dangerous or insanitary. This is primarily to protect human life and safety rather than the buildings themselves.
Health Act	Councils and the Director-General of Health can require repairs to be undertaken on buildings unfit for human habitation, and if they are not done, prohibit use of the building for residential use.
Urban Development Act	Land can be acquired, developed and disposed of to facilitate new urban settlements. Kāinga Ora can manage the development process (including the provision of infrastructure and funding), standing in the shoes of the council, and subject to a development plan
Land Act	Land can be voluntarily acquired and development by LINZ but the provisions of the Act are somewhat outdated and not entirely fit for purpose.

Figure 9 Summary of statutory provisions for relocation and development of new settlements

Endnotes

1 Local Government Act 2002, section 97

2 *Waihi Beach Protection Society v Western Bay of Plenty District Council*, A27/2002, Environment Court

3 *Waihi Beach Protection Society v Western Bay of Plenty District Council*, A27/2002, Environment Court

4 Soil Conservation and Rivers Control Act 1941, section 10

5 Soil Conservation and Rivers Control Act 1941, section 148

6 Local Government Act 2002, section 131

7 Local Government Act 2002, section 134

8 Local Government (Rating) Act 2002, section 19

9 *Quake Outcasts v Minister for Canterbury Earthquake Recovery and Ors* [2015] NZSC 27, at [75]

10 Hayward M, 2019, 'Christchurch council spends $74k connecting water, sewerage to lone red one house', *Stuff*, 22 February

11 Mitchell C, 2017, '"Costly and inefficient" makeshift services for lonely red-zoned neighbourhoods', *Stuff*, 6 February

12 Christchurch City Council, 2018, 'Council offers to buy five red zone properties', *Newsline*, 12 March; Gates C and A Williams, 2021, 'Christchurch red zone stayers are now living in "paradise"', *Stuff*, 22 February

13 Gates C and A Williams, 2021, 'Christchurch red zone stayers are now living in "paradise"', *Stuff*, 22 February

14 Civil Defence Emergency Management Act 2002, section 86

15 Building Act 2004, section 131

16 Building Act 2004, section 124

17 Building Act 2004, section 133BD

18 Building Act 2004, section 133BD(1)

19 Building Act 2004, section 133BR

20 See Building Act 2004, section 133BN

21 Health Act 1956, section 42

22 Urban Development Act 2020, section 3(1)

23 Urban Development Act 2020, section 10(1)

24 Urban Development Act 2020, section 32

25 Urban Development Act 2020, section 72(4)

26 Urban Development Act 2020, section 57(b)(iii)

27 Urban Development Act 2020, section 263

28 Urban Development Act 2020, section 264

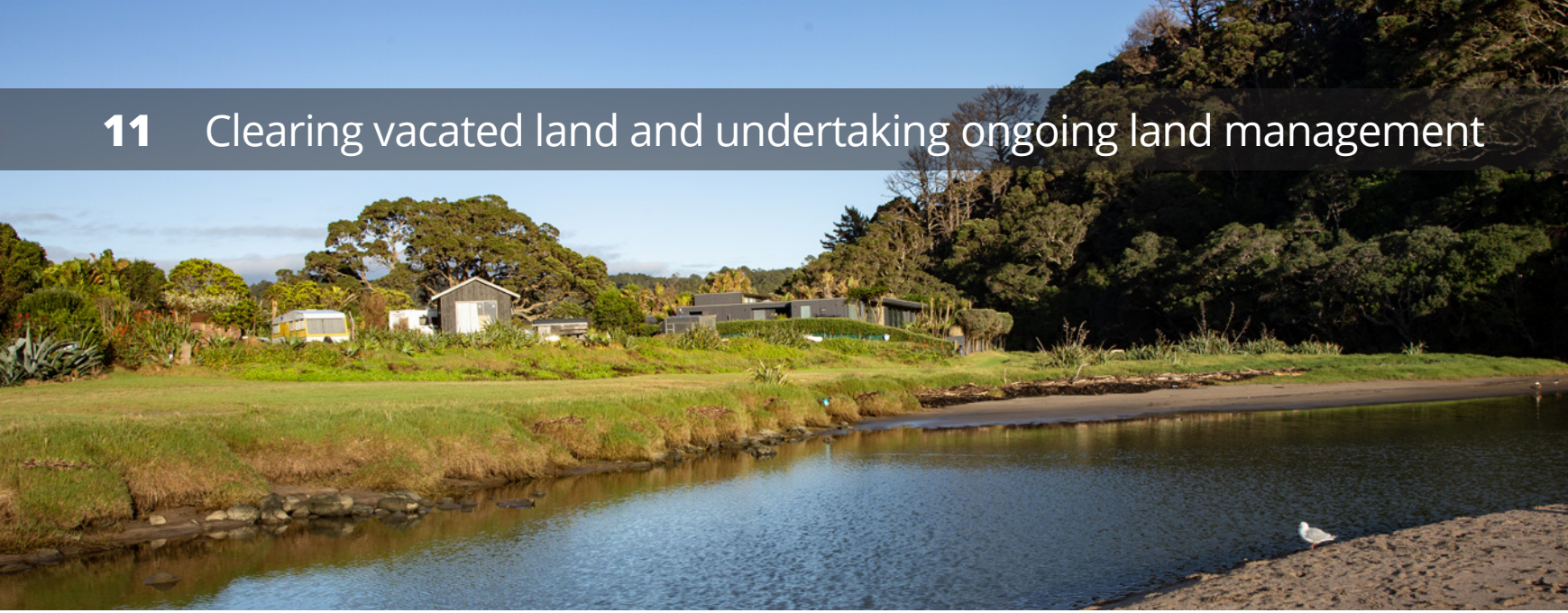
29 Urban Development Act 2020, sections 274 and 275

30 Urban Development Act 2020, section 271

31 Land Act 1948, section 44(1)

32 Land Act 1948, section 45

11 Clearing vacated land and undertaking ongoing land management



Esplanade reserve at Hot Water beach

Once people have moved from a hazardous area, the land will need to be cleared and arrangements made for its ongoing management. This brings into play several pieces of legislation.

11.1 Demolition

Ideally, buildings and infrastructure left in vacated areas which are no longer required, would be repurposed for other uses rather than being disposed of in landfill. However, there is currently no legal requirement for this to happen. Demolition is included in the definition of building work under the Building Act and therefore a building consent is required to carry out demolition work.[1] This should help ensure a safe demolition process. The obligation to undertake demolition and rehabilitation of the land would need to be clearly specified when the land changes ownership.

11.2 Road stopping

There is also the issue of whether roads in the hazardous area should be 'stopped' to enable the land to be incorporated into a new (and potentially more environmentally sensitive) management regime. 'Stopping' a road is the process by which the legal status of a road (which can exist even if a roadway has not been created, such as with 'paper roads') is removed with the land reverting to its underlying owner, typically the territorial authority or the Crown. The process is provided for in the Local Government Act 1974 which states that councils have the power to stop or close roads[2] subject to specific requirements. Notably, a road cannot be stopped in a rural area without the prior consent of the Minister of Land Information.[3]

The stopping of roads needs to go through a set procedure specified in Schedule 10 to the Act. To proceed with a stopping, the council needs to prepare an explanation of the reasons why the road is proposed to be stopped and the purpose to which the land will be put. This is then open for public objections, and if any are lodged, the matter is determined by the Environment Court.

There is no decision-making criteria in the Act for the Court to follow when deciding on a road stopping application but some principles have evolved via case law. The Environment Court has noted that "the lack of statutory direction means that the court may have regard to a wide range of relevant factors, although a central issue is whether or not the roads to be closed are needed for public use".[4] The Court has also emphasised that "Roads are vested in local authorities for the primary purpose of providing public access and it is only when the roads in question are not needed for that purpose that they ought to be stopped".[5] This means the stopping of roads within vacated hazards areas are only likely to be confirmed by the Environment Court if they no longer provide access for any parties.

11.3 Reserve land

The cleared land could be managed under various pieces of legislation. This includes the Reserves Act which provides for the "preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing" recreational use or potential; wildlife; indigenous flora or fauna; environmental and landscape amenity or interest; or a

range of other values.[6] Reserves can be classified for a range of purposes including as recreation, historic, scenic, nature, scientific, government purpose and local purpose.[7] They can be owned and managed by central and local government or other "trustees" including potentially iwi/hapū. Importantly, reserves do not include as a purpose rehabilitation or managed realignment/managed retreat. This could be usefully added to the legislation.

11.4 Conservation land

Another possibility is for the land to be brought under the Conservation Act which provides for the management of land by DOC for "conservation purposes" [8] with "conservation" defined as meaning "the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options for future generations".[9]

11.5 Land Act and Treaty settlement landbank

The land could also be managed under the Land Act through which LINZ currently manages unallocated Crown Land. However, the Land Act lacks a purpose or principles, so provides little direction on when and why land should be acquired and how it should be managed.[10]

LINZ also manages land in the Treaty Settlement Landbank and vacated land could be transferred into this landbank for potential use in future settlements (if suitable). However, the landbank is an interim process set up to ensure that Crown-owned land of potential value in future Treaty settlements is retained for use as commercial redress. Once all settlements are complete the landbank will be decommissioned. Any residual land remaining within it will then be sold on the open market and this category of Crown land administered under the Land Act will no longer be functional.

Red zoned property at Piha

A spotlight on management of land in the Christchurch red zone under the Land Act

After the 2010/2011 Christchurch earthquakes the Crown purchased almost 8,000 properties located in the areas worst affected. In 2015, LINZ took over responsibility from the Canterbury Earthquake Recovery Authority for clearing and managing this 'red zone' land. Since then, it has co-ordinated the demolition of about 300 houses, cleared and grassed thousands of properties, and has been responsible for keeping 7,700 properties safe and secure.

LINZ has managed the residential red zone by applying an interim land management approach which preserves future use options for the land. LINZ's key priorities for maintenance activities include managing hazards to prevent harm; maintaining amenity and ecological values; managing and maintaining private property rights; and pest management.

In accordance with a 2019 Global Settlement Agreement, the ownership and management of Crown-owned red zone land is being progressively transferred from the Crown to Christchurch City Council. The agreement finalises the remaining costs and responsibilities for the earthquake recovery and regeneration. As part of the agreement, LINZ has undertaken a large scale title re-configuration and review of property interests.

11.6 New Zealand Coastal Policy Statement restoration policy

When providing a policy and rule framework for land management under the RMA, the NZPCS provides strong direction on the management of land within the coastal environment for restoration purposes. Policy 14 addresses restoration of natural character which needs to be promoted by councils in plans. This might include identifying areas and opportunities for restoration and rehabilitation, providing policies, rules and other methods, and where practicable imposing restoration or rehabilitation conditions on resource consents.

11.7 Overall assessment

Land can be cleared and rehabilitated under various statutes. The Building Act controls demolition, and the roads can be stopped under the Local Government Act 1974 provided they are no longer needed for access. The NZCPS provides a framework for the restoration of coastal land.

The cleared land could be managed by councils and/or other entities such as iwi/hapū under the Reserves Act (although there is no specific reserve category for restoration or managed retreat/realignment) or by DOC under the Conservation Act. Land could also be placed in the Treaty Settlement Landbank in the interim. It would be useful to have a specific category of land, perhaps under the Reserves Act, that is focused on restoration and rehabilitation of natural ecosystems.

Statute or policy	Effect
Building Act	Manages building demolition through the requirement to obtain a building consent.
Local Government Act (1974)	Enables roads to be stopped but, in practice, only when they are no longer required for public access.
Reserves Act	Provides for the classification and management of reserve land "for the benefit and enjoyment of the public" by a range of parties which could include iwi/hapū entities. *Limitation:* Does not include a reserve that has as its purpose rehabilitation or managed realignment/managed relocation.
Conservation Act	Provides for the management of conservation land for conservation purposes by DOC.
Land Act	Provides for land management by LINZ. *Limitation:* Has no purposes or principles to guide management decision-making.
Resource Management Act (New Zealand Coastal Policy Statement)	Unlike other statutory provisions, provides for the restoration and rehabilitation of natural character. *Limitation:* Only applies in the coastal environment and not throughout the rest of Aotearoa.

Figure 10 Summary of statutory provisions for clearance and ongoing management of land

Endnotes

1 Building Act 2004, sections 40 and 127

2 Local Government Act 1974, section 319(1)(h)

3 Local Government Act 1974, section 342(1)(a)

4 *Clutha District Council v Vreugdenhil & Ors* [2021] NZEnvC 183, at [30]

5 *Re New Plymouth District Council* [2011] NZEnvC 88, at [16]

6 Reserves Act 1977, section 3(1)

7 Reserves Act 1977, Part 3 Classification and management of reserves

8 Conservation Act 1987, sections 7, 8 and 17A

9 Conservation Act 1987, section 2

10 Schlaepfer S and R Peart, 2023, *Managing crown land: A review of the Land Act 1948*, Environmental Defence Society, Auckland

12 Weaknesses and gaps in current law

Bream Bay beach accessway (Tom Fitzgerald)

In this section we draw conclusions from our analysis in previous chapters in order to identify issues with the current legal and statutory framework for management retreat which may need to be addressed when designing the Climate Adaptation Act. They are:

1. Tikanga is the first law of Aotearoa. It provides key underlying principles which could usefully underpin climate adaptation policy and law.

2. Local authorities, specifically territorial authorities, could potentially be liable in common law negligence for granting building and resource consents for development in high hazard zones without due diligence. This potential liability could be reduced by statute on public policy grounds.

3. There is a long history of dispossession of Māori land in Aotearoa that forms the backdrop to any managed retreat policy. Māori currently own very little land which can make finding suitable sites for managed retreat problematic. Government assistance in securing new safe locations may be required.

4. Although freehold title in land is strongly protected in law, there is no general statutory protection against the taking of land for public purposes, although fair compensation will generally be expected.

5. The Treaty principles of partnership and active protection require the Crown to actively support Māori in adapting to climate risks including the managed retreat of marae.

6. Any managed retreat policy must honour fundamental human rights including the right to life, the right not to be subjected to degrading treatment, and the right to natural justice.

7. Although there is a robust framework for the preparation and communication of a regular national climate risk assessment, by an independent agency, there is not similar rigour at a regional or local level. Under current law, outside the coastal environment, there is no obligation on any agency to regularly collect and make available natural hazard and climate risk information.

8. The current legal framework is not well configured to prevent development in hazard zones. Only the Building Act can be relied on to achieve this through the refusal of building consents, but only when the safety of people is at stake.

9. Councils can refuse to grant subdivision consent under the RMA when there is a significant risk from natural hazards, but they are not required to do so

10. It will usually not be possible to downzone land in a high hazard zone, to exclude development, unless the council offers to purchase the property at market value and the landowner agrees.

11. The NZCPS provides some clear directives on avoiding redevelopment and land use change in coastal hazard areas. However, there is no similar direction for how councils are to address natural hazards outside the coastal environment.

12. The NPS-UD appears poorly configured to avoid development in high hazard zones. Although it provides for natural hazards as qualifying matters, the regime effectively discourages councils from taking a strategic long-term approach to addressing cumulative and compounding risks.

13. Although the Climate Change Response Act requires the preparation of a national adaptation plan, there is currently no specific statutory provision for regional and local adaptation planning. Councils can choose to undertake such planning as part of their broad capacities under the LGA but there is no *explicit* provision for implementation including assigning responsibilities and securing funding.

14. No legislation is well configured for acquiring land exposed to hazard in circumstances of managed retreat. The Public Works Act and Urban Development Act are likely unsuitable. The Land Act (through the Commissioner of Crown Lands) or the LGA (through local authorities) could enable a mechanism for voluntary purchase, but neither would provide a suitable framework for compensation.

15. There is no obligation on councils to protect private property from coastal erosion or to maintain existing coastal protection works. However regional councils may need to maintain flood protection works or be liable for the resultant damage.

16. With the exception of water services, it is possible for councils to withdraw most services (including roading) from a site facing managed retreat, so long as a proper decision-making process has been undertaken.

17. In the context of an emergency, there are strong statutory provisions for moving people away from unsafe homes and buildings. However, they are designed to be short term measures and are unsuitable for managed retreat, especially if it is pre-emptive.

18. The Urban Development Act provides a set of powerful tools to undertake urban development in an integrated manner to provide new settlements for those who need to retreat from areas exposed to natural hazards. Such development could also potentially be undertaken under the Land Act, although its provisions are dated and not as well configured for this purpose.

19. The cleared land could be managed by councils and/or other entities such as iwi/hapū under the Reserves Act or by DOC under the Conservation Act. Land could also be placed in the Treaty Settlement Landbank. There is currently no specific category of land under the Reserves Act that is focused on restoration and rehabilitation of natural ecosystems.

Clearly that there are a number of gaps in the statutory framework for managed retreat. In Working Paper 3 we will be exploring options to fill them.

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