

PAPER
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50/50 VISION
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When we were asked to present a paper on council coastal issues from a legal perspective we posed the following questions:

Should the precautionary approach be applied to Coastal Planning?

1. How to balance environmental concerns against the interests of property owners?
2. How should territorial authorities manage reserves which abut, and are threatened by, coastal erosion?
3. How should the public purse be spent in managing coastal erosion and other coastal hazards?
4. How far do we go in managing or guarding against the effects of coastal erosion and other coastal hazards?
5. What should prevail? Public interests or private interests.
6. Is it a Central Government issue? Should local authorities be left to deal with what is essentially an issue for the whole country?

In the first part of this session following afternoon tea you have heard from the three wise men on the subject of coastal development – planning, landscape and legal perspectives. We will address the issues in the context of the Council's many roles including those of consent authority, land owner and manager.

To carry on with the biblical theme in Matthew VII, in the third part of the sermon on the Mount Jesus spoke of the wise man who built his house upon rock after heeding Jesus' word and the foolish man who built his house upon sand who lost everything when he did not listen to the Messiah.

Later in history King Canute is said to have tried to turn back the tide and failed. The efforts of men since the time of Canute to prevent nature doing her work have largely proved ineffective. That has not stopped mankind from flocking to the coast, not like lemmings to throw ourselves off cliffs but rather to establish dwellings and retain a link, if you are from the school of Darwin, with the oceans from which we originate. As was said in the music hall song "We do like to be beside the seaside".

So what does all this mean for local government and planners in particular? The sea can affect property in three main ways:

- by a rise in sea level, the extent of which is not yet known with certainty;
- by eroding the land on which dwellings sit;
- by battering down the natural or manmade structures that stand in its way such as cliffs, sand dunes and sea walls.

The Kapiti Coast District Council has just received a report which discusses the possibility of constructing additional protective seawalls for the settlement of Raumati South. The price tag, \$40,000 per property! Who should pay? The property owners whose private asset is protected or should there also be some "community contribution"? A similar situation exists at Wainui Beach in Gisborne. There have been protective measures of some sort on that beach since the 1930s. Many of them were initiated by property owners in a haphazard way. During the 1960s with Government funding the Council undertook the construction of a number of groynes, log walls and gabion baskets. All failed to a degree over time. The Council resolved not to maintain the protective measures but to encourage retreat. A policy described as harsh in the High Court and Environment Court. The cost of protecting the houses on the foreshore at Wainui Beach "permanently" is astronomic, the physical works required being significant in cost and visual terms and the damage done to one of New Zealand's foremost surfing beaches also potentially significant. There is also the risk of flow on effects i.e. damage to adjoining or nearby land.

Wainui of course is only one of many settlements in New Zealand where dwellings started out their days as baches but, to coin a phrase I heard recently in respect of Omaha Beach, north of Auckland, it is now a much sought after location for very large and very expensive "second homes".

Coastal processes

Coastal processes are a part of the natural character of the dynamic coastal environment. Hazards arise from the interaction of such processes with human use, property or infrastructure. Natural coastal hazards can adversely affect the economy, the health, the wellbeing and the safety of people and communities. They may also adversely affect vegetation and habitat; public access to and along the coastal marine area; visual character; amenity values; recreation; and aspects of coastal heritage such as historical buildings or structures. Sites and areas of significance to tangata whenua such as waahi tapu, urupa, middens and other taonga may also be at risk from natural coastal hazards.

Methods used to remedy or mitigate the loss of existing assets to such hazards include the construction of engineered structures, the planting of vegetation and beach nourishment programmes. Other approaches which avoid or mitigate the loss potential include avoiding development in hazard prone areas, relocating endangered structures and maintaining a buffer between mean high water springs and development.

It is axiomatic that inappropriate subdivision, use and development may cause or exacerbate natural coastal hazards, create new risk, or unnecessarily place human life and property under threat. So where natural coastal features have a tendency to change or migrate inland as a result of climate and sea level changes new subdivision should be located and designed to avoid interference with those processes thereby avoiding the need for coastal protection measures. Where existing subdivision use and development in the coastal environment is adversely affected

by coastal hazards, including sea level rise, further subdivision, use and development that exacerbates the coastal hazard or creates a new coastal hazard should also be avoided.

The New Zealand Coastal Policy statement favours the use of non-structural methods including planting and beach nourishment to protect development.

So what do Councils need to do as far as management of coastal erosion is concerned. The Civil Defence Emergency Management Act 2002 requires a similar approach to hazard management - identify the hazard, assess the level of risk, take steps to avoid or mitigate the risk, be prepared to deal with a major/disastrous event and plan recovery measures.

A common problem

Returning to the questions posed at the commencement of our paper, elected members and staff alike are placed under considerable pressure by property owners facing the risk of damage to their major assets by inundation. Examples of that are Matapouri in Whangarei district, Raumati South on the Kapiti Coast, Clifton and Te Awanga in Hawkes Bay and Buffalo Beach and Cooks Beach in the Thames-Coromandel District. The Councils of today have inherited some real headaches from the acts or omissions of predecessor councils and the Crown. While the science of coastal processes is relatively young, more is known today than 50 years ago when development of some of our coastal settlements commenced. Some of the actions taken by developers in those days would certainly not be permitted today, for example the flattening of the sand dunes at Papamoa and Omaha. That said, some of you will be aware of the goings on in Brighton, Christchurch where some members of the community are advocating the lowering of sand dunes (to open up views) and others are bitterly opposed to the suggestion. Similarly in Tauranga some residents are opposing the planting of Pohutakawas as part of shoreline restoration works – over time they will block views. If we look at the Coromandel Peninsular how many of the settlements there, which overflow with visitors during the holiday seasons are built where streams and the tide meet? The combination of high rainfall and high tides is a lethal one. It is easy to see how local authorities have for many years turned a blind eye to the realities of coastal erosion. Picture this:

The Mayor of your local authority stands in the most seaward room of a property built on the foreshore at a New Zealand coastal settlement. Mean high water mark hasn't yet reached the 8m EQC threshold but the waves are lapping at the seaward boundary of the property and a chunk of land has already been lost. Sorry but the politician has distressed constituents to deal with and says sure bring in a few truck loads of boulders from the local quarry. That will fix it".

It may well fix it but the fix will be very short term.

Protection works

As a nation of islands the cost of "protecting" our coastline would be prohibitive. Whoever is liable for those costs, there is a very definite need to understand the ramifications of any remedial work. The problem with regard to seawalls for example is that the prevailing wisdom is now to let the sea in. The belief amongst experts is that if you "protect" one part of the coast you merely create problems elsewhere. In addition, the types of sea walls that often impress landowners can look completely inadequate to the experts who fear that the walls will eventually fail leaving owners bitterly disappointed and seeking someone else to blame. What that means for these owners is

that their homes may eventually be lost to the sea. In some parts of the country, councils are promoting the use of "relocatable" buildings or buildings designed to survive temporary flooding situations, such as pole houses, thereby minimising the loss owners may suffer. So anyone wanting to live on the coast needs to realise the limitations and risk associated with coastal property ownership and needs to ensure that they take steps to check the stability of land and assess the risk of erosion. Coastal erosion will occur – its only a question of when.

Property owners can of course seek consents to undertake work on their land to protect their property and in fact do so. However it is not always reasonable to expect a local authority to expend public money in protecting private assets, especially if this protection may then detrimentally affect other areas and other assets. In New Zealand coastal erosion is a fact of life. We are unlikely to ever invest in protection measures to the extent that the Dutch have done and therefore the problem is unlikely to ever be solved. It is not merely financially prohibitive, but impractical both from an engineering and environmental perspective. For coastal property owners, it is a risk they run in exchange for their seaside dwellings. There is an old saying that "cliffs are where the land used to be" – wise words that are often overlooked when searching for that seaside location or view. And what lengths those residents will go to in order to protect their views and amenity. A 5 lot in fill subdivision in Ohope has been the subject of 2 Environment Court hearings, 2 High Court hearings and a visit to the Court of Appeal in Wellington Murray v Whakatane District Council will have consumed close to \$1m in consultants fees by the time houses are eventually built.

The precautionary approach

The New Zealand Coastal Policy statement advocates a precautionary approach to coastal development. The Environment Court has in two cases in the Bay of Plenty endorsed that approach. A third decision in respect of planning provisions relating to South Brighton in Christchurch is awaited. Adrienne Young-Cooper gave evidence in one of the Bay of Plenty cases. She is quoted in Bay of Plenty Regional Council and Waihi Beach Protection Society Inc. v Western Bay of Plenty District Council A 27/2002 as follows:

[40] *By way of general comment, Ms Young Cooper had this to say:*

New Zealanders have a natural propensity to wish to locate permanent and holiday houses close to the coast, especially the "lee" or eastern coastline of New Zealand, and in particular from the Bay of Plenty north. Sea views over geologically unstable beaches are very attractive and have driven subdivision and development in many locations on or very close to the dunes that provide some protection from the natural hazards of storms and rise in sea level. Such beachfront properties can be highly valued, even when they are subject to known and identified hazard.

[41] *And later she observed:*

The desire to protect one's property from erosion and destruction is understandable, bearing in mind the value of those properties, in some cases the long tenure even over generations, and the amenity of the coastal location which may be enjoyed.

...

A typical view of the development of an urban area is that not only is the development permanent, but also that in desirable locations such as east coast beaches, the density and value of both public and private investment will increase over time. This runs counter to the concept of what should be viewed, in terms of part of Waihi and Pukehina Beaches, on the basis of best scientific information today, as a "lease" on such locations.

The risks which these known coastal hazards create are intensified by existing and future urban development. Risk is multi-dimensional and includes not only the quantification of the hazard events, but also a "receiving environment" factor. So, for example, coastal erosion in unpopulated, undeveloped coastlines has a much lower risk profile than the same events in a location with urban development. It therefore follows that the greater the level of development in both capital investment and density of people, the greater is the risk profile in that location.

The social impact of the definition of the Coastal Protection Area is not explicitly explored in any of the Council's reports, although the consultation with the residents of Waihi Beach may provide some proxy for this.

In the absence of an adequate range of methods, including information, actions under the RMA and other Acts, and market mechanisms, levels of public and private investment in these hazardous locations may be founded upon a concept of permanence. This in time could lead to uneconomic use of those investments, and/or pressure for expensive coastal and flood protective works.

It is reasonable in my view to start from an assumption that the higher the value of development in a coastal location, the more likely it is that hard engineered coastal protection options will be pursued to manage coastal hazard. For example where a beach is fronted with extensive high-rise apartments, it is much more likely that heavily engineered coastal protection works and options such as beach nourishment will be taken, than allowing the beach to its natural processes, and demolishing apartments approaching the tide.

The decision also contains a number of findings which should be of interest to any practitioner grappling with issues relating to the management and control of development in the coastal environment.

Environment v Property Owners

Property owners have expectations. Today those expectations encompass the wish to subdivide or redevelop one's property. After all a man's home is his castle. Barker J however in **Falkner v GDC** [1995] NZRMA 462 confirmed that there is no longer an obligation on the part of the King (read the Crown) to protect the realm from incursions of the sea. So while each situation would have to be looked at on its own facts in general we would suggest that the private interests of landowners should give way to the greater public interest which will include, among others, minimising the financial risk to which the community as a whole is exposed. When coastal erosion occurs property owners are usually loathe to accept that it is a natural process. They tend to look for scapegoats. Generally developers and builders are long gone but the council in some form or another remains. So there will be allegations that the Council was negligent and/or breached its

statutory duty in permitting the subdivision, granting building permit/consents, undertaking or not undertaking the construction of protective measures as the case may be and generally that the council shouldn't have allowed the landowner to find him or herself in the unfortunate position he or she is now in.

This situation gets even more complex when the Council either owns or administers land which lies between privately owned property and the sea. Currently in New Zealand the law is that you cannot remove the support which your property provides to your neighbours' property. How does this apply to esplanade reserve the seaward boundary of which is characterised by the sandstone cliffs common throughout Auckland? Does the Council have a positive obligation to take steps to ensure that the support provided to adjoining land remains. This might for example require the armouring of the toe of part of a cliff. This would require resource consent from the regional council, it would have a visual impact. It would be unnatural in the sense of bringing large basalt or greywacke boulders into an area where they do not occur naturally. We would hope that the answer is no. That is that the natural processes may continue and that the local authority does not have a responsibility either as landowner or manager to interfere with the natural processes. This issue is before the High Court now.

Services

There are other situations where infrastructure such as roads and drains are constructed in coastal areas. Public assets such as these may need to be protected and therefore different considerations relate to them. By the same token councils need to be cognisant of the damage that former practices caused, for example, stormwater outfalls on beaches giving rise to localised erosion. Alternative methods need to be found. In general therefore it is our view that public monies should not be expended on protecting private assets. To avoid costly and potentially acrimonious litigation councils need to give real thought, not lip service, to a policy of retreat, i.e. facilitating the addressing of the risk currently faced by foreshore property owners by encouraging them to either move their houses back on their existing sites if possible, in the knowledge that this is only a temporary measure, or to relocate to another site. It may even be that the Council purchases land specifically for that purpose.

Moving away from erosion

One of the other issues which many smaller councils are facing is opposition from tangata whenua to the continued operation of ocean outfalls from effluent treatment systems. The costs associated with upgrading to a land based system can be prohibitive. For geological reasons it may not even be possible to discharge treated effluent to land. In the case of the Hastings outfall a mediated consent was overturned by the Minister of Conservation in a situation where her own Department had been a party to the consent negotiated through mediation. There is insufficient central government involvement in this issue, there is certainly no funding available. Central Government has through the Resource Management Act created an expectation amongst iwi that the use of ocean outfalls will cease thereby returning the mauri to the ocean. In many cases it can't be done or if it can be done it won't happen overnight.

Tied to this issue are considerations relating to the aquaculture industry. Maori want a big stake in this industry. The moratorium is giving regional councils the opportunity to identify areas in which aquaculture can be established. Not only will "health" and perception issues play a part in the identification of suitable sites but there will be opposition from competing interests for example the fishing industry and recreational "boaties". Large scale mussel farms also have the potential to

impact on landscape values to a significant degree. As can be seen by the number of cases in the Marlborough and Nelson regions and the thickness of Judge Kenderdine's decisions, there is a lot at stake.

Conclusion

Councils are essentially conservative entities. They are generally risk adverse. The new local government legislation requires them to look after their communities. One such community might be the owners of foreshore properties. As we said earlier those owners have expectations. Natural processes don't seem to dim those expectations. The value of coastal land continues to climb regardless of warnings of sea level rise and climate change. Recent figures suggest increases by as much as 2000% over recent years. So what should councils do? In our opinion they should certainly not expose their communities to any greater or additional risk. They need to be mindful of their obligations under section 106 RMA and section 36BA. They need to establish frameworks within which property owners might have some of their expectations met while the interests of the wider community are also met.

The maintenance and enhancement of access to and along the coastal marine area is a matter of national importance as is the preservation of the natural character of the coastal environment and the protection of it from inappropriate subdivision, use and development. The clear signals are that unspoilt areas should be left in that state. Development should be encouraged to locate in areas which have already been "compromised". Councils need to be very careful about the development opportunities which they enable through their district plans. The sort of development to be found at the Gold Coast or Noosa is not likely to be replicated anywhere in New Zealand. That is not to be critical of the high rise development to be found at Mt Maunganui. Rather it is to recognise that development of that nature may have had its day and more sensitive development is required. The area may be urban but it is also coastal. Balancing urban development in a coastal setting is obviously a challenge but local authorities shouldn't shirk their responsibility.