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Interpretation and Application of Coastal Hazards provisions of the New Zealand Coastal Policy Statement

Relevance to Christchurch District Plan

Introduction

- Policy and regulatory context: Proposed Change to Christchurch District Plan to address coastal hazards
- History of current District Plan provisions as they relate to coastal hazards
 - Independent Hearing Panel Process
 - S 71 Process under the Christchurch Regeneration Act 2016
- Geographical Context – existing Residentially Zoned land at Southshore/Brighton/ Redcliffs



Scope of presentation

- Local authority obligations for the management of natural hazards under the RMA
- Hierarchy of RMA instruments and the need for subordinate instruments to give effect to higher order documents
- Relevant Coastal Hazard Objective/Policies of New Zealand Coastal Policy Statement 2010
- Interpretation and Application of NZCPS by the Courts
- Outline of Current Provisions of the Christchurch District Plan
- Relevant Natural Hazard Provisions of the Canterbury Regional Policy Statement



Local Authority Obligations under the RMA for Management of Natural Hazards

- S 6 (h) of RMA introduced the following Matter of National Importance into the RMA, requiring local authorities to recognise and provide for:
 - *“the management of significant risks from natural hazards”*
- Confirms that a risk based approach is required
 - Probability of occurrence & consequences
- Also significant is undefined in the RMA – in a different context i.e. as a measure of effects, “significant” is usually considered to be something more than minor.
- Introduction of 6 (h) raises the issue of whether or not NZCPS provisions on coastal hazards need to be reviewed?
- RMA also mandates specific regional council (s 30) and district council (s 31) functions for the avoidance or mitigation of natural hazards, which are implemented through the development of planning instruments such as policy statements, regional and district plans.



Hierarchy Of Instruments Under the RMA

National Policy Statement



Regional Policy Statement



District Plan



“Give Effect to” Requirement

- Subordinate documents must “give effect to” higher order documents
- So, RPS must give effect to NZCPS and District Plan must give effect to the RPS and NZCPS;
- "Give effect to" means "implement"; and
- *"Minister sets objectives and policies in the NZCPS and relevant authorities are obliged to implement those objectives and policies"*

(Supreme Court in *King Salmon*)



Introduction to New Zealand Coastal Policy Statement (NZCPS)

- The NZCPS is a national policy statement under the RMA. The purpose of the NZCPS is to state policies in order to achieve the purpose of the Act in relation to New Zealand's coastal environment.
- Board of Inquiry recommendations approved in 2010 – primarily a response to criticism of lack of clear direction in earlier 1994 version.



Objective 5

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

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



Objective 5 (Commentary)

- Clear direction that "new" development should be located away from risk-prone areas
- What constitutes new development for the purposes of this Objective?
- Meaning of "prone to" – "*likely or liable to*" i.e. more likely than not. What does this mean for risk assessments under Policy 24 that are based on scenarios that may not be "likely" to occur?
- Does Objective 5 seek to address all risk, and not just significant risk (s 6 RMA)?
- Does it create an obligation to protect or restore natural defences?



Policy 24 NZCPS

Identify areas in the coastal environment that are potentially affected by coastal hazards (including tsunami), giving priority to the identification of areas at high risk of being affected. Hazard risks, over at least 100 years, are to be assessed having regard to:

- (a) physical drivers and processes that cause coastal change including sea level rise;*
- (b) short-term and long-term natural dynamic fluctuations of erosion and accretion;*
- (c) geomorphological character;*
- (d) the potential for inundation of the coastal environment, taking into account potential sources, inundation pathways and overland extent;*
- (e) cumulative effects of sea level rise, storm surge and wave height under storm conditions;*
- (f) influences that humans have had or are having on the coast;*
- (g) the extent and permanence of built development; and*
- (h) the effects of climate change on:*
 - (i) matters (a) to (g) above;*
 - (ii) storm frequency, intensity and surges; and*
 - (iii) coastal sediment dynamics;*

taking into account national guidance and the best available information on the likely effects of climate change on the region or district.



Policy 24 (Commentary)

- Highly complex assessment required to provide the technical basis for further planning i.e. assessment under Policy 24 informs decisions as to the policy and regulatory approach/ approaches to be implemented for a district or region.
- Assessments in accordance with Policy 24 likely to be the subject of intense scrutiny – see for example: *Peer Review of the Christchurch Coastal Hazard Assessment Report* (Kenderdine et al, 18 August 2016); also *Weir v Kapiti DC* (LIM information)
- Variety of language in the Policy not necessarily helpful: "*potentially affected*" "*high risk*" "*likely effects of*". Use of the word "potentially" does not import any particular degree of likelihood, rather it is simply a possibility supported by a degree of objective analysis. This is different to "likely", which is traditionally interpreted as an something that is more likely than not - > 50% chance. What constitutes a "high risk" should informed by the likelihood of the event occurring and the associated likelihood of consequences, but is it solely high likelihood/high consequences (or a lesser standard)?
- Again, Policy does not reflect the "significant risk" requirement in Section 6 of the RMA, unless "significant risk " and " high risk" are to be treated as synonymous.



Policy 25 - Subdivision, use, and development in areas of coastal hazard risk

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

- a. avoid increasing the risk of social, environmental and economic harm from coastal hazards;*
- b. avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;*
- c. encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;*
- d. encourage the location of infrastructure away from areas of hazard risk where practicable;*
- e. discourage hard protection structures and promote the use of alternatives to them, including natural defences; and*
- f. consider the potential effects of tsunami and how to avoid or mitigate them.*



Policy 25 (Commentary)

- Key, overarching policy for management of coastal hazard risks
- Applies to all areas “potentially” affected, but does not appear to prioritise areas (as Policy 27 does) or reflect the requirement in section 6 RMA to manage “significant” risk. In theory therefore, Policy 25 could apply to areas where risk is negligible i.e possibility of event occurring is below unlikely and the consequences are minimal.
- 25 (a) & (b) phrased in very directive terms, but clearly do not seek to avoid all development per se, but instead to avoid an increase in risk
- Broad range of potential impacts (social, environmental or economic harm) must be considered, leaving open the question of whether there are solutions available to avoid an increase in risk? Does risk in economic harm relate to the wider community, or does it also include the property owner?
- Reduction of risk is “encouraged” – an inherently weak obligation – and this can be by way of managed retreat or design solutions



Policy 26 – Natural Defences against Coastal Hazards

- (1) Provide where appropriate for the protection, restoration or enhancement of natural defences that protect coastal land uses, or sites of significant biodiversity, cultural or historic heritage or geological value, from coastal hazards.*
- (2) Recognise that such natural defences include beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands.*



Policy 26 (Commentary)

- Policy expresses a clear preference for natural defences over hard protection structures and expect this is to achieve consistency with policies elsewhere in NZCPS relating to the preservation and restoration of natural character in the coastal environment
- Also, approach recognises that by comparison hard protection structures in the wrong location can impact on social, cultural and environmental values
- Unsure as to the level of relevance of Policy 26 to Brighton/ Southshore/ Redcliffs, but perhaps a factor to consider in long-term strategic approach?



Policy 27 – Strategies for protecting significant existing development from coastal hazard risk

- (1) *In areas of significant existing development likely to be affected by coastal hazards, the range of options for reducing coastal hazard risk that should be assessed includes*
- a. *promoting and identifying long-term sustainable risk reduction approaches including the relocation or removal of existing development or structures at risk;*
 - b. *identifying the consequences of potential strategic options relative to the option of “do-nothing”;*
 - c. *recognising that hard protection structures may be the only practical means to protect existing infrastructure of national or regional importance, to sustain the potential of built physical resources to meet the reasonably foreseeable needs of future generations;*
 - d. *recognising and considering the environmental and social costs of permitting hard protection structures to protect private property; and*
 - e. *identifying and planning for transition mechanisms and timeframes for moving to more sustainable approaches.*
- (2) *In evaluating options under (1):*
- a. *focus on approaches to risk management that reduce the need for hard protection structures and similar engineering interventions;*
 - b. *take into account the nature of the coastal hazard risk and how it might change over at least a 100-year timeframe, including the expected effects of climate change; and*
 - c. *evaluate the likely costs and benefits of any proposed coastal hazard risk reduction options.*
- (3) *Where hard protection structures are considered to be necessary, ensure that the form and location of any structures are designed to minimise adverse effects on the coastal environment.*
- (4) *Hard protection structures, where considered necessary to protect private assets, should not be located on public land if there is no significant public or environmental benefit in doing so.*

Policy 27 (Commentary)

- Policy 27 squarely relates to urban areas (Brighton, Southshore, Redcliffs)
- Evidentially, needs to be established that it is likely i.e. more likely than not that areas will be affected by coastal hazards
- Requires a long term adaptive management approach to the risk, involving ongoing monitoring of the level of risk and adopting different strategies depending on slowing down/acceleration of risk
- Strategies could ultimately include removal of existing development if justified by the level of risk
- Hard protection structures not ruled out as being necessary in some circumstances to protect existing investment in infrastructure and development, but clearly a least favoured option. Likely to be motivated by the desirability of shifting community thinking away from hard protection being the primary or sole focus of management.
- Should provision be made for hard protections structures in the District Plan?



Judicial Interpretation and Application of NZCPS

- *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38. (King Salmon)
- *Carter Holt Harvey HBU Ltd v Tasman District Council* W025/2013
- *Mahanga E Tu Inc v Hawke's Bay Regional Council and Wairoa District Council* W083/2014
- *D & C Gallagher v Tasman District Council* W245/2014



Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited [2014] NZSC 38. (King Salmon)

- Supreme Court's assessment of highly prescriptive "avoidance of adverse effects" on natural character policies (13 & 15) in NZCPS as amounting to environmental bottom lines; but
 - *" it is improbable that it would be necessary to prohibit an activity that has a minor or transitory adverse effect in order to preserve the natural character of the coastal environment, even where that natural character is outstanding. Moreover, some uses or developments may enhance the natural character of an area."*
- The more directive or prescriptive the policy, the clearer the obligation to give effect to it.
- Coastal Hazard policies in NZCPS not quite as prescriptive as Policies 13 & 15, but nevertheless contain directive language such as "ensure" and "avoid" as well as non prescriptive wording such as "encourage"; "promoting"; "*recognising and considering*" etc..



Carter Holt Harvey HBU Ltd v Tasman District Council W025/2013



Carter Holt Harvey HBU Ltd v Tasman District Council (cont)

- Appeal by CHH against a decision of TDC to decline consent for a proposal to develop six allotments on rural zoned land at Kina Peninsula, Moutere Inlet.
- Experts agreed that land would be subject to significant coastal erosion and inundation due to climate change effects within the 100 year assessment period mandated by Policy 24 of NZCPS. Applicant contended that risk to proposed building platforms and structures could be adequately mitigated by minimum height levels and relocatability of buildings at a certain trigger point.
- In assessing the proposal against the NZCPS, the Court held that Policy 25 was of particular significance, finding that the proposal failed to achieve the policy to avoid the risks identified in 25 (a) & (b). The Court went on to say:

[179] We acknowledge that the horizon of at least 100 years is very long indeed and that persons who choose to build on the residential lots will have made an informed choice to do so. We note that both Policies (a) and (b) seek to avoid increase in risk and that designing for relocatability under Policy 25 (c) is seen as a way of reduction of the risk of adverse effects. We do not interpret Policy 25 as imposing a de facto prohibition on development in areas potentially affected by coastal hazards....

[180] We also acknowledge that designing for relocatability is encouraged in the case of redevelopment or change in land use. These provisions appear inconsistent with Objective 5 which seeks to ensure that new development is located away from areas prone to coastal hazard risks and that managed retreat is proposed for existing development rather than new development...



Carter Holt Harvey HBU Ltd v Tasman District Council (continued)

- Evidence of coastal hazard effects meant that the proposal raised a clear conflict with the provisions of the NZCPS, so refusal of appeal practically inevitable in the circumstances;
- In addition, there were numerous, significant deficiencies in the Applicant's case, particular around the practicality of relocating the houses and the maintenance of access to the development.
- While emphasis was placed on the "avoidance" component of Policy 25, the Court did not exclude the possibility of innovative solutions which could deal with the likely risk. However, managed retreat is intended to apply to existing development.
- Court took a different approach to *Mahanga* (below) in terms of weight to be given to the voluntary assumption of risk



Mahanga E Tu Inc v Hawke's Bay Regional Council and Wairoa District Council W083/2014



Mahanga E Tu (continued)

- Appeal against decisions approving 5 lot subdivision of a residentially zoned property at Mahanga on the Mahia Peninsula – two of the allotments within the highest risk Coastal Hazard Zone (CHZ 1). Applicant offered fairly typical (but nevertheless robust) conditions regarding minimum building platform heights, a condition requiring relocation of houses on the CHZ 1 allotments triggered by a certain level of erosion and a bond to ensure that the cost of relocation would never fall as a burden on the community.
- Relevant experts assisting the Court differed as to the rate of coastal erosion, with the Court preferring the more pragmatic approach of the Applicant's witness with a potential doubling of the rate being attributed to SLR. Finding that the "managed retreat" condition could be invoked within 20 years, which was nevertheless considered a sufficient period.
- Tested against the provisions of the NZCPS, the Court stated in respect of Objective 5:

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

And in respect of Policy 25:

Paras a. b. and f. of this Policy are of particular interest, and are dealt with elsewhere in the course of this decision, In short, we can say that the risk is confined to properties, the owners of which are fully aware of, and willingly accept, them. The risks to other land will not be aggravated by the proposal, and the adverse effects on the affected lots will be mitigated by the removal requirements.



Mahanga E Tu (continued)

Comment

- May perhaps be viewed as a rather surprising outcome given the clear evidence of coastal erosion in the (relatively) short term.
- Decision can be reconciled with the NZCPS provisions if relocatability/bond etc.. is viewed as an acceptable alternative to avoidance of locating development in a risk prone areas in the sense that such features avoided an increase in risk of social, environmental or economic harm to the wider community (as opposed to property owner). High probability, but no consequences?
- Decision significantly influenced by the fact that the property in question had been zoned for residential purposes for in excess of 40 years. So, perhaps should be confined to its own facts.



D & C Gallagher v Tasman District Council W245/2014



D & C Gallagher v Tasman District Council (cont)

- By way of submission on Council plan change (PC22), Gallaghers sought a rezoning of their property in Ruby Bay from Rural to a form enabling subdivision into 13 residential allotments. Dwellings would be relocatable on building platforms elevated above predicted inundation levels. Council sought to have further development of the property prohibited.
- Extensive expert evidence on coastal erosion, stormwater and seawater inundation. Court found on the evidence that Gallagher property would be subject to seawater inundation to depths of 2m. Considered a high hazard risk exposure.
- In terms of NZCPS, Objective 5 and Policy 25, the Court held that Objective 5 was highly directive in nature, requiring local authorities to ensure that coastal hazards are managed in accordance with the bullet points contained within the Objective, in particular the requirement that new development be located away from risk-prone areas.
- In terms of the relationship between Policy 25 (a) & (b) the Court stated:

*"Policies 25 (a) and (b) are directed at subdivision, use or development (including redevelopment) which increases the risk of social, environmental and economic harm and the risk of adverse effects from coastal hazards. The policies **do not require the complete avoidance** of risk which is defined as ... a combination of the consequences of an event (including changes in circumstances) and the associated likelihood of occurrence ... **but rather seek to avoid increasing risk**. We do not consider that use of the word avoid with respect to proposed activities which increase risk is inconsistent with Objective 5 in any way."*



D & C Gallagher v Tasman District Council (cont)

- PC22 included provisions for the growth of Ruby Bay. Outcome of Gallaghers' appeal practically inevitable once finding made as to the high hazard risk associated with development on the land, a risk which did not exist on other land identified for growth.
- Case essentially related to a proposal for Greenfield rezoning of rural land, and therefore clear conflict existed with proposal and Objective 5 of NZCPS, which requires new development be located away from areas prone to coastal hazards risks. Findings do not necessarily transpose to South Shore/ Redcliffs/ Summer scenario where the main prospect of development is likely to be limited intensification/ redevelopment of existing residentially zoned properties.
- An evaluation of local circumstances is critical, although an application of risk assessment to individual properties is fraught with complexity.
- Decision reinforces the requirement for subordinate plans to give effect to the NZCPS and earlier cases dealing with resource consent appeals (such as *Mahanga E Tu*) distinguished on the basis that a different "have regard to" test was required of local authorities in respect of the provisions of the NZCPS.

Overview of Current District Plan Provisions

- Focus on High Flood Hazard Management Areas (HFHMA) – identified on the basis of increased inundation from sea level rise
- Residential Unit Overlay – provides an exception from an otherwise strict avoidance policy for all forms of development within HFMA
 - Replacement and repair of buildings existing as at 04 September 2010 permitted
 - New residential units (other than above) restricted discretionary activities with matters of discretion focused on minimising risk by, amongst others, design.
 - Subdivision to create a new allotment is non-complying
- Above provisions inserted under s 71 of Greater Christchurch Recovery Act 2016. Minister's decision records her disagreement with alleged failure to give effect to NZCPS on the basis that the NZCPS contemplates mitigation of risk and not complete avoidance.
- How are these provisions working?



Canterbury Regional Policy Statement – Natural Hazard Provisions

- RPS post dates NZCPS and is deemed to give effect to higher order document.
- Christchurch District Plan must give effect to RPS – not to be reviewed for another 3 years
- RPS contains a two tiered policy approach to management of coastal hazards, with the clear starting point being avoidance (where possible) of development with High Hazard areas;
 - Exception applying to existing urban areas where policy focus (Policy 11.3.1) is either on avoidance or appropriate mitigation of risk
 - RPS very influential in IHP's decision to incorporate RUO and associated provisions in District Plan, and Minister Wood's decision to approve the s 71 Proposal.



Concluding Remarks

- Consequences of SLR induced inundation on existing coastal areas such as Brighton/ Southshore/ Redcliffs potentially greater than other areas of the District given the significant level of existing investment
- Probability of hazard occurring to a damaging level within 100 year timeframe remains uncertain, and therefore likely to be the subject of ongoing intense scrutiny and debate
- Policies of NZCPS /RPS very influential in shaping the policy and regulatory approach toward management of natural hazards
- Courts have consistently held that the RMA is not a no risk statute
- *Gallagher* decision most relevant given it deals with a plan change – makes it clear that to be consistent with NZCPS, approach should be to locate new development away from areas prone to risk
- Greenfield subdivision within high risk areas objectively difficult to justify from a NZCPS policy perspective; minor intensification and replacement of existing development less so.



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