Reducing risk through the management of existing uses: tensions under the RMA

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ABBREVATIONS

CDEM	Civil Defence Emergency Management
DAPP	Dynamic Adaptive Pathways Planning
MFE	Ministry for Environment
NCDEM	National Civil Defence Emergency Management Plan
NPS	National Policy Statement
NZCPS	New Zealand Coastal Policy Statement
RNC	Resilience to Nature's Challenges
RMA	Resource Management Act 1991
RPS	Regional Policy Statement
TAs	Territorial authorities

KEYWORDS

Risk reduction, existing uses, land use planning, Resource Management Act, unfair and unreasonable burden, incapable of reasonable use

EXECUTIVE SUMMARY

Many communities in New Zealand face risks from natural hazards that are either increasing due to climate change, or where new knowledge has revealed the hazard has greater probability, magnitude or likely impact. There are also situations where the potential consequences of a hazard event are increasing as a result of intensification of development. Local government agencies face the challenge of how to respond when an existing community faces a new level of risk that was not provided for when the development was established. In this situation land use planning offers a means to reduce risk by applying controls and restrictions on existing land uses, including extinguishing them entirely. The Resource Management Act 1991 (RMA) provides for the management of natural hazards through land use planning, however, to-date there have been few examples of local authorities using the RMA to reduce risk to existing developments by modifying existing uses. Local authorities are not merely driven by a requirement to respond to the content of the RMA but need the RMA to provide them with the tools and the guidance to act in a way that their obligations to community wellbeing and safeguard demand.

This research examined three fundamental questions: (i) What are the options for managing existing use under the RMA for the purpose of risk reduction? (ii) Why have there been so few examples of managing existing use for risk reduction to date? and (iii) What further steps may be necessary to bring clarity and certainty to a very difficult issue with many competing views and imperatives?

This has been an interdisciplinary research project involving planning, legal and social systems understanding. It has involved interviews with territorial and regional local government authorities, assessment of current Regional Policy Statement (RPS) documents, legal analysis, and a review of planning and legal literature. It has also been usefully informed by discussion with the project steering group, which included representatives from local and central government, and researchers with planning, legal, and natural hazards and climate change expertise.

Reflective of the complexity of the situation, there are four purposes and therefore four audiences for this work: (i) to provide local government agencies with greater clarity on their options for reducing risk through the management of existing uses; (ii) to provide policy makers in central government with an awareness of the challenges facing local government agencies in developing and implementing land use policies that target existing uses for reducing natural hazard risk; (iii) to provide those advising people on the legal ramifications of policy choices in this area some legal analysis of the key sections and (iv) to contribute to further research on climate change adaptation, dynamic adaptive pathways planning (DAPP)[1] , and managed retreat, by refining our understanding of the issues that need to be addressed to progress these.

[1] Dynamic adaptive pathways planning (DAPP) is a planning approach for identifying ways forward despite uncertainty. (Bell et al. 2017)

We have identified reasons why it is uncommon to see rules that reduce risk to existing developments by managing existing uses in regional plans and identified options available under the RMA for overcoming hurdles to reduce risk. These reasons and options fall into four themes:

1. Fundamental concepts of risk and existing uses and how these are dealt with under the RMA
2. The structure and intention of RMA policy documents
3. Clarity of roles and responsibilities through governance arrangements under the RMA
4. The practicalities of how policies and rules to reduce risk through managing existing use meet with the checks and balances established by the RMA for policy and rule development.

Our key findings address how current provisions under the RMA affect local government agencies' **understanding** of their roles and options, as well as their **abilities** and **imperatives** to act to manage existing uses to reduce risk.

Issues affecting understanding

We identified four ways that issues of 'understanding' create barriers for local government agencies to reduce natural hazard risk through the management of existing uses:

1. **Lack of understanding about what it means to reduce natural hazard risk in existing developments.** Changing risk for existing development is a complex issue and we found examples where local government agencies assumed risk reduction would result from the implementation of their policies when at best these would result in only lessening the risk increase. Alongside this was widespread uncertainty about definitions of acceptable and significant risk, and how these translate into planning and policy actions to address natural hazard risk in existing developments.
2. **Views on how the RMA protects existing uses**. Local government agencies clearly have a much greater understanding of the protection of existing uses than of how to manage existing uses to reduce natural hazard risk in existing developments. This gives rise to the reluctance to engage communities on measures that will interfere with existing uses.
3. **Roles and responsibilities (i.e. who can do what?)**. We observed variation in what local government officers understood are the roles and responsibilities of their agencies in respect to reduction of hazard risk in existing developments. We also identified confusion about the overlapping jurisdiction in the RMA on this matter. Regional councils can make land use rules that manage existing use, but do not necessarily have the understanding required to do this. In contrast, territorial authorities (TAs) have the understanding about how to make land use rules but cannot make rules to manage existing uses. Notably we found no observable difference in the views and behaviours of unitary authorities suggesting organisational arrangements are not having a significant impact in this context.
4. **How regional rules work:** There was high-level understanding of the option of prohibiting residential uses as part of managed retreat. However, there was a practical lack of understanding of how regional rules can be used to reduce hazard risk in existing developments, and the spectrum of rule frameworks available. There was also uncertainty around the assessments and checks and balances under the RMA for rules to manage existing uses, particularly prohibited activity rules.

Issues affecting ability to act

Our review found that the RMA provides plenty of scope to act to manage existing uses to reduce natural hazard risk, where this action falls short of complete extinguishment. This includes (i) the ability of regional councils to use regional rules and (ii) the potential for an RPS to provide strong direction on management of existing uses to reduce risk. However, difficulties are likely to be encountered where complete extinguishment is contemplated due to s 85 of the RMA and the potential for such action to render the land incapable of reasonable use and create an "unfair and unreasonable burden".

Related to this is what we have termed the "timing conundrum", where it may be quite difficult to introduce a prohibited activity rule to require withdrawal, in advance of a risk becoming significant. This is because our analysis of s 85 suggests that for a prohibited activity rule that requires immediate withdrawal to pass the test set in s 85, there must be significant risk. At the same time, we conclude that rules that impose the heaviest restriction, being the extinguishment of existing uses, may be more palatable if there is a long lead-in time to their implementation. This long lead-in time does not correspond to the need for a significant risk in s 85. It is unclear if the inevitability of sea level rise effects, the magnitude and timing of which may be uncertain, would be a significant enough risk to pass the provisos to s 85. This would leave any long-term plan to manage a gradual but purposeful reduction in risk to existing developments with an uncertain last step, as it would not be clear if the final withdrawal was possible until the process to bring in a prohibited activity rule was underway.

Issues affecting imperative to act

Our research identified considerable license and flexibility afforded to local authorities for natural hazard management and climate change adaptation. While this flexibility provides an ability to act, it provides no imperative to act. Flexibility is contributed to by (i) the language of the RMA and planning documents, through use of terms such as 'manage', 'consider' and 'encourage' (ii) the lack of a clear outcome for risk reduction in existing developments, contributed to by the use of the terms 'avoid' and 'mitigate' rather than 'reduce'; and (iii) a lack of clarity in governance arrangements under the RMA for reducing risk.

An outcome for risk reduction set at the nation level would provide an imperative to act. This should be accompanied by a direction on which authority is responsible for achieving the outcome. This would overcome the lack of a clear line of responsibility between regional councils and TAs for risk reduction through managing existing uses, which currently causes a disincentive for agencies to assume authority.

Conclusion and Recommendations

Our overall conclusion is that it is possible to use the RMA to implement a policy to reduce existing risk in most circumstances. However, there is considerable uncertainty around the ability of local authorities to completely extinguish existing uses and thereby achieve immediate (or complete) risk reduction. Our recommendations fall into the three categories of improving practice and implementation, legislative change, and further research.

Improving practice and implementation

a. Education and capacity building for those working under the RMA (council staff, decision-makers, consultants, lawyers, engineers and others) on:
    i. key concepts of natural hazard risk and risk reduction, including climate change effects, and how policy approaches under the RMA affect risk outcomes.
    ii. Land use planning for reduction of risk to existing developments, for those working at the regional level and/or unitary authorities.
b. Encouragement of strong coordination and collaboration between regional councils and TAs on natural hazard management, and particularly for the reduction of risk to existing developments.
c. Development of a national planning document under the RMA for the management of natural hazard risk.
d. National level development of implementation tools and frameworks that support the use of the RMA to manage existing uses to reduce risk. These include addressing and clarifying issues relating to compensation, infrastructure, how risk is assessed, how levels of risk trigger actions, and public engagement on risk.

Recommendations for legislative change

e. Clarification of the operation of s 85 of the RMA in the case of extinguishment of existing uses for reduction of natural hazard risk to existing developments, including whether the option of extinguishment of existing uses should be available in advance of the risk becoming significant, and consideration of whether the complexities in this area require bespoke legislation.
f. Changes to the language of the RMA to provide a consistent narrative on addressing natural hazard risk and to clarify the place of 'reduce' among (or instead of) 'avoid and mitigate'.
    i. Make a distinction in the RMA between the 'management' of risk to future developments, and the 'reduction' of risk to existing developments.
    ii. Add a second limb to s 6(h) of the RMA so that reduction of significant risk to existing developments is to be achieved as part of the management of significant risk.
    iii. Add 'risk' and 'reduction' to ss 30 and 31 and consider the appropriateness of retaining 'avoid and mitigate'.
g. Development of a statutory requirement to act (rather than just an ability) for regional councils or TAs to reduce risk to existing developments through the management of existing uses.

Key areas for further research

h. The implications of our findings for adaptive planning process such as DAPP that seek to plan for adjustments to changing levels of risk in the future.
i. How existing uses established by resource consent can be managed to reduce risk to existing developments, and consideration of whether the existing provisions regarding the modification of resource consents are likely to cause problems in practice or not.

Action under the current system

Our key recommendation to local authorities is that the use of rules to manage existing uses to reduce risk should be proactive and begun well in advance of the need for a complete withdrawal from an area. We recommend that local authorities facing this situation look closely at:

- What is meant by reduction of risk to existing developments and the management of existing uses under the RMA, including the options for how rules can be used to achieve risk reduction outcomes.
- The hierarchy of RMA documents that applies in the region, focusing particularly on the RPS, and what changes might be necessary to these documents to ensure an objective to reduce risk to existing developments is clearly articulated through the hierarchy.
- Governance arrangements between the regional council and TA, and the state of the relationship between the two levels of local government.
- The checks and balances established under the RMA, particularly the operation of s 85, and the requirements of s 32.

1.0 INTRODUCTION

Many communities in New Zealand face risks from natural hazards that are either increasing due to climate change, or where new knowledge has revealed the hazard has greater probability, magnitude or likely impact. There are also situations where the potential consequences of a hazard event are increasing as a result of intensification of development. Local government agencies face the challenge of how to respond when an existing community faces a new level of risk that was not provided for when the development was established. With this greater awareness comes a range of questions about how land use planning can be used to reduce risk. Three broad planning directions are possible (i) to manage further increases in risk by controlling the type and amount of intensification of the development, (ii) to maintain existing levels of risk by restricting further development, and (iii) to take a form of retrospective action that alters the nature of the current land use to reduce the changed level of risk to people and property. Thus, fundamental to any land use policy addressing significant risk for an existing development is the management (including extinguishment) of existing uses.

Risk reduction through land use planning can encompass relatively minor actions to modify the existing use (such as controlling the way in which properties are rebuilt following hazard events) through to the major action of extinguishing an existing use completely (such as de-habitation of an area often referred to as managed retreat (Lawrence et al. 2018, Hanna et al. 2017, Harker, 2016, Reisinger et al. 2015)). The Resource Management Act 1991 (RMA) is the primary land use planning legislation for local government agencies and provides for the management of natural hazards through land use planning. However, the extent to which it facilitates adaptation of existing communities to changing levels of risk is not entirely clear. It is certain that to-date, there have been few examples of local government using the RMA to reduce risk to existing developments by modifying existing land use.[2]

Commentators agree that there are a range of tools available to reduce risk from natural hazards in the RMA, regional rules being the main one; but also observe that these tools have been rarely or poorly utilised (Tonkin & Taylor 2016, LGNZ 2014, MFE 2012, Lawrence and Allan 2009, Turbott 2006). Moreover, while reducing risk through the alteration of existing land use may be only one of a range of risk management options available to local governments, it is likely to be a significant one. Climate change projections for New Zealand show that substantive impacts will be felt by thousands of people in coastal communities who will ultimately need to be resettled on higher ground (Bell et al. 2017). It is therefore critical to understand how well our primary planning legislation is set up for this prospect. Simply put: are local government agencies empowered to use the main tool in their planning toolbox (the RMA) to reduce risk from natural hazards through the management of existing uses?

This research examines three fundamental questions: (i) What are the options for managing existing use under the RMA for the purpose of risk reduction? (ii) Why have there been so few examples of managing existing use for risk reduction to date and (iii) What further steps may

[2] There have been cases where management of existing uses in New Zealand for the purpose of retreat from hazards has occurred using means outside the provisions of the RMA (see examples in Vandenbeld and MacDonald (2013) and Hanna et al. (2017)).

be necessary to bring clarity and certainty to a very difficult area with many completing views and imperatives?

1.1 Outline of Report

The report is structured as follows:

Section 2 – Fundamentals: risk reduction and existing use under the RMA: describes the concept of reduction of risk for existing communities through land use planning. It outlines how the fundamental principles and legislative provisions of the RMA explain and deal with risk and allow for existing uses to be managed. It explores how possible tensions are created through the language of the RMA regarding risk and the high degree of protection for existing uses generally provided in the RMA and how this affects clarity of action and purpose for local government agencies.

Section 3 – RMA Policy documents: explores the intersection of hazard risk reduction and existing use as reflected in current policy and planning documents. It particularly examines the influence of the policy and plan hierarchy, including how the directives provided by national and regional planning documents, and the way policy objectives are articulated, can shape a clear intention to reduce risk at a local level.

Section 4 – Governance: explores the role of governance and inter-governmental cooperation between regional and territorial authorities, including: (i) whether the RMA provides sufficient governance structure for reducing risk, (ii) whether a barrier to action is created by the fact that the ability to create a rule to extinguish existing use rests at the regional level while in practice the management of land use is generally undertaken at the territorial authority level.

Section 5 – Practicalities: reviews the checks and balances in the RMA that are required before policy and rules can be implemented and considers their impact on the nature of policies to reduce risk through managing existing uses. It examines s 85, which raises the possibility of compensation where a rule to control existing use renders land incapable of reasonable use and poses an 'unfair and unreasonable burden', and its potential influence on the ability to implement policies to extinguish existing uses.

In Section 6 we discuss the implications of our findings. We consider how options for local government to reduce natural hazard risk in established communities by managing existing use might be affected by real and assumed constraints within the RMA, or within governance arrangements regarding hazard risk reduction and management of existing land use, lack of clarity about statutory options and consider what factors would improve both the ability and the incentive to act.

In Section 7 we present our overall conclusions and make recommendations.

1.2 Audience, Scope and Related Work

Reflective of the complexity of the situation, there are four purposes and therefore four audiences for this work: (i) to provide local government agencies with greater clarity on their options for reducing risk through the management of existing uses; (ii) to provide policy makers in central government with an awareness of the challenges facing local government agencies in developing and implementing land use policies that target existing uses for reducing natural hazard risk; (iii) to provide those advising people on the legal ramifications of policy choices in this area some legal analysis of the key sections and (iv) to contribute to further research on

climate change adaptation, dynamic adaptive pathways planning (DAPP)[3], and managed retreat, by refining our understanding of the issues that need to be addressed to progress these.

This has been an interdisciplinary research project involving planning, legal and social systems understanding, which provides for a comprehensive assessment of the issue. The nature of the reporting reflects the different disciplines involved, and we acknowledge that those reading with a background in only one of the disciplines may not be familiar with the style of the others and we have done our best to account for this.

The scope of this report is limited to the provisions of the RMA itself and their interpretation in the case law, as well as policy and planning documents and tools, current planning practice, and relevant governance issues. While we acknowledge that there are provisions under the Civil Defence Emergency Management Act 2002 and the Building Act 2004 and other related legislation, such as the Public Works Act 1981 to reduce natural hazard risk, our focus is solely on the capacity to do so under the planning framework provided by the RMA.

We acknowledge other research that is currently being undertaken in this area including by local government agencies themselves, to maximise the learning potential of their experiences, through the Resilience to Nature's Challenges programme including "The Living Edge"[4] project and Resilience Governance Project[5]. These include: Whakatāne District Council's management of debris flow risk at Matatā (Hanna et al. 2017); and the adaptive planning approach to the Hawkes Bay Coastal strategy (Lawrence et al. 2018). We also acknowledge work being undertaken for the Impacts and Implications Programme[6] of the Deep South National Science Challenge, including on the role of insurance (forthcoming, Storey,) and council legal liability issues (forthcoming, Irons Magallanes).

1.3 Methodology

An important part of this project has been the interdisciplinary team who have brought planning, legal and social systems understanding to a complex issue. The research used a methodology for building and testing theory about practice based on constructivist modifications of grounded theory (Charmaz 2008) and participatory action research (Kemmis and Wilkinson 1998, Kindon et al. 2007, Mcintryre 2008). Through cycles of data gathering and testing with experienced stakeholders, a set of ideas about how the situation works and the potential for change is built up and validated by both researchers and practitioners.

The work began by asking broad questions about the challenges of managing existing uses in high hazard areas based on preliminary examination of legal and planning literature, alongside understanding of concerns raised by experienced stakeholders. From this, an initial understanding of the problem situation was developed (including for example: What were the common and most concerning issues? Who or what were regarded as important influences, and events? What were the areas of uncertainty?). A conceptual map of these initial ideas was then validated and amended through discussion with members of the project steering group

[3] Dynamic adaptive pathways planning (DAPP) is a planning approach for identifying ways forward despite uncertainty. (Bell et al. 2017)

[4] https://resiliencechallenge.nz/edge/

[5] https://resiliencechallenge.nz/governance/

[6] https://www.deepsouthchallenge.co.nz/programmes/impacts-and-implications

who included district, regional and central government staff, and experienced academics (see Appendix 1-steering group).

This initial problem understanding formed the basis for more in-depth inquiry conducted in three ways:

Interviews

Semi-structured qualitative interviews were held with regional, district and unitary authorities (Appendix 2). The interviewees were provided with an initial overview document (Grace et al. 2018) and asked guiding questions that enabled them to explore the following three areas in ways that were most relevant to their own experience.

1. Policy and planning measures under the RMA: what approaches are currently being used by agencies to address existing uses in high hazard areas, including measures that are under consideration as well as those already taken; the expected impact of these and any issues associated with implementation.
2. Influences on the choices being made by agencies regarding addressing existing uses (including organisational, social and contextual influences).
3. Legal concerns and understanding about RMA provisions to address existing uses – including understanding about limitations and implications of various options and how these might influence their choice to act in particular ways.

The interviews also explored the kinds of guidance and information that participants were using or would like to have available.

The interviews (some with individuals and some with groups) were held with staff in a range of roles associated with risk and planning as reflects the diversity of arrangements in regional, territorial and unitary authorities. They were recorded (for note taking) and later analysed for key themes.

Review of the legal and planning literature

A more refined review of legal literature and case law, and planning literature was also undertaken – shaped by the questions and themes emerging from the interviews.

An analysis of regional policy statements

An analysis was undertaken across all 17 Regional Policy Statements (RPSs) comparing how different planning policy frameworks can lead to rules that reduce natural hazard risk through managing existing use (see summary table Appendix 3). Objectives, policies, and associated methods were assessed where they had (1) used an ‘avoid and mitigate’ approach (2) a specific focus on reduction of hazard risk for development. The assessment looked at the relationship between use of the word ‘reduction’ of natural hazard risk and the identified method of management of existing uses and/or extinguishing existing uses. The assessment also considered the overall policy intention and looked at whether the RPS referred to (or further qualified) responsibilities for regional and district agencies regarding existing uses and/or risk reduction.

Throughout the research there were also several opportunities to meet with professional groups to present and discuss initial findings or further explore the questions put to the interview groups with wider audiences. These include presentations at the New Zealand

Planning Institute conferences 2018 and 2019, the Resource Management Law Association Annual Conference in 2018; a meeting with the Regional Council Natural Hazards special interest group; and a meeting with a grouping of national agencies in November 2018. Information about the emerging themes from the research was also shared with ongoing parallel research within the Resilience to Natures Challenges, the Living Edge and Governance projects.

In November 2018 a preliminary set of findings about critical issues was presented to the project steering group and a rigorous discussion led to a prioritising of areas most useful to expand on in this final report. A draft report was reviewed internally in June 2019 by Dr Wendy Saunders and Maureen Coomer of GNS Science. In July and August 2019, the full research report was reviewed by Dr Judy Lawrence (Victoria University of Wellington), Julia Harker (Auckland Council (formerly Faculty of Law, University of Auckland)) and Mark Johnson (Ministry for the Environment), and the remainder of the project steering group were also offered the chance to review the document and make comments.

2.0 FUNDAMENTALS: RISK REDUCTION AND EXISTING USES UNDER THE RMA

This section considers the first theme of our research: the fundamentals of risk reduction and existing use under the RMA. It begins by explaining what risk, and particularly risk reduction, is in the context of land use planning; and looks at how risk is addressed under the RMA. It then considers how the RMA addresses existing uses, as reducing risk for an established community will likely require current uses to be modified or extinguished. This section also explores how these fundamental concepts and policy choices within the RMA impact on decision-makers' perceptions of their options to reduce risk. Finally, we look at steps taken by six (of 17) regional councils to manage existing use in high hazard areas through RMA documents.

2.1 Risk Definition and Risk-Based Land Use Planning

Reduction of risk to existing developments can be achieved through land use rules that manage or extinguish existing uses. Understanding 'risk' is central to understanding how management of existing uses can be achieved under the RMA, as risk is the metric by which decisions to extinguish or manage existing uses are measured.

2.1.1 Defining Risk

There are many ways to define risk. For the purposes of understanding land use planning to manage risk, it is helpful to consider the straightforward approach to consider risk as being the combination of the likelihood (probability) of an event of any magnitude occurring and the consequences (impact) of that event. A commonly used expression that emphasises the importance of these two components is

Risk = likelihood x consequence

Different combinations of likelihood and consequences produce different levels of risk, which form the basis for understanding when a risk becomes significant and requires management (Saunders & Kilvington 2016).

2.1.2 Risk-Based Land Use Planning

New Zealand land use planning practice is moving towards a risk-based approach, and the New Zealand courts have accepted that managing natural hazards is about risk management (Maw & Melhopt 2017). This differs from historic practices by focussing on the presence and level of risk, rather than the presence and likelihood of the hazard (BOPRC 2014). Such an approach considers various scales of a natural hazard event (for example different magnitude earthquakes; different intensities and durations of flooding events), together with the likelihood of that event occurring and the effects that it would cause, particularly on people and property (CCC 2016).

A risk-based planning approach ensures that land use is managed so that the level of restriction corresponds to the level of risk. The implication being that a low level of response may be taken even where a hazard is likely if the consequence would be low. Conversely, land use control may be required in respect of a hazard with a relatively low level of likelihood if the potential consequences of that hazard event are very high (BOPRC 2014) (see text box).

Land use planning based on risk rather than hazard – what's the difference?

In a risk-based approach to land use planning, rather than relying only on a likelihood of a hazard event happening (for example the 1 in 100-year flood, or the 1% AEP flood) to design planning provisions, consideration is given to both likelihood and consequences together. For instance, this acknowledges that a 1% AEP flood may produce only minor damage, and the overall risk may not warrant significant planning interventions. By comparison, a tsunami that has a low likelihood of occurring may have such catastrophic consequences such that the risk is considered high and strong planning interventions are warranted. Risk-based planning also enables a suite of planning responses that reduce overall risk by managing the consequences of the event (i.e. by influencing the extent and nature of development).

With the move towards a risk-based approach in land use planning, there is an emerging trend for land use planning documents to refer to some degree of risk acceptability, which requires an assessment. The terms vary and include acceptable, tolerable, intolerable, unacceptable, and significant risk (in various combinations); or they could be phrased as high, medium and low risk. None of these terms are specifically defined in the RMA. 'Acceptable risk' is generally regarded as contextually dependent i.e. a product of the risk assessment and community expectations in any risk management situation (Kilvington & Saunders 2018). For robust decisions, planning documents need to indicate clear thresholds for risk acceptability and transparent processes for their determination. It is considered good planning practice to link thresholds of acceptability (including 'tolerable' or 'intolerable') with a planning and policy response related to levels of land use control (Saunders & Kilvington 2016).

Another emerging trend in risk-based land use planning is to use different planning responses for risk to life and risk to property. The Christchurch City District Plan has identified life risk as being of primary importance in situations prone to sudden and unpredictable events (such as rock fall in the Port Hills area) and has mapped levels of risk to life using the AIFR metric (Annual Individual Fatality Risk). Very specific land use regulation is then used to control activities in the mapped risk areas, including prohibiting certain activities in the highest areas of risk. Risk to property becomes more significant in situations such as flooding where evacuation is possible and repeated events can create unsustainable social and economic impact. A one-size-fits-all approach is used in this type of situation, where all development must achieve protection from a specified event (for example, a 2% AEP (Annual Exceedance Probability)[7] flood event in Canterbury).

2.1.3 Dynamic Adaptive Pathways Planning

Uncertainty is a key additional factor in understanding risk, which is particularly relevant to risk from sea level rise and other climate change related effects. Current scientific and socio-economic studies cannot assign a probability to any particular sea-level rise within any given

[7] AEP is the likelihood of occurrence of a flood of given size or larger occurring in any one year. AEP is expressed as a percentage (%) and may be expressed as the reciprocal of ARI (Average Recurrence Interval). E.g. if a peak flood discharge of 500 m3/s has an AEP of 5%, it means that there is a 5% probability of a peak flood discharge of 500 m3/s or larger occurring in any one year. (Victoria state government flood information https://www.floodvictoria.vic.gov.au/)

timeframe, and this uncertainty increases for projections beyond 2050 (Bell et al. 2017). In this situation, it is not possible to assign a likelihood to a set of consequences. Rather, when assessing the risk associated with sea level rise, emphasis is placed on the consequences, and consideration is given to how different types of development or activity will be affected in a range of future scenarios (Bell et al. 2017).

Dynamic Adaptive Pathways Planning (DAPP) is an approach that allows uncertainty and changing risk to be considered and addressed. It identifies ways forward (pathways) despite uncertainty, while remaining responsive to change should this be needed (dynamic). It can be summarised as follows:

> *The dynamic adaptive pathways planning approach can accommodate change in the future without locking in investments that make future adjustments difficult and costly. The process can be seen as a series of interlinked pathways, where the course can change at agreed trigger or decision points within the context of a range of future scenarios. By exploring different pathways to meet objectives, an adaptive plan can be developed and implemented to include short-term actions and long-term options. This approach will help both long-term sustainability and community resilience. (Bell et al. 2017, 12)*

For existing developments facing legacy issues caused by planning decisions made when the risk context was different, the DAPP approach can be used to set an objective of risk reduction and the pathways available to achieve it. This would include identifying triggers or conditions that indicate when a switch to another pathway or option is required to ensure the objective remains achievable. It is likely that management of existing uses would be part of the options included, with extinguishment of existing uses a possible final step to reduce risk.

2.2 Reduction of Risk to Existing Developments Through Land Use Planning

While land use planning can be used to manage risk from natural hazards in a number of ways, the focus of this research is on how to use it to reduce risk to existing developments through the management of existing uses. Land use planning is generally concerned with new- and re-development and does not often consider the management of existing uses. It was apparent during interviews with council staff that the concept of risk reduction, both through the management of existing use and the management of risk to future developments, was not always clearly understood.

Reducing risk to existing developments by managing existing uses addresses legacy issues caused by previous land use decisions. Such issues arise when development has proceeded without knowledge of risk, and risk then becomes known or the level of risk changes, for example due to the effects of climate change.

At the heart of this issue is addressing how to retrospectively insert an awareness of risk, or an awareness of a changing level of risk, into an existing development. This is a notable departure from common land use planning practice in New Zealand which typically seeks to manage risk to future developments (whether ‘brownfield’ or ‘greenfield’), and where the consideration is of risk to future, yet to be established, uses. Our research explored the extent to which this context acts as a barrier for risk reduction through managing existing uses.

2.2.1 Risk Outcomes from Different Planning Approaches

Figure 2.1. shows outcomes for management of risk to existing developments as a continuum. It illustrates the different outcomes that result from the use of different land use planning directions and approaches, being either (i) reduction of risk to existing developments, (ii) maintenance of current risk levels, or (iii) allowing risk to increase.

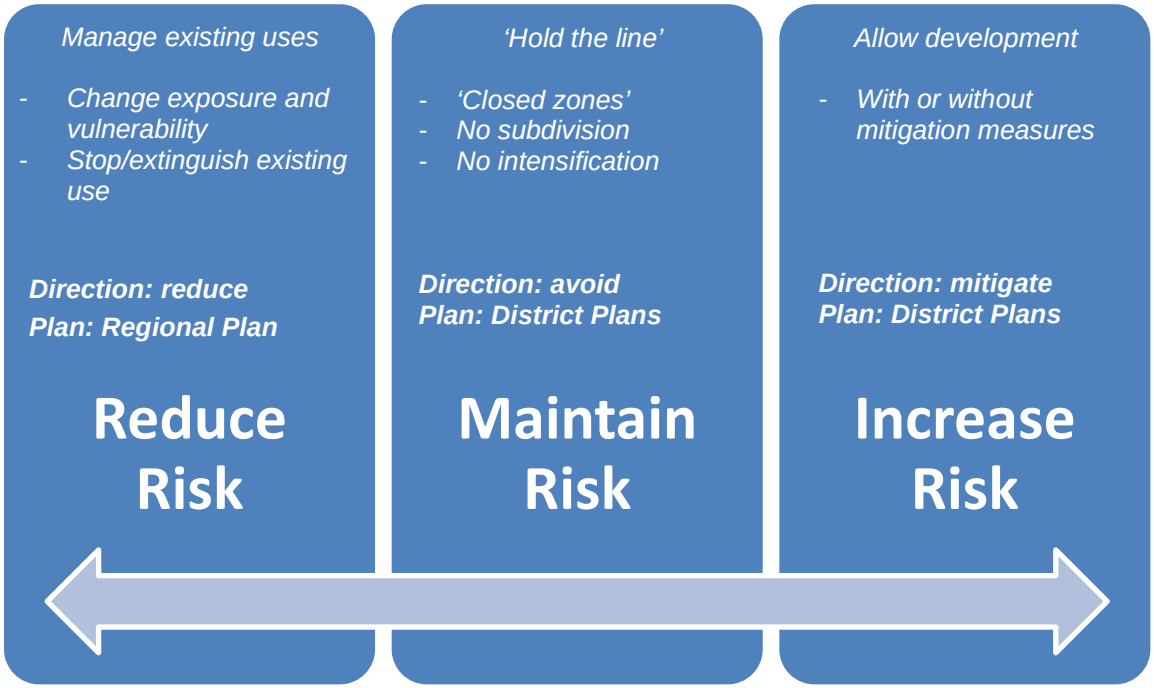

Figure 2.1 Continuum of risk management outcomes for existing developments, comparing land use planning approaches that result in reducing risk, maintaining risk or allowing risk to increase, including the key RMA policy direction that results in the outcome.

Reduction of risk to existing developments through land use planning results from changes to existing uses that alter the consequences of a hazard event. This is achieved by reducing exposure or vulnerability of people or property to hazards. For example, to reduce property damage to an existing development from coastal erosion, the effects of which are increasing due to climate change, one land use planning option is to relocate buildings and infrastructure further inland, reducing their exposure to the hazard. Another land use planning option that reduces exposure is abandonment of properties altogether.

Maintaining levels of risk is the result of stopping further development, including subdivision in the hazard prone area. This ensures no new buildings or people are exposed to hazards. It is not the same as risk reduction as it does not do anything about the risk to already established uses and physical resources. An example of this has been implemented in the Tasman Region, where a 'closed zone' has been created in a coastal area to manage risk from coastal erosion and inundation and encourage development on higher ground.[8] Subdivision is prohibited in the coastal area, which limits future intensification. It is important to note that this idea of "holding the line" does not take into account an increasing level of risk caused by the changes

[8] Plan Change 22 Mapua and Ruby Bay Development: http://old.tasman.govt.nz/policy/plans/tasman-resource-management-plan/plan-change-projects/operative-changes-and-variations/change-22-mapua-and-ruby-bay-development/

to the hazard likelihood, frequency or magnitude such as the climate change effects on sea level rise, flooding or coastal erosion. In this situation existing development will continue to be exposed to a gradually increasing level of risk. This policy approach might be more accurately regarded as 'reducing the increase in risk'.

Increase in risk is the outcome that results from land use planning decisions that allow development to proceed in hazard areas, even with mitigation measures in place to mitigate risk. This is because allowing development increases exposure and/or vulnerability to hazards. Although the mitigation measures might mean risk is lower than it would have been without such measures (for example, because vulnerability to flooding is less due to a dwelling having raised floor levels), exposure to the hazard has still increased by a new development being established in a hazard area. Raised floor levels may alter outcomes for some types of hazard events but do not reduce overall risk. The significance of this is particularly felt at the coast where the effectiveness of such measures will be time limited.

We note that these three outcomes for risk management align with the 'protect, accommodate, retreat' approach to management of sea level rise and the effects of climate change (Hanna et al. 2017). A reduction in risk has parallels to 'retreat', the maintenance of risk levels has parallels with 'protect' (also referred to as 'defend' or 'holding the line'), and allowing risk to increase with mitigate measures in place has parallels with 'accommodate'. This demonstrates that our research has implications for managing risk from both 'event' hazards and the effects of sea level rise and climate change.

2.2.2 Considerations for Risk Reduction to Existing Developments

Reducing risk to existing developments needs awareness of both current levels of risk, and how risk might change over time, particularly as a result of climate change. Land use planning options to reduce risk need to consider how consequences, now and into the future, can be reduced for existing developments, particularly how exposure and vulnerability can be modified through land use rules. The following considerations are helpful:

- Individual life and injury risk can most certainly be reduced by a decrease in time spent by an individual in an area (early warning systems can have an impact that varies according to an individual's ability to evacuate), reducing exposure.
- Collective (community-wide) life and injury risk can be reduced by reduction in population (such as through policies that discourage replacement of hazard damaged properties – sometimes referred to as a 'sinking lid'). This reduces exposure.
- Voluntarily leaving an area obviously reduces risk for those who leave but this typically favours the young, healthy or those with more resources. Those remaining will be those who had the highest personal vulnerability in the first place, and so overall risk may not meaningfully decrease as much as desired or within the most preferable time limit.
- Risk to property can be reduced through adaptation of property characteristics that reduce the vulnerability of the property to the hazard (e.g. raised floor levels, seismic strengthening). This may reduce the scale of impact but since it is oriented towards reducing property damage (rather than other consequences such as life, livelihood, infrastructure), the effect on the overall risk profile may be minimal, particularly without timelines for achieving substantive changes. It may also be counterproductive if this encourages further development and investment.
- Infrastructure can be designed to withstand some hazards, reducing its vulnerability to hazards, but residual risk is likely to remain.

Choosing appropriate land use planning options for risk reduction for existing communities requires an understanding of the legislative context for risk reduction, in particular the RMA and its ability to enable local government to use land use planning to achieve risk reduction.

2.3 Reduction of Risk from Natural Hazards and the RMA

It is important to understand how the RMA addresses risk from natural hazards, and risk reduction specifically. This includes the mandatory requirements of the legislation, the extent of guidance it provides, and the flexibility for a council to pursue a policy of reduction of risk through the management of existing uses. If a local authority decides it is necessary to pursue a policy to reduce risk to an existing development, land use planning (governed by the RMA) is a key tool that can help achieve this.

There is no section of the RMA that specifically requires or precludes a policy to reduce risk to existing developments from natural hazards. There are, however, sections that refer to management of natural hazards. This part of the report reviews those sections of the RMA and considers what influence they have on using RMA plans for the reduction of hazard risk.[9]

The starting point in understanding the RMA's approach to risk is s 5 and the sustainable management purpose at the heart of the RMA. Coupled with this is s 3 and the definition of 'effect'. Risk from natural hazards is addressed directly in the RMA in s 6, s 106, and clause 7(1)(f) of Schedule 4. The effects of climate change are addressed in s 7(i). The management of natural hazards is addressed in ss 30 and 31 along with the definition of 'natural hazard' in s 2. As we describe these sections below, we note the language used in each section and its relevance for RMA provisions for natural hazard risk reduction for existing communities.

2.3.1 Section 5 of the RMA

Section 5 of the RMA identifies the purpose of the RMA as being "to promote the sustainable management of natural and physical resources" (s 5(1)). This purpose is further defined in subsection (2), which is as follows:

> *In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
> *(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> *(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
> *(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Of particular relevance to the reduction of natural hazard risk is the requirement to provide for the wellbeing and health and safety of communities when managing use and development. This provides an opportunity for a policy aimed at risk reduction for existing communities, as

[9] We note that the New Zealand Coastal Policy Statement, prepared under the RMA, addresses reduction of risk to existing developments, and this is discussed in section 3.2 of this report.

reduction of natural hazard risk, especially significant or intolerable risk, can protect or improve peoples' wellbeing, health and safety.

2.3.2 Section 3 of the RMA

Section 3 of the RMA includes a definition of 'effect'.[10] This is helpful in understanding the meaning of the sustainable management purpose in s 5 of the RMA, as well as the functions of local authorities (which are set out in s 30 and s 31 (discussed further below)). Importantly, amongst the list of what the term 'effect' includes is "any potential effect of low probability which has a high potential impact" (s 3(f)), as well as any "past, present or future effect" (s 3(c)), and "any potential effect of high probability" (s 3(e)). While not explicitly defining the term 'risk', the definition of 'effect' does incorporate the concept of risk, as it refers to both probability (likelihood) and impact (consequences), and it allows consideration of both imminent and future risks. Therefore, while risk is implicit in the 'effect' definition, it may not be immediately obvious that 'effect' incorporates 'risk'.

2.3.3 Section 6 of the RMA

Section 6 of the RMA identifies matters of national importance that those exercising functions under the RMA must recognise and provide for. Following amendments in 2017, this includes a requirement to "recognise and provide for the management of significant risks from natural hazards" (s 6(h)). This is a specific use of the term 'risk' in the RMA. This directive applies to all local authorities, as well as central government, so it needs to be implemented by TAs and regional councils alike. This requirement provides flexibility for local councils to pursue risk reduction policies in areas of significant risk from natural hazards. The flexibility comes from the use of the term 'manage', which does not set an actual outcome to be achieved, but rather requires a process to be followed. This change was made to the RMA with no national guidance on how to implement the requirement, and no definition of 'significant risk' added to the RMA.

2.3.4 Section 7 of the RMA

Section 7 of the RMA sets out matters that those exercising functions under the RMA must have particular regard to. This includes "the effects of climate change" (s 7(i)). This means the effects of climate change are to be given particular regard in all decision-making under the RMA, including when considering the reduction of risk to existing developments.

This requirement in s 7(i) combines with the requirement in s 6(h) so that the effects of climate change must be considered when managing significant risks from natural hazards under the RMA.

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[10] **3 Meaning of effect**

In this Act, unless the context otherwise requires, the term effect includes —

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect which arises over time or in combination with other effects —

regardless of the scale, intensity, duration, or frequency of the effect, and also includes —

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

2.3.5 Section 106 of the RMA

Section 106 of the RMA is specific to the consideration of subdivision applications, but it is the closest the RMA comes to providing a definition of 'risk'. This section was amended in 2017, at the same time as changes to s 6. Section 106 allows consent authorities to refuse subdivision consent if it considers "that there is a significant risk from natural hazards" (s 106(1(a)). Section 106 is potentially powerful at stopping risk increasing through subdivision, as it operates in addition to plan provisions and can override them. For example, it can override the requirement that a controlled activity subdivision must be granted (see s 87A(2)(a)(i)).

Subsection 1A states:

> *an assessment of risk from natural hazards requires a combined assessment of:*
> *(a) the likelihood of natural hazards occurring (whether individually or in combination); and*
> *(b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and*
> *(c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b).*

This supports the consideration of risk as the product of likelihood and consequences. It requires a consideration of how risk might change into the future due to changes in use, and the consideration of consequences includes damage to both land and structures. The focus is on risk to property, rather than on risk to life. While there is no definition of 'significant risk' in the RMA, s 106 provides the factors to be considered when deciding if a risk is significant or not, at least in the case of subdivision applications (note that territorial authorities (TAs) have the jurisdiction over subdivision of land, not regional councils). The list in s 106 does not constrain the ability to consider other factors for the management of significant risk as a matter of national importance under s 6, particularly for regional-level policy and rules. For example, risk to life can be an important consideration in determining the significance of a risk, particularly as the health and safety of communities is part of the sustainable management purpose of the RMA (see s 5).

2.3.6 Section 220 of the RMA

Section 220 is another section relevant to subdivision, but one that uses 'natural hazard' rather than 'risk'. Section 220(1)(d) allows conditions to be imposed on subdivision consents for the protection of land against natural hazards.

2.3.7 Schedule 4 of the RMA

Schedule 4 of the RMA uses the term 'risk'. It requires that applications for resource consent must be accompanied by an assessment of the activity's effects on the environment that must address, among other things, "any risk to the neighbourhood, the wider community, or the environment through natural hazards or hazardous installation" (Clause 7(1)(f)). The risk from natural hazard should therefore be assessed as part of all applications for resource consent.

2.3.8 Sections 30 and 31 of the RMA

Sections 30 and 31 relate to the functions of regional councils and territorial authorities respectively. Importantly to this research, one function given to both regional councils and TAs is the control of the use of land, or the control of the effects of the use of land, for the purpose

of the avoidance or mitigation of natural hazards. These functions are implemented through RMA planning documents prepared by regional councils and TAs, including regional policy statements, regional plans and district plans.

There is no reference to risk in ss 30 and 31 of the RMA. Rather, there is reference to the *avoidance* or *mitigation* of *natural hazards*. The definition of natural hazard[11] (which is referred to in ss 30 and 31) in the RMA includes the concepts of both the hazardous event and its effect on society. A link between this definition and risk reduction can be made, as the reduction of risk reduces the effects of the natural hazard on society. Again, we note that this relationship is not necessarily obvious from the wording of the provision (as for 'effect' and 'risk').

2.4 Language of the RMA and Risk Reduction

One reason why there have not been many examples of active management of existing uses to reduce risk may be because the language of the RMA does not sit easily with the language of risk reduction. Risk reduction has been identified as a weakness in New Zealand's natural hazards management regime, due to the regime's focus on avoiding and mitigating natural hazards, rather than a focus on risk (LGNZ 2014). This section of the report has shown that there is enough flexibility within the RMA for a council to pursue a policy of risk reduction. However, this is not immediately obvious from the way the sections of the RMA are worded. The amendments in 2017 improved the language of the RMA by introducing the concept of significant risk from natural hazards, but this was a change in only two of the RMA's sections (ss 6 and 106) and did not include a definition of significant risk. This change created an inconsistency with the 'avoid, remedy and mitigate' language that has been within the RMA since its inception in 1991, meaning that key sections for hazard management, such as ss 30 and 31 (functions for natural hazard management) still refer to 'hazard', 'avoid' and 'mitigate', and not to 'risk' or 'significant' or 'reduction'.

Reduction (risk language) does not sit very easily with *avoidance* or *mitigation* (RMA language). The Oxford Dictionary[12] defines 'avoid' as "keep away from or stop oneself from doing (something)", and "prevent from happening". The key element of these definitions is that something is stopped before it occurs. The Supreme Court has indicated that, at least for the purposes of s 5(2)(c) and the NZCPS, the word 'avoid' "has its ordinary meaning of "not allow" or "prevent the occurrence of".[13] This is clearly in line with the dictionary definition. The Oxford Dictionary definition of 'mitigate'[14] is "make (something bad) less severe, serious, or painful". The definition of 'reduce'[15] is "make smaller or less in amount, degree, or size". Therefore, to reduce something, it must first already be there. In this way, 'avoid' does not lend itself to a situation of reducing risk that is already present. However, the meaning of 'mitigation' is close to the meaning of 'reduction'.

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[11] *natural hazard means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment (s 2 RMA).*

[12] https://en.oxforddictionaries.com/definition/avoid

[13] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (King Salmon) at [96].

[14] https://www.lexico.com/en/definition/mitigate

[15] https://en.oxforddictionaries.com/definition/reduce

Reduction of natural hazard risk is a more specific direction than a requirement to *avoid* or *mitigate* natural hazards. A reduction of risk to 'zero', or the elimination of risk completely, would achieve the avoidance of natural hazards. For example, the removal of people and structures from an area of significant risk from natural hazards would result in the natural hazard being avoided. Any other degree of reduction in hazard risk, for example the raising of floor levels to reduce the consequences of flooding, would be a mitigation measure as some risk would remain. Therefore, while the concept of 'reduction' is present in 'avoid' and 'mitigate', it is not an obvious relationship.

We have shown the relationship between a direction to 'reduce', 'avoid' or 'mitigate' and risk management outcomes in Figure 2.1 in section 2.2 of this report.

The use of the 'avoid and mitigate' language in the RMA leads to some confusion and a lack of clarity about the desired outcome for risk reduction (Tonkin & Taylor 2016). Combined with sections that do use risk language (s 6, s 106, and clause 7(1)(f) of Schedule 4), it makes it difficult for those reading and applying the RMA as the language used means there is no consistent narrative on addressing risk. This has the potential to frustrate the creation of effective planning provisions to reduce risk to existing developments, as to prepare quality plans that comply with the RMA, the RMAs key provisions need to be clear to both planners and councillors alike. If not, a lot of resources are wasted in trying to figure out the intentions of the RMA rather than being used in actual plan preparation (Ericksen et al. 2003).

2.5 Other Legislation for the Reduction of Natural Hazard Risk in New Zealand

We note that the RMA is one of a number of pieces of legislation that address natural hazards in New Zealand. The legislative framework for natural hazards management in New Zealand has been described as "a patchwork of laws from different eras and to some extent different philosophies and subject to different legislative purposes" (LGNZ 2014, 21). There is a lack of clarity and consensus about the overall objective for managing natural hazards in New Zealand (Tonkin & Taylor 2016) with commentators observing that risk reduction needs greater national ownership, leadership and coordination (Tonkin & Taylor 2016, Boston & Lawrence 2017). Figure 2.2 below sets out the legislative framework for managing natural hazards in New Zealand, showing the roles of the Local Government Act 2002, the Resource Management Act 1991, the Building Act 2004, the Local Government Official Information and Meetings Act 1987, and the Civil Defence and Emergency Management Act 2002 (CDEM Act). Appendix 4 contains a summary of how the CDEM Act addresses risk reduction.

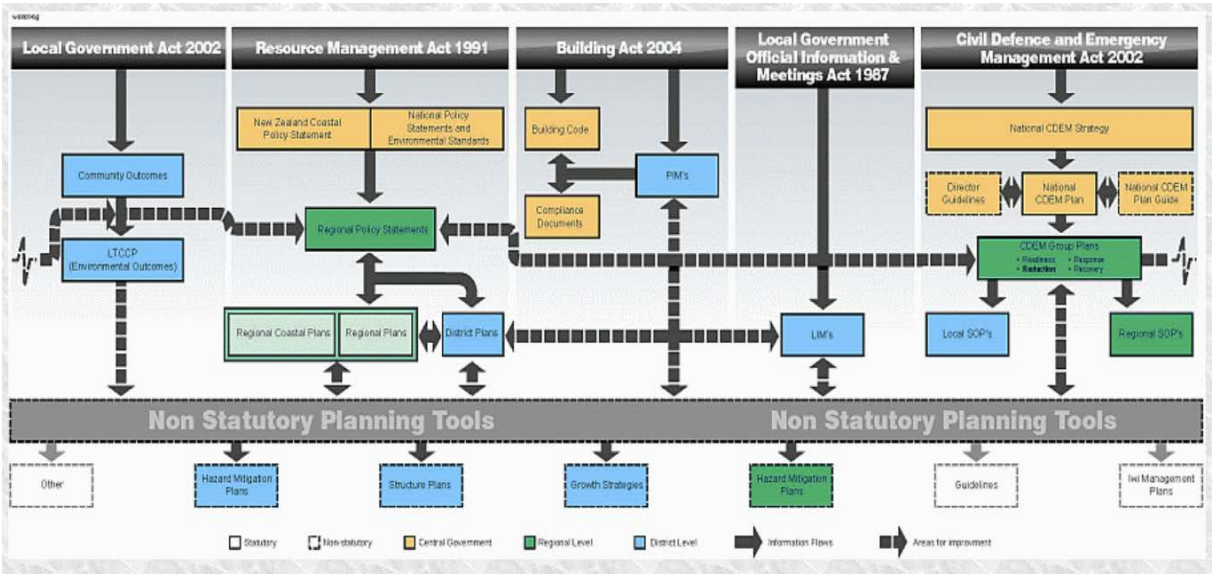

Figure 2.2 The legislative framework for managing natural hazards in New Zealand (Source: Glavovic et al. 2010)

2.6 Existing Use and the RMA

In assessing whether (and how) a policy under the RMA to reduce risk to an existing development can be implemented, it is also necessary to consider how the RMA approaches private property and existing use. A key area of inquiry for this work has therefore been understanding how the RMA provides for existing uses to be managed, and the history and policies underpinning those provisions. This section begins by reviewing the underpinning policy decision regarding private property made at the RMA's inception and how this is reflected in s 9 (which outlines restrictions on land use). We then consider how the RMA both provides a high level of protection against change to existing uses under district plans under s 10, while also providing regional councils with the ability to extinguish existing uses in some circumstances under s 20A. Understanding the significance of these provisions and this apparent tension provides some explanation for why there have been limited attempts to manage risk by controlling or extinguishing existing uses to date.

2.6.1 Land Use and the RMA

The principles that underpin the RMA itself provide significant direction about how a policy to reduce risk for an established development intersects with expectations around the safeguarding of private property. Central to these principles is the explicit policy choice made when the RMA was enacted, to return to the common law position that a person may undertake any activity on their land that they wish, unless it is controlled by a lawful constraint (MFE 1990, 56, Resource Management Bill 1989, Explanatory Note at v). As noted during the third reading of the Resource Management Bill:

> *People can use their land for whatever purpose they like. The law should restrain the intentions of the private landowners only for clear reasons and through the use of tightly targeted controls with minimum effects … the Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Providing that those objectives are met, what people get up to is their affair (Upton, 1991)*

This was a significant change from the position under the Town and Country Planning Act 1977 where all uses of land were prohibited, unless they were expressly provided for under a district scheme, a resource consent, or an existing use protection.[16]

In addition to the general neo-liberal economic shift occurring during the 1980s, the policy choice was driven by a view that because most land is in private ownership it was appropriate that the common law presumption apply. It was also aimed at ensuring that "planning agencies make clear the specific controls they intend to impose." (Resource Management Bill 1989, Explanatory note at v and Palmer, 1989).[17]

Realisation of this policy is now seen in Part III of the RMA and s 9. Section 9 outlines the primary constraint on land use by stating that no person may use land in a manner that contravenes a national environmental standard, a regional rule or a district rule. It follows that any use of land that does not contravene the provisions of a national standard, a regional rule, or a district rule is allowed. The premise is that land may be used (or developed) for any purpose unless otherwise restricted.

In considering the management of risk through control of existing use, s 9 is important. It contains a clear statement that, in general, the owners of land should be able to do what they wish. Any action to reduce risk, where the hazard itself cannot be sufficiently managed, will by necessity engage the use of the land, and where a policy of dehabitation is seen as necessary it would go beyond being a mere restriction on use and suggest the land cannot be used at all (or at the very least not used for its previous purpose). Given the presumption that people can do what they wish on their land unless there is a good reason for a tightly targeted control, we suspect that the policy underpinning s 9 plays an important part in decision making about whether to modify existing use or not.

2.6.2 Section 9 And Theories of Private Property

The approach to land use under the RMA is closely aligned with the dominant (although not the only)[18] justification for private property within our Western liberal democracy. Ensuring individual autonomy and confining the powers of the state is central to the classical liberal account of private ownership of property (particularly land) (Rose, 1995). Private property gives individuals the legal means to exercise a free choice as to what to do with what they own and how they live their lives. By each individual satisfying his or her preferences, trade is encouraged and the wealth of the community as a whole increases (Babie 2010). By providing a clear boundary between the private and the public, private property also helps to identify the boundary between appropriate and inappropriate exercise of governmental power and protects individuals from the state acquiring land compulsorily without paying compensation. The classical liberal approach suggests that people should be able to do what they want with what they own, and, as noted above, this idea is reflected in s 9 of the RMA.

[16] For a discussion of how the existing use protections under the Town and Country Planning Act 1977 operated and how the current RMA provisions are different see the summary in Appendix 5.

[17] However, while this presumption was to apply to land use, a different approach was to be adopted for the allocation of water, coastal space and other "public resources" (Resource Management Bill 1989, Explanatory note at v).

[18] It should be noted that this is not the only justification for private property, and it is contested. A large amount of recent scholarship suggests that this approach to private property has never been a true explanation for how the institution works within law or society (for a review see France-Hudson, 2017) . Nonetheless, it has certainly captured the public imagination.

In the context of planning law this view causes an inevitable tension between claims by individuals that they ought to be able to do as they wish with their property, and the reality that our modern society relies on a complex approach to resource use that balances the individual's rights against environmental imperatives, the rights of future generations and the community as a whole. This is reflected in the purpose of the RMA itself; to promote the sustainable management of natural and physical resources, which includes managing the use, development, and protection of natural and physical resources in a way that enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety, while also providing for the needs of future generations, safeguarding the life-supporting capacity of natural systems, and managing adverse effects of activities on the environment (RMA, s 5).

Discussion of the tensions between private rights and planning law have a long history, but it can now be taken as settled that planning law is a central part of modern society for a range of important reasons including its role in protecting the environment (both for its own sake and that of future generations) and also its role in facilitating the creation and maintenance of the services and amenities crucial to the economy and modern life. Moreover, as noted by Barton "There would not be much point in the RMA if it did not encompass the possibility of constraining the use of property" (Barton 2003, 397). In some respects, this position runs counter to popular perceptions of the RMA as being focused on the effect of activities on the environment but as not encroaching on private property rights in circumstances where the effects are minimal. However, as noted by Palmer this "approach has never been an accurate representation of the nature of regulation under the Act" (Palmer 2009).

As illustrated by provisions such as s 9, the importance of private property and appropriate limits on planning remains an ongoing discussion. As will be seen in our discussion on practicalities (Section 5), these tensions are also evident in s 85 of the RMA which allows for acquisition of land under the Public Works Act 1981, in circumstances where a land owner can prove that the provision in question renders the land incapable of reasonable use is also both unfair and unreasonable. Section 32 of the RMA also provides a safeguard which can constrain the extent to which public decision making can impact on private rights (Barton 2003, 397).

Overall, we suggest that at a broad level these tensions are also factors which inform perceptions regarding the availability and desirability of changing existing uses to reduce natural hazard risk to existing development. It engages questions of private property and the limits of planning approaches in a way few other areas of planning practice do.

2.6.3 Further Provisions Regarding Existing Uses

Beyond the presumption that land can be used unless an activity is constrained by a lawful constraint, the RMA contains several further provisions which, in some circumstances, protect existing uses of land. These are also important factors that contribute to decisions about whether to modify existing use in order to reduce risk.

Where a use of land (which is defined very broadly in s 2)[19] does contravene the provision of a plan (i.e. a 'lawful constraint'), that use may be allowed if resource consent is obtained, or the use is covered by one of three 'existing use' provisions of the RMA: ss 10, 10A and 20A.[20]

2.6.3.1 District Plans: s 10

Section 10 operates to provide a very strong degree of protection to existing uses of land where there is a conflict with the provisions of a district plan. In the context of managed retreat this provision appears to provide a complete impediment to a territorial authority attempting to implement such a policy under a district plan.[21]

Section 10,[22] in essence, allows land to be used in a manner that contravenes a rule in a district plan if the use was "lawfully established" before the rule became operative

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[19] **2 Interpretation**

(1) In this Act, unless the context otherwise requires, —

use, —

(a) in sections 9, 10, 10A, 10B, 81(2), 176(1)(b)(i), and 193(a), means—

(i) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:

(ii) drill, excavate, or tunnel land or disturb land in a similar way:

(iii) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:

(iv) deposit a substance in, on, or under land:

(v) any other use of land; and

(b) in sections 9, 10A, 81(2), 176(1)(b)(i), and 193(a), also means to enter onto or pass across the surface of water in a lake or river

[20] See Resource Management Act 1991, s 9. Section 10A deals with existing uses of the surface of water. It is not considered further in this report.

[21] See the general discussion in *Saddle Views Estate Ltd v Dunedin City Council* [2017] NZHC 1727, [2017] NZRMA 505 and earlier proceedings.

[22] **10 Certain existing uses in relation to land protected**

(1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—

(a) either—

(i) the use was lawfully established before the rule became operative or the proposed plan was notified; and

(ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

(b) or—

(i) the use was lawfully established by way of a designation; and

(ii) the effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.

(2) Subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

(a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and

(b) the territorial authority has granted an extension upon being satisfied that—

(i) the effect of the extension will not be contrary to the objectives and policies of the district plan; and

(ii) the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.

(3) This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.

(4) For the avoidance of doubt, this section does not apply to any use of land that is—

(a) controlled under section 30(1)(c) (regional control of certain land uses); or

(which means the activity was carried out within the planning rules in force prior to the new rule coming into force)[23] and the effects of the use are the "same or similar in character, intensity, and scale" to those which existed before the rule became operative.[24] Where these tests are satisfied the activity in question can continue indefinitely unless there is some sort of material change in its effect.[25]

There are some limits. For example, it will not apply when a use of land that contravenes a rule in a district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative.[26] However, it is possible to extend this time by making an application to the relevant territorial authority within two years of the initial discontinuance.[27] The section is also explicitly subject to other provisions in the RMA. It is stated "for the avoidance of doubt", that the section does not apply to a use of land that is controlled under s 30(1)(c) (regional control of certain land uses), which includes the function of regional councils to manage natural hazards. Moreover, the section is subject to the provisions of s 20A (certain existing lawful activities allowed) which can extinguish existing uses in some circumstances (see s 20A discussion below). In the context of managed retreat these provisions are crucial. They provide for regional rules to modify and extinguish existing uses, including to effect managed retreat (see text box for an example of how s 10 operates).

(b) restricted under section 12 (coastal marine area); or

(c) restricted under section 13 (certain river and lakebed controls).

(5) Nothing in this section limits section 20A (certain existing lawful activities allowed).

[23] See *One Tree Hill Borough Council v Lowe* HC Wellington M270/1984, 25 March 1986. In this case, the creation of a flat had breached a number of by-laws (such as fire wall regulations), but the Court concluded that this would not affect the lawfulness of the *use* in the context of establishing an existing use. In essence, existing uses are concerned with planning legality.

[24] Resource Management Act 1991, s 10(1)(a). Note that s 10(1)(b) contains similar provisions in relation to uses established by way of designation.

[25] Resource Management Act 1991, s 10(1)(a). Note that s 10(1)(b) contains similar provisions in relation to uses established by way of designation.

[26] Resource Management Act 1991, s 10(2).

[27] Resource Management Act 1991, s 10(2)(a).

Section 10 in operation - *McKinlay v Timaru DC*

McKinlay v Timaru DC (2001) 7 ELRNZ 116; [2001] NZRMA 569 provides an interesting illustration of how s 10 operates. The McKinlay's had been occupying a property as a residence continuously for 39 years. Under a revised district plan issued in 1998 the property would fall within a recreation zone and was also within a coastal inundation line. Within these areas the construction of new dwellings would be a prohibited activity, although existing buildings would be allowed to remain. Importantly, the effect of the rule was that reconstruction of a dwelling on the property would also be prohibited if it was destroyed by fire or another natural hazard. The McKinlay's requested that rule be changed to allow reconstruction. A preliminary issue before the court was whether the McKinlays had the right to reconstruct their dwelling in the event of destruction by virtue of the provisions of s 10.

One argument raised by the territorial authority was that because of s 10(4), s 10(1) may not apply if the use of the land was controlled by the Regional Council under s 30(1)(c) of the Act (in which case a different existing use regime would apply). However, the Environment Court concluded that because the regional council did not control the use of the property under the functions granted to it by s 30(1)(c), the provisions of s 10 did apply. As a result, a dwelling sited within the coastal inundation zone would be able to be reconstructed as of right if it had been destroyed, even though the operative district plan prohibited the erection of dwellings in that zone. Importantly, the Environment Court also concluded that, had there been a rule in the relevant regional plan prohibiting building in that zone, the outcome would have been different.

2.6.3.2 The Theoretical Justification for s 10

The justification for s 10 reflects the general tension between planning law and private property canvassed above. Essentially, the special treatment given to existing uses under legislation such as the RMA recognises that when a plan is put in place, it is inevitable that there will be some existing uses that no longer conform to the new rules (*Russell v Manuaku CC* [1996] NZRMA 35 (HC)). As noted in the Explanatory Note to the Resource Management Bill 1989:

> *Fairness requires that any resource management system must recognise the interests of existing users when rules and plans change. In relation to land, this Bill carries over the existing use provisions in the Town and Country Planning Act 1977.*

This reflects a general acceptance that from the point of view of both zoning practice and theory it is necessary to cater for activities and structures that are not in accordance with the provisions in a plan (Palmer 2015, 3.67). For example, there may have been activities that were undertaken as of right, but which now require consent (Warnock and Baker-Galloway 2015, 287).

On a practical level, these provisions can be articulated as an 'inheritance' based on the lawful establishment of the activities that continues after the promulgation of rules that would otherwise mean the activity was illegal; rather than as planning provisions per se (Warnock and Baker-Galloway 2015, 263).

From a theoretical level existing uses can continue for two basic reasons. The first is the presumption that the legislature is not to be accorded an intention to take away private property rights without clear words to that effect. The second arises from issues of fairness and the somewhat arbitrary nature of the planning process (Stein 2008, 58). As Kirby J observed in the Australian context:

> *…[the] principle was to exclude existing use rights from the general requirement of new planning law and of respect for the accrued rights of private property, out of recognition of the inequity of imposing upon those rights the retrospective operation of newly introduced planning and out of regard for the fact that in our form of society, with private ownership of land, the character of a neighbourhood cannot suddenly be changed by the stroke of the planner's zoning pencil. North Sydney Municipal Council v Boyts Radio and Electrical Ltd (1989) 16 NSWLR 50 at 57 (cited in Stein 2008, 57).*

Similar views are expressed in New Zealand judgments. For example, in *Ashburton Borough v Clifford* [1969] NZLR 927 (CA) individual judges discussed the purpose of the existing uses provisions contained within the Town and Country Planning Act 1953 (which are generally similar in intent to the RMA provisions).[28] President North noted that:

> *It seems reasonable to suppose that the Legislature recognised that it would be unjust not to make some provision protecting the owners of existing buildings from continuing to use them for the purpose for which they were last used before a district scheme became operative even although the building did not conform to the type of building permitted in a particular zone (at 933).*

Further, McCarthy J stated:[29]

> *The judgment appealed from contains a refreshing reminder of the proper place of the Town and Country Planning legislation in our legal structure. It says this: "At common law an owner of the property could, subject to any contractual conditions binding on him and some restrictions imposed by the law of torts, do with it as he wished. In the interests of the community the Legislature has found it necessary to place further restrictions on such right …" … The point I want to emphasise is that the continuing use of a building in a manner which does not require substantial reconstruction and is of the same character as the use to which the building was put before the district scheme was promulgated, is not a dispensation enjoyed as a matter of grace, but is an ancient right to which, as yet, the law has not reached out and taken away. A person does not retain his existing use as a matter of special privilege. He exercises it because it is a basic property right until now left intact by the Legislature (at 933).*

However, as observed by McCarthy J, the law can "reach out and take away" 'rights' and planning law often does just that.[30] Moreover, it is recognised that existing uses do conflict with current planning process and so they tend to be constrained by time limits (i.e. if they are not

[28] The detailed history of existing use protection under New Zealand planning law is interesting but outside the scope of our report – see Appendix 5 for a summary.

[29] *Ashburton Borough v Clifford* [1969] NZLR 927 (CA) at 933 per McCarthy J.

[30] For further discussion see *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

used for a certain period they will be lost). An example is s 10(2) which states that the provisions in s 10 do not apply when an existing use has been discontinued for a continuous period of more than 12 months.

The protections in s 10 are not limitless and s 20A takes a very different approach. It is interesting to note that the intention behind s 10 when it was enacted was to only give protection to existing uses that were already covered by the Town and Country Planning Act 1977.[31] This approach was adopted at the time the RMA was being developed on the basis that as land is generally held in private ownership, it was considered appropriate to maintain the protections provided by the earlier legislation under the new regime (MFE 1990, 57). In contrast, neither the Soil Conservation and Rivers Control Act 1941, nor the Harbours Act 1950 protected existing uses. The former because regulation under that Act was aimed at achieving public safety purposes; and the latter because the consent holder was occupying and using publicly owned land (MFE 1990, 57). These factors were important considerations in the final shape of what is now Part III of the RMA, and the division (and overlap) of jurisdiction between regional councils and territorial authorities. They were also relevant to the formation of s 20A of the RMA, which allows for existing uses (including those protected by s 10) to be extinguished in some circumstances.

2.6.3.3 Regional Plans: s 20A

One of the primary limits on the protections extended to existing use under the RMA is that rules in a regional plan may operate to extinguish them. This is achieved by s 20A.[32] This section provides that where a rule in a regional plan becomes operative, and an activity previously undertaken now requires resource consent as a result of the rule, the activity may

[31] Sections 90 and 91 of the TCPA 1977 enabled certain activities which would contravene a district scheme to continue provided they had been established before the scheme came into effect.

[32] **20A Certain existing lawful activities allowed**

(1) If, as a result of a rule in a proposed regional plan taking legal effect …, an activity requires a resource consent, the activity may continue until the rule becomes operative if,—

(a) before the rule took legal effect …, the activity—

(i) was a permitted activity or otherwise could have been lawfully carried on without a resource consent; and

(ii) was lawfully established; and

(b) the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the rule took legal effect …; and

(c) the activity has not been discontinued for a continuous period of more than 6 months (or a longer period fixed by a rule in the proposed regional plan in any particular case or class of case by the regional council that is responsible for the proposed plan) since the rule took legal effect ….

(2) If, as a result of a rule in a regional plan becoming operative, an activity requires a resource consent, the activity may continue after the rule becomes operative if,—

(a) before the rule became operative, the activity—

(i) was a permitted activity or allowed to continue under subsection (1) or otherwise could have been lawfully carried on without a resource consent; and

(ii) was lawfully established; and

(b) the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the rule became operative; and

(c) the person carrying on the activity has applied for a resource consent from the appropriate consent authority within 6 months after the date the rule became operative and the application has not been decided or any appeals have not been determined.

continue after the rule becomes operative until resource consent is obtained. However, in order for an activity to quality under s 20A:

- The activity in question must have been permitted, or could be lawfully carried out without a resource consent and was lawfully established before the rule became operative; and
- The effects of the activity must be the same or similar in character, intensity, and scale to the effects that existed before the rule became operative; and
- The person carrying out the activity must have applied for a resource consent within 6 months of the date the rule became operative (and the application had not been decided or appeals determined).

The same basic provisions apply to proposed regional rules.[33] The effect of this provision is that a person may continue to undertake an existing activity that now requires a resource consent until a decision is made to grant or decline that consent (providing they apply for consent). If consent is granted the activity will be able to continue (subject to any conditions imposed as part of the resource consent process). If resource consent is declined, then the activity would have to stop. The type of consent needed will depend on the rules in the regional plan.

In the context of risk reduction through existing use modification, (particularly if there is an overall policy intention of retreating from a previously occupied area) it is likely that prohibited activity status for residential activities would be required. In this case it would not be possible to apply for a resource consent and the existing use would be extinguished from the date on which the rule in the regional plan became operative.

Section 20A embodies a very different set of policy considerations than those underpinning s 10. It reflects a desire by Parliament for regional councils to control all activities that come within their remit, regardless of when they were established. It enables regional councils to manage the effects of an activity (which is lawful and existing), and either allow it to continue by way of a resource consent (possibly subject to conditions) or decline authorisation (and therefore halt the activity) (Palmer 2015, 3.70). This power is subject to all other controls in the RMA including: the plan development processes, s 32, rights of appeal to the Environment Court, or challenge by way of judicial review.

When recommending that what is now s 20A be included in the RMA, the MFE noted that s 10 would be limited in application to district plans and would not exempt existing uses of land affected by proposed regional plans. Nor was s 10 to apply to "public resources" such as air, water, or the costal marine area (MFE 1990, 72–73).

It appears that at the time of the RMA's development there were some concerns about the provisions that were ultimately expressed in s 20A. Developers were concerned about potential uncertainty in relation to investment (MFE 1990, 73). However, it appears that the overarching concern lay with the effect of a new rule coming into effect and changing the position 'overnight'. For example, it was noted:

> *… a hospital heating system may discharge smoke; a proposed plan may be notified with unreasonably high emission standards. The discharge would become*

[33] Resource Management Act 1991, s 20A(1).

> *unlawful overnight, even though the public submission process may subsequently show proposed standards too high and the hospital's emissions okay (MFE 1990, 72).*

As a result, what is now s 20A also ensures a person in this position has a measure of protection while resource consent for continuing the activity is sought. As with s 10 the intention was that there would be restrictions limiting any increase in the scale of the activity over that time, although restriction would go further than s 10 on the basis that "[be]cause there is less right to the use of the public estate than there is in relation to private land, the right to subsist with an activity after a proposed plan is notified should cease if such activity ceases for any period-more than 6 months (compared with 12 months under clause 8 [now s 10]" (MFE 1990, 72). This reasoning does not hold for land use rules for hazards that are usually dealt with by territorial authorities, but this point does not appear to have been addressed at the time the RMA was being formed.

In responding to general concerns about the effect of s 20A on existing uses, the MFE accepted that this provision would have the effect of extinguishing existing uses. It also highlighted that this went right to the philosophy of the Bill regarding the activities that would be the subject of regional plans. Such activities were "to be prohibited unless allowed", and it was expressly acknowledged that this was the opposite of the philosophy underpinning what is now s 10 (and the idea that users of private property should be able to do what they wish with it, unless there is some lawful constraint on that use). The report continued that:

> *The reason for this difference is that unlike district plans, regional plans will generally deal with use of the public estate rather than private property: air, water and the coast. Users do not have a "right" to private use of the public estate. While regional plans can also deal with land use, this is in relation to matters of regional significance such as natural hazard mitigation.*
>
> *This different presumption has implications for existing users affected by a plan change. Under clause 8 [now s 10] existing users are given rights to continue their use where a plan change results in their activity no longer being a permitted activity. Such "existing use rights" do not apply to users of resources where a change to a regional plan means their activity is no longer "permitted". (MFE 1990, 74).*

This discussion makes it very clear that while the presumption in ss 9 and 10 is that people may use land in any manner they wish (subject to any lawful constraints), the intention (now reflected in the Act), was that regional councils would be empowered to extinguish existing uses in the context of their functions (including specifically noting the context of regionally significant matters such as natural hazard mitigation). Importantly, this power extended beyond resources that are part of the 'public estate' to include land use. In the context of risk reduction this would include the ability to extinguish an existing use of land where necessary for the avoidance or mitigation of natural hazards.[34] This was reflected in our interviews where it was generally accepted that regional councils have the power to extinguish existing uses, although there was uncertainty as to how far such a power would extend in the context of risk reduction.

[34] Resource Management Act, s 30(1)(C)(iv).

2.7 Rules to Manage Existing Uses

An understanding of the fundamentals of risk and especially risk reduction, and an understanding of the way the RMA governs existing uses, particularly through ss 10 and 20A, allows consideration of how rules can be used to reduce natural hazard risk. Rules are a key tool available under the RMA to implement any policy aimed at risk reduction.

In practice, the protection of existing uses provided for in s 10 of the RMA allows for uses/buildings to remain in place, even when a district rule comes into force that would otherwise require them to change, provided the effects of the use/building remain the same in character, intensity and scale. In a hazard context, this means buildings can remain in place in high hazard areas, even after a rule is introduced into a district plan to restrict activities in that area. District land use rules can restrict activities in the future, after the rules are in force, but they cannot apply retrospectively or require any change to an existing use. The operation of s 10 also means that a building destroyed by a hazard, such as a coastal erosion event, can be rebuilt 'as of right', even if there is a rule in the district plan that prohibits buildings in that location. Because rules in district plans do not apply retrospectively, they are unable to manage existing uses in hazard areas. This re-establishment of land use activities in the same location after hazard 'events' has contributed to a continued exposure to risk (Lawrence et al. 2015).

As already outlined in section 2.6.3, regional rules can manage existing uses and override the protection provided by s 10. Any regional rule that imposes a land use control for the purposes of hazard management, including risk reduction, will apply to existing as well as future development. This means regional land use rules do have retrospective effect and can require changes to existing uses.

Land use rules for risk reduction, which override the protection of existing uses, can range from setting parameters to manage rebuilding following hazard events (such as requiring rebuilds to integrate mitigation measures like raised floor levels or relocating a rebuild within a site), to full extinguishment of the use, which would facilitate a withdrawal from the building and/or the stopping of the use.

Six of the 17 regions in New Zealand are taking steps (or proposing to do so) to manage existing uses in high hazard areas through RMA plans, including by using regional rules:

- Northland: RPS directs regional plans to require land use consent for the repair or reconstruction of a building following damage by specified flood and coastal hazards. A corresponding rule is included in the proposed Regional Plan for Northland[35]
- Waikato RPS: directs regional plans to identify circumstances where it is appropriate to require existing development along the coast to be relocated, and to include provisions for this relocation[36]
- Hawke's Bay Regional Coastal Environment Plan: makes replacement of a structure damaged or destroyed by coastal erosion or storm surge inundation, in particular hazard zones, a non-complying activity[37]

[35] Method 7.1.7 and explanation of Regional Policy Statement for Northland, May 2016, and Rule C8.6 Proposed Regional Plan for Northland, September 2017

[36] Implementation method 6.2.4, Waikato Regional Policy Statement, 2016

[37] Rule 101, Hawke's Bay Regional Coastal Environment Plan, 2014

- Canterbury Regional Coastal Environment Plan: restricts rebuilding of structures damaged by the sea where there is less than 450m^2 of site left, and subject to other conditions[38]
- Otago RPS: Specifies that the regional council may, at the request of a TA, make a regional rule for the purpose of extinguishing existing use rights under s 10 of the RMA to address natural hazard risk[39]
- Bay of Plenty Proposed Plan Change 17: this is a proposed introduction of a prohibited activity rule for residential activity on specifically identified properties, to reduce risk from debris flow hazard on the Awatarariki fanhead[40]

Rules to manage existing uses are in place in three regions: Northland, Hawke's Bay and Canterbury. A rule is proposed in Bay of Plenty but has not yet progressed through the public hearing and decision-making process and currently has no effect. Rules are anticipated in Waikato and Otago but are not yet proposed. The three regional rules currently in regional plans all control rebuilding following a hazard event. These rules override the protection of existing use as they take away the ability to rebuild to the same character, intensity and scale provided for under s 10, and instead regulate the parameters and conditions for the rebuilding, with the aim of reducing risk through the rebuilding process. Because they are triggered by a hazard event, they do not require any immediate change to existing uses. An example of one of these rules is shown in Figure 2.3, from the proposed Regional Plan for Northland.

How rules are used to reduce hazard risk, and the options for what those rules might look like, is strongly linked to the intent of the policy the rules are implementing. The RMA establishes rules as methods to achieve objectives and policies. Rules controlling the rebuilding of structures damaged by hazard events, such as those just described, are just one option. It is therefore important to understand the policy intent in RMA plans around reduction of natural hazard risk, and then consider what the options are for rules to implement those policies. We consider both these things in the following section of this report.

[38] Rule 9.1(b), Canterbury Regional Coastal Environment Plan, 2005

[39] Method 2.3.7, Otago Regional Policy Statement, partially operative 14 January 2019.

[40] Proposed rule NH R71, Proposed Plan Change 17 (Natural Hazards) to the Regional Natural Resources Plan, June 2018.

C.8.6 Re-building

C.8.6.1

Re-building of materially damaged or destroyed buildings – restricted discretionary activity

The re-building of a habitable building in a high risk coastal hazard area or high risk flood hazard area that has been materially damaged or destroyed by flooding, erosion or land instability caused by a natural hazard event is a restricted discretionary activity, provided:

1) the application includes a natural hazard assessment from a suitably qualified professional, and
2) natural hazard risk to other property is not increased.

Matters of discretion:

1) The design of the building to withstand natural hazard risk.
2) The potential to exacerbate existing natural hazard risk as a result of the proposed re-building.

The RMA activities this rule covers:

- Restrictions on the use of land, (s9(2)).

C.8.6.2

Re-building of materially damaged or destroyed buildings – non-complying activity

The re-building of a habitable building in a high risk coastal hazard area or high risk flood hazard area that has been materially damaged or destroyed by flooding, erosion or land instability caused by a natural hazard event, that is not a:

1) restricted discretionary activity under rule C.8.6.1 'Re-building of materially damaged or destroyed buildings – restricted discretionary activity'

is a non-complying activity.

The RMA activities this rule covers:

- Restrictions on the use of land, (s9(2)).

Figure 2.3 Rules in proposed Regional Plan for Northland that manage existing uses in hazard areas (Proposed Regional Plan for Northland, September 2017, p160)

3.0 RMA POLICY DOCUMENTS: THE INTERSECTION BETWEEN RISK REDUCTION AND EXISTING USE UNDER THE RMA

A central focus of our research was to understand how the potentially conflicting policies of reducing natural hazard risk to existing development and protecting existing uses intersect, and how they play out in practice in RMA plans. Put simply, tension results because "avoiding or mitigating risk associated with natural hazards under the RMA means interfering with people's property rights and affecting property values" (LGNZ 2014, 31). Tensions between public and private interests were identified as a contributing factor to a hiatus in consideration of climate risks in local government in New Zealand (Lawrence et al. 2015). We consider what the policies in national, regional and district RMA documents aim to achieve, and under what circumstances a policy to reduce risk to existing development might be considered appropriate and 'win out' over a policy to protect existing uses. We also discuss how rule frameworks can be used to implement a policy aimed at natural hazard risk reduction.

In addition, this section looks at how the RMA language of 'manage significant risk' and 'avoid and mitigate hazards' carries through and is implemented in policies and plans, and whether the absence of specific language that identifies 'risk reduction' directly creates challenges for pursuing a policy with that objective in mind. LGNZ (2014) suggests a difficulty with the focus on hazards, suggesting that while the RMA clearly supports the restriction of the exercise of individual property rights so as to avoid people creating or exacerbating a *hazard* (such as undertaking earthworks that cause slope instability), restricting rights to stop people exposing themselves to unacceptable *risk* from natural hazards sits less comfortably.

3.1 RMA Plan Hierarchy

Some background on the hierarchy of planning documents under the RMA is necessary to set the context of the discussion in this section. This hierarchy is central to the structure and operation of the RMA. Each of the three levels of government in New Zealand can make planning documents under the RMA: national, regional and district (TA). Table 3.1 below sets out the type of planning documents each level can prepare and the type of provisions the documents can contain (objective, policy and/or method/rule).

Table 3.1 Types of planning documents prepared by the three levels of New Zealand government.

Level of government	Type of plan	Type of provisions
National	National policy statements, including New Zealand Coastal Policy Statement	Objectives and policies
	National environmental standards	Regulations (rules)
	National planning standards	All types of provisions
Regional	Regional policy statements	Objectives and policies
	Regional plans	Objectives, policies, methods/rules
District (territorial authority)	District plans	Objectives, policies, methods/rules

The RMA sets these planning documents up in a hierarchy through the phrase 'give effect to'. It specifies that the lower order documents must *give effect to* higher order documents. An RPS must give effect to any relevant national policy statement, the New Zealand Coastal Policy Statement (NZCPS), and national planning standards (s 62(3)), and regional plans and district plans must give effect to these national documents as well as the relevant RPS (ss 67(3) and

75(3)). The words 'give effect to' are intended to convey that lower order plans should actively implement the higher order plans and policy statements (QP 2013, 64). Case law suggests 'give effect to' means positive implementation of the higher order documents.[41] In this way, the RMA creates a three-tier plan hierarchy, with national policy statements and the NZCPS at the top, RPSs in the middle, and regional plans and district plans on the lower level (see Figure 3.1).

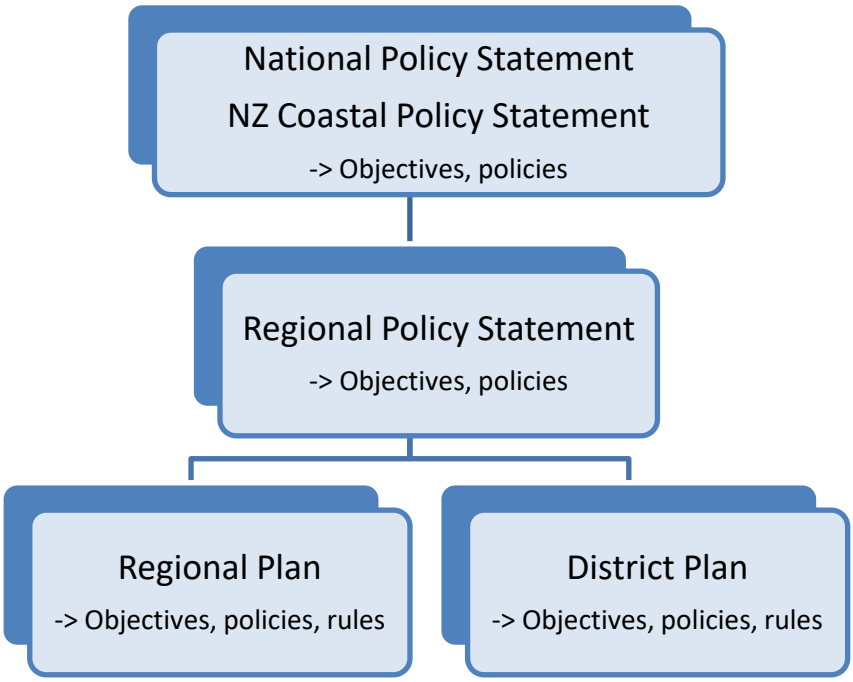


Figure 3.1 Three-tier plan hierarchy under the RMA, showing the types of provisions within each.

National planning standards have a slightly different purpose to the other RMA planning documents in Figure 3.1. Rather than being stand-alone planning documents, they insert plan content into other RMA planning documents. National planning standards can set out requirements and provisions relating to the structure, format, or content of RPSs and plans that the Minister for the Environment considers require national consistency, are required to support implementation of other national policy documents or regulations or are required to assist people to comply with the procedural principles of the RMA (s 58B). There are currently no national planning standards on the content of RPSs or plans relating to natural hazards.

The hierarchy of plans means the national documents can be directive towards the RPSs and regional and district plans, and the RPSs are also able to be directive towards regional and district plans. This hierarchy has been emphasised by the Supreme Court in the *King Salmon* case,[42] where the court suggests that when preparing a planning document, in most circumstances, it is only necessary to look to implement the planning document at the next level up, as it can be assumed that the higher order document gives effect to those documents that sit above it on the plan hierarchy, including Part 2 of the RMA.[43]

[41] *Clevedon Cares Inc v Manukau City Council* [2010] 16 ELRNZ 417.

[42] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*).

[43] See also the analysis of *King Salmon* in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Bay of Plenty Regional Council* [2017] NZHC 3080.

The types of provisions each planning document may contain is also important. National policy statements (including the NZCPS), and regional policy statements are limited to objectives and policies. They cannot contain methods, including (notable for this report) rules. These documents therefore rely on other planning documents to implement the objectives and policies, such as either national environmental standards (of which there are few, and none on the topic of natural hazards), or regional plans and district plans, which can contain rules. This reliance on a different planning document for implementation of policies, which may be prepared at a different time and possibly by a different level of government, opens the door for ineffectiveness, and emphasises the point that the higher order documents need to be clear and specific in their directions to the 'documents' that will implement them. The language used in the higher order documents is crucial to the way they will be given effect to by the lower order documents. It also illustrates how powerful the national policy statements and RPSs can be in directing the use of rules to achieve specified outcomes. As noted below, our analysis of RPSs investigated whether this opportunity is being taken up by RPSs in the context of reduction of natural hazard risk through the management of existing uses. However, we start first with consideration of how the NZCPS addresses risk reduction, being the only national level planning document under the RMA that contains provisions relating to natural hazard management.

3.2 Risk Reduction in the NZCPS

There is currently no national policy statement solely on natural hazards. One implication of this is that in most planning contexts decision-makers have a great deal of flexibility as to how they approach the hazards within their jurisdiction. Consequently (as the analysis in other sections of this report indicates), there are a wide range of different approaches to hazard management, and a lack of understanding and clarity regarding the possible options. However, coastal hazard management is an exception as the NZCPS is a binding national planning document that contains national policy on the management of coastal hazards and risk reduction. It provides a useful illustration of the type of national direction that is absent in other planning contexts.

The NZCPS contains objectives and policies. There is no direct reference to risk reduction in the objectives. However, Objective 5 does reference risk to existing developments. Objective 5 is as follows:

> *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.*

Reduction of risk to existing development is specifically addressed in the NZCPS by Policies 25 and 27. Policy 25 focuses on subdivision, use and development in areas of coastal hazard risk. Subsection (c) is specific to risk reduction:

> ***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:*
>
> 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 …*

Policy 27 focuses on strategies for protecting significant exiting development from coastal hazard risk. Subsection (a) is specific to risk reduction:

> ***Policy 27 Strategies for protecting significant exiting 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 structure at risk.*

As a national document that is limited to objectives and policies, the NZCPS relies on other documents to implement the objectives and policies through the use of rules. Regional coastal plans are key, as they apply in the coastal environment (both seaward and landward). District plans are also relevant, for the landward section of the coast. The policy direction provided by the NZCPS to these plans on risk reduction, contained in the objective and policies identified above, is to:

- *manage* coastal hazard risks by *considering* responses for existing developments (Objective 5)
- *encourage* redevelopment or change in use that would reduce risk (Policy 25)
- *assess* the option of *promoting* long-term sustainable risk reduction approaches (Policy 27)

This policy approach requires management of existing uses be considered as an option to reduce risk but does not make reduction of risk itself compulsory, using language that is not particularly strong in its direction, with no specific outcome for risk reduction set. Furthermore, there is a high degree of flexibility provided to local authorities to implement the approach they consider appropriate, provided through the use of terms such as *manage, consider, encourage,* and *promote*. A stronger and more directive objective could establish an outcome for risk reduction by setting a level to which risk should be reduced (for example ‘acceptable’ or ‘tolerable’ risk), or setting a standardised level of risk protection, such as protection from a 1% AEP coastal erosion event.

We would expect the sort of policy direction currently contained in the NZCPS to result in varying responses in regional and district plans, due to the flexibility afforded to local authorities

and the lack of an overall outcome regarding reduction of risk to existing development. This variation is evident when we see most regional plans with no rules to manage existing uses to reduce risk, and three regional plans[44] that do have rules to manage existing use, all of which apply to rebuilding following damage by coastal hazards (and also flood hazards in the case of the Northland plan). The fact that the only rules that manage existing uses to reduce risk are for coastal hazard situations suggests that the policy approach in the NZCPS, which prompts consideration of managing existing uses to reduce risk, has had a positive influence on the creation of these rules and the regional policies that support them. We suggest that a national level policy approach to reduction of risk to existing developments from other hazards, through a directive NPS, is likely to result in similar rules to reduce risk from other hazards.

The lack of a specific outcome for reduction of risk in the NZCPS may be evidence of the tension between reducing risk and the protection of existing uses. This tension can be seen in the provisions that relate to hard protection structures, which are able to provide some protection to existing uses. The emphasis in policies 25, 26 and 27 is to discourage hard protection structures and provide for natural coastal systems that provide defences against coastal hazards, but there is acknowledgement that hard protection structures have their place, particularly in the case of infrastructure of national or regional importance. Overall, the focus of the policy in the NZCPS is on moving away from the use of hard protection structures, and there is acknowledgement in the policies that this will require some form of managed retreat, although this is an option to be considered along with others. Our conclusion is that the policy approach in the NZCPS clearly allows for the protection of existing uses to be overcome, where reduction of natural hazard risk is pursued by a local authority, but it stops short of specifying the circumstances in which this might be appropriate. As such, it is up to individual local authorities to implement these policies as they see fit, and hence there is variance in how this is done throughout the country, with only a small number using rules to reduce risk to existing developments.

The effect of a specific policy direction compared to a more flexible direction in the NZCPS can be seen in research undertaken in 2015 by Saunders et al. That study looked at how the NZCPS objective and policies on coastal hazards were implemented by regional and district planning documents. The data Saunders et al. collected by analysing RMA plans shows that the policy approach to ‘avoid’ increasing risk from coastal hazards contained in Policy 25 (a) and (b) of the NZCPS resulted in a much higher rate of implementation provisions in lower order documents than the more flexible direction to ‘encourage’ redevelopment, or change in land use to reduce risk included in Policy 25 (c). In the case of the ‘avoid’ policy, which is a very strong policy direction, 90% of relevant RMA planning documents included a policy that implemented the NZCPS policy (Saunders et al. 2015, 21). By comparison, 14% of relevant RMA plans referred to managed retreat and 43% referred to relocation, implementing the ‘encourage’ policy of the NZCPS (Saunders et al. 2015, 22). This demonstrates that a specific and strong policy direction is more likely to be implemented in lower order planning documents than more flexible directions and is more likely to achieve a consistent outcome across the country. This is not the approach chosen for the reduction of risk to existing developments in the NZCPS and may be a key reason why there are not more examples of existing uses being managed to reduce risk.

[44] Rule C8.6 Proposed Regional Plan for Northland, September 2017; Rule 101, Hawke’s Bay Regional Coastal Environment Plan, 2014; Rule 9.1(b), Canterbury Regional Coastal Environment Plan, 2005

3.3 Risk Reduction in Regional Policy Statements

The starting point in managing natural hazards is the RPS (MFE 2012). As there is no national policy statement on natural hazards (other than coastal hazards), regional policy statements have more prominence and importance in setting the direction for risk reduction. This is due to the hierarchy of plans set up under the RMA, in which regional plans and district plans must give effect to RPSs. In the context of managed retreat, Hanna et al. (2018) identified that in the absence of a national framework for dealing with natural hazard risk, RPSs can assist in the enablement of managed retreat where they provide a strong policy framework and are highly directive (Hanna et al. 2018). We investigated the extent to which RPSs provide strong and directive guidance to regional and district plans for reduction of natural hazard risk by considering what regional council officers told us about the policy intent of their RPSs, and by analysing the approach to risk reduction taken in all 17 RPSs in New Zealand. We then considered and reflected on why there are so few examples of management of existing uses to reduce risk.

3.3.1 The 'Avoid and Mitigate' Policy Approach

Regional council officers we interviewed consistently referred to a policy intent to avoid high hazard areas, and to mitigate other hazards in RPSs. This approach generally includes policies to avoid locating development in areas of high natural hazard risk, with corresponding rules that place strong restrictions on developments in these areas. For areas that are subject to lesser magnitude hazards, the policies focus on mitigating the effects of hazards on developments. Our analysis of RPSs (Appendix 3) found that this combination of avoiding high hazard areas and mitigating other hazards is common. We have termed this the 'avoid and mitigate' approach.

We note that there is no standard metric or standardised method for identifying or defining 'high' hazard (or risk) areas in RPSs in New Zealand. For example, we found RPSs that set 'high' flood hazard at a 1% AEP level and others that used 0.5% AEP. The term 'high' hazard may be used interchangeably with 'significant' hazard in an RPS. The common factor in the approach we have identified is that it uses two tiers of control: the 'worst' hazard ('high' or 'significant') is treated in a more restrictive manner than lower levels of hazard.

3.3.2 Practitioner Perceptions

We explored this adherence to the 'avoid and mitigate' approach with regional council officers through interviews with Greater Wellington and Environment Canterbury. We looked at how this policy direction might compare to a specific policy direction to reduce risk in terms of providing the strength and direction for policies and rules that can allow for the management of existing use. Neither the Canterbury nor the Wellington RPSs address existing uses directly. Both have the policy intent of avoiding development in high hazard areas and mitigating the effects of hazards on developments in other areas. The regional council officers thought that this policy framework was sufficient to manage existing uses and expressed the view that there was no particular reason why a policy to 'avoid' could not achieve the same as a policy to 'reduce'. The intent to avoid was not meant to apply only to greenfield developments. One participant highlighted that the avoid policy had been used to oppose intensification of a hazard area.

This discussion with the regional council officers reiterates comments we make in Section 2 of this report on the meaning of reduction of risk to existing development, and on the language of the RMA not sitting easily with the language of risk reduction. The participant who pointed

out that an ‘avoid’ policy had been used to oppose intensification was trying to illustrate that ‘avoid’ had resulted in a reduction of risk. It was the participant’s perception that opposing intensification was equivalent to reducing risk, when in fact it is, at best, avoiding further increase in risk. If the opposition to intensification is successful, what has been achieved is a holding of risk at current levels. While an increase in risk, through greater exposure of more people and structures, may have been avoided by the intensification not proceeding, the current risk to the existing development has not been reduced. Furthermore, such a policy does not address any future projected increase in the hazard frequency, or intensity (e.g. through climate change effects on flooding and coastal erosion). Therefore, hazard risk may continue to increase for the existing community. This perception suggests that ‘avoid’ is not capable of conveying the same meaning as ‘reduction’ in the context of managing existing uses in high hazard areas.

This suggests that policies to avoid high risk areas and mitigate other hazards do not convey the same meaning as ‘reduction’. Adherence to the ‘avoid and mitigate’ approach provides no specific direction that risk to existing developments should be reduced and is a reason why there are so few examples of management of existing uses to reduce risk. Use of the term ‘reduction’ in clear and specific policies is needed if a specific outcome of reduction of risk to existing developments is sought. We have shown the relationship between a direction to ‘reduce’, ‘avoid’ or ‘mitigate’ and risk management outcomes in Figure 2.1 in section 2.2 of this report.

3.3.3 RPS Analysis

Our analysis of the 17 RPSs in New Zealand found four that had a strong focus on the reduction of risk to existing developments and did not use the more common policy approach of avoiding high hazard areas and mitigating other hazards. These were the RPSs for Otago, Northland, Bay of Plenty and Waikato. In addition, these were the only four RPSs to specifically state that the ability to extinguish existing use rights sits with the regional council. Three of the four RPSs identified the option of transferring or delegating the functions in relation to this rule to the relevant city or district council under s 33 of the RMA. We have analysed two of these RPSs, the most recently operative (Otago) and one that has directly resulted in regional plan rules to manage existing uses (Northland).

3.3.3.1 Reduction of existing natural hazard risk in the Otago RPS

The Otago RPS (partially operative on 14 January 2019) clearly applies a risk-based approach. Objective 4.1 is that “risks that natural hazards pose to Otago’s communities are minimised”, and the associated policies step through the risk-based approach by requiring (i) the identification of hazards; (ii) an assessment of the likelihood and consequences of the hazards; (iii) management of natural hazard risk by minimising increases in natural hazard risk; and (iv) reducing existing natural hazard risk. Policy 4.1.7 requires the reduction of existing natural hazard risk (Figure 3.2). The Otago RPS identifies that one way to achieve this is by city or district councils requesting the regional council develop a regional rule for the purpose of extinguishing existing use rights (Methods 2.3.7 and 4.2.8(b)). Further, Method 2.3.8 identifies that at the request of the city or district council, the regional council may delegate the administration of that regional rule to the city or district council.

This policy framework in the Otago RPS is very specific and clear towards the management of existing uses to reduce risk. It goes as far as to identify how a regional rule to manage existing uses could come about – by request from the relevant TA. However, the policies are not particularly strong, using directions such as ‘encourage’ and ‘consider’. The Otago RPS does

use the specific language of risk, requiring management of risk by either minimising or reducing risk. It does not use the 'avoid and mitigate' approach but does require risk to be minimised by "avoiding activities that result in significant risk from natural hazards" (Policy 4.1.6). Significant risk is not defined in the Otago RPS.

We note that it is too soon to investigate how this direction in the Otago RPS is influencing regional and district plans and the creation of rules, as it only became partially operative in January 2019. However, it provides a clear avenue for the creation of regional rules to manage existing uses to reduce risk, should the TA decide to pursue this.

Policy 4.1.7 Reducing existing natural hazard risk

Reduce existing natural hazard risk to people and communities, including by all of the following:

a. Encouraging activities that:
   i. Reduce risk; or
   ii. Reduce community vulnerability;
b. Discouraging activities that:
   iii. Increase risk; or
   iv. Increase community vulnerability;
c. Considering the use of exit strategies for areas of significant risk to people and communities;
d. Encouraging design that facilitates:
   v. Recovery from natural hazard events; or
   vi. Relocation to areas of lower risk; or
   vii. Mitigation of risk;
e. Relocating lifeline utilities, and facilities for essential and emergency service, to areas of reduced risk, where appropriate and practicable;
f. Enabling development, upgrade, maintenance and operation of lifeline utilities and facilities for essential and emergency services;
g. Reassessing natural hazard risk to people and communities, and community tolerance of that risk, following significant natural hazard events.

Figure 3.2 Example of policy requiring a reduction in existing natural hazard risk (Otago RPS, 2019).

3.3.3.2 Reduction of risk to existing developments in the Northland RPS

Of the four RPSs we identified as having a strong focus on reduction of risk to existing developments, the Northland RPS (operative 2016) is the only one under which a regional plan has been reviewed and regional rules to manage existing uses have been created. We note that a joint review is underway of the Waikato Regional Plan and Regional Coastal Plan, but the proposed combined Waikato Resource Management Plan has yet to be publicly notified. We also note that there is a plan change process underway in Bay of Plenty to introduce a regional rule to extinguish existing uses in the Matatā debris flow area, which is discussed later in this report (see section 3.5.4).

The Northland RPS encourages reduction of natural hazard risk to existing development, primarily in relation to coastal and flood hazard areas. As with the Otago RPS, the key objective is to *minimise* risks from natural hazards (Objective 3.13), including by "promoting long-term strategies that reduce the risk of natural hazards impacting on people and communities" (Objective 3.13(f)). This is implemented by policies that encourage redevelopment or changes in land use that reduce risk and identify managed retreat as a measure to reduce risk to existing developments (Policies 7.1.3 and 7.1.4). The RPS justifies the policy direction by reference to giving effect to the NZCPS and extending the approach to manage flood hazard. The methods to implement the policy direction are very specific. They direct both regional plans and district plans. Regional plans are to require land use consent for repairs or reconstruction of buildings damaged by natural hazard events (Method 7.1.7(8)), and district plans are to classify new subdivision proposals in specified hazard areas as non-complying or prohibited activities (Method 7.1.7(3)). These are very clear and specific directions that would be hard to ignore when the regional council and TAs are giving effect to the RPS. The direction to district plans on subdivision is particularly important, as it is district rules that manage subdivision, not regional rules. Subdivision, by its nature, is concerned with future uses. However, implementation of a policy to reduce risk to existing developments needs to also stop subdivision, as otherwise risk could continue to increase through the creation of new allotments. It is therefore critical that the RPS directs district plans in a consistent way to regional plans. We note that this direction relating to subdivision is yet to be implemented by district plans in the Northland Region.

The Proposed Regional Plan for Northland (PRPN) was prepared after the Northland RPS and is required to give effect to the RPS. It combines the regional air, water and coastal plan. Decisions on matters raised in submissions were made in April 2019, and the PRPN is now under appeal (i.e. at the time of this publication, it is a significant way through the plan making process). To give effect to the direction in the Northland RPS, the PRPN sets a rule that the re-building of a materially damaged or destroyed building is a non-complying activity in high risk coastal or flood hazard areas (Rule C.8.6.2). If the resource consent application is accompanied by a natural hazard risk assessment (conducted by a suitably qualified professional) that demonstrates that the risk to the building is reduced, and the risk to other property is not increased, the activity status is reduced to restricted discretionary (Rule C.8.6.1 and Policy D.6.3). These rules allow the Northland RPS policy direction to reduce natural hazard risk to be implemented through the consideration of resource consent applications to rebuild following hazard events.

3.3.3.3 Managed retreat and risk reduction in other regional policy statements

We note that other RPSs besides the four already discussed identify managed retreat/relocation as a possible management option (e.g. Auckland, West Coast, Southland).[45] However, the strength of identifying this option is arguably undermined by a policy framework that does not provide a strong risk reduction pathway from the policies through to the methods. Other RPSs were completely silent on risk reduction and options such as managed retreat. RPSs without a strong focus on reduction of risk to existing developments generally employed the 'avoid and mitigate' approach described above (section 2.4). The place of risk reduction in this type of policy framework is not immediately obvious, given the plain meanings of avoid

[45] For a comprehensive review of the terminology and approach all types of RMA plans use for managed retreat, see Hanna et al. 2017.

and mitigate (see section 2.3.7). This means it may be more difficult for this approach to result in rules to manage existing uses to reduce risk as there is no obvious path from an outcome (objective) to a method (rule). The RPSs that set risk reduction as an outcome, and follow through with policies and rules, do provide this path.

An alternative approach was found in the Auckland RPS (part of the Auckland Unitary Plan), which requires risk to existing development to not increase, and for new development to avoid creating risk. A review of the Auckland Unitary Plan by Tonkin & Taylor (2016), which incorporates regional plans and district plans as well as the RPS, demonstrated that this approach broadens out through the rest of the plan. Outcomes ranged from managing, through minimising, not increasing, mitigating, and avoiding, to reducing risk from natural hazards and the concept of building resilience (Tonkin & Taylor 2016). Although the approach in the Auckland Unitary Plan is clearly focused on risk, it does not identify a clear outcome for risk reduction.

The analysis of the RPSs also showed that those prepared by the unitary authorities (being Auckland Council, Gisborne, Marlborough and Tasman District Councils, Nelson City Council and Chatham Islands) generally did not take a strong stance on reducing risk to existing developments. This may be a consequence of time since each RPS was last reviewed, as a shift in the direction of plans post-2016 in how risk reduction was managed is evident. Marlborough District and Nelson City Councils are currently reviewing their RPSs, while the Tasman District RPS is subject to rolling reviews.

3.3.3.4 Comments on RPS approaches to risk reduction

We found that it is not simply a focus on reduction of risk that is required by the objectives, policies and methods of an RPS, but a reduction in risk to *existing* developments that will lead to rules that manage existing uses. While some older RPSs (operative prior to 2016) refer to the reduction of risk, the wider policy framework clearly signalled that this was in terms of limiting the creation of future risk.

The dominance of the ‘avoid and mitigate’ approach and the lack of clear outcomes for reduction of risk to existing developments in RPSs is reflective of the confused legislative language and lack of direction in national policy. The concepts of avoid and mitigate have been in the RMA since its inception, while risk from natural hazards was only introduced in 2017. The RMA clearly provides flexibility for regional councils to take whichever approach they see fit to “manage significant risks from natural hazards” (s 6(h)), which could include reduction of risk to existing development. However, risk reduction is not mandatory in the RMA, and we reiterate our comment that the NZCPS (as the only national policy statement that includes reference to natural hazards (in the coastal context)) provides no outcome for risk reduction, but rather requires it to be ‘considered’, ‘assessed’, and ‘encouraged’ (see section 3.2 above). Weak planning frameworks, with a preference to use words such as ‘consider’ or ‘encourage’, are a barrier to implementing managed retreat in New Zealand (Hanna et al. 2017). Against this national-level context, it is not surprising to see a limited number of RPSs that directly address risk reduction through the management of existing uses.

RPSs can also be very directive and strong and fill the gap in national level policy direction on reduction of risk to existing developments (for example the RPSs for Otago, Northland, Bay of Plenty and Waikato identified above). There are three key elements from these RPSs:

1. Reduction of risk to existing developments is identified as an objective or outcome
2. The ability of regional rules to manage existing uses is specifically identified

3. Transfer to the relevant TA of the function to make rules to manage existing uses is identified as an option for consideration

Also important is a specific direction to district plans on controlling subdivision that aligns with the direction to reduce risk through regional rules. Although subdivision rules cannot be used to reduce risk to existing developments, ongoing subdivision could frustrate the achievement of risk reduction through land use rules, so needs to be controlled in a complimentary way.

A clear objective or outcome for risk reduction appears essential for policy to give rise to rules to manage existing uses. This is clearly lacking under the RMA but is beginning to appear at the regional level. One of the more common criticisms of natural hazard management in New Zealand is that there is no sense of a common goal or performance outcome for hazard managers to work towards (LGNZ 2014). There is strong support from many commentators on the concept that risk reduction should be clearly established as an intended outcome under the RMA (Tonkin & Taylor 2016). Since 2015, the NCDEM Plan has included an objective for risk reduction: "to take preventative steps to avoid or mitigate adverse consequences" (clause 87 of the NCDEM Plan). While this is not under the RMA or specific to land use planning, it offers an example of a national policy document that addresses risk reduction. It has been recognised that RPSs are a key document to provide the link for risk reduction between the CDEM Act and the RMA (Saunders et al. 2007). Our research shows that there is a real opportunity for RPSs to provide strong leadership, not only on risk reduction generally, but reduction of risk to *existing* developments specifically, through strong objectives on risk reduction.

3.4 Risk Reduction in District Plans

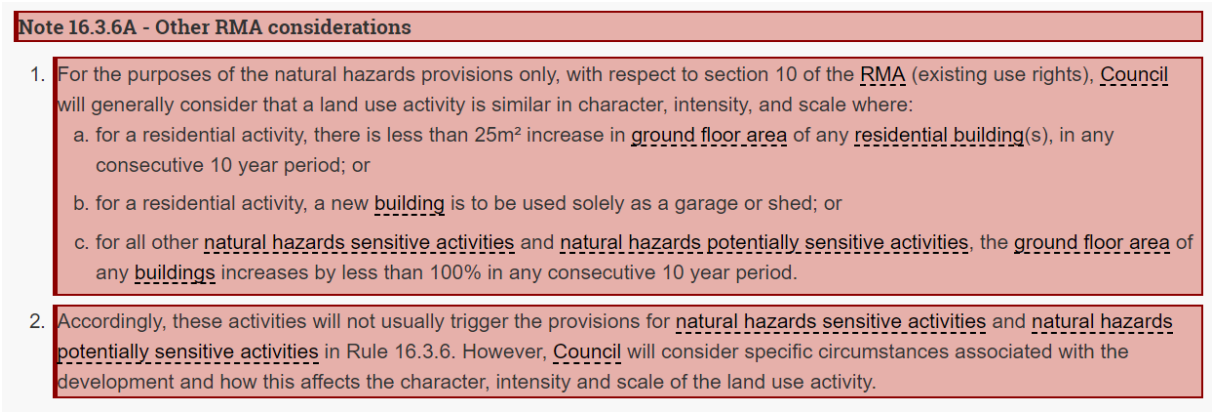
Under s 10 of the RMA district plans are not able to reduce risk to existing developments through the management of existing uses. District council officers we spoke to acknowledged this. However, some district council officers described the policy intent of their district plan as being to reduce risk, and it took further discussion before it was acknowledged that this was limited to minimising risk to new developments, rather than reducing risk to existing developments.

3.4.1 Policy Approach in District Plans

Given the restriction imposed by s 10, the best a district plan can do is 'hold the line', or stop risk increasing. When asked what the policy intent of the district plan was in relation to risk from natural hazards, responses from district council officers we spoke to included: *holding the line, holding the status quo, controlling future potential risk, no growth in risk, not making the existing situation any worse, avoiding high risk and mitigating other risk, having flexibility to respond*. However, the degree to which district plans prevent risk from increasing varies. The only way to stop risk increasing with any certainty is using restrictive zoning or prohibited activity status (to the extent it can be used in light of restrictions inherent in s 10). However, all district council officers we spoke to describe a reluctance to use prohibited activity status, preferring to allow some development in hazard areas subject to controls. District plans, in practice, allow risk to increase when they allow any development in hazard areas, even with mitigation in place, as exposure of people and property is increased (see Figure 2.1 in section 2.2 of this report). This becomes particularly acute where the magnitude or frequency of a hazard is increasing over time.

3.4.2 Application of s 10

During our interviews, council officers described how they apply s 10 of the RMA, which illustrates one way TAs allow risk to incrementally increase. For example: if s 10 is to apply to the reconstruction of a dwelling following damage by a coastal erosion event, the use needs to have been lawfully established, and the effects of the replacement dwelling need to be the same or similar in character, intensity and scale to those which existed before. Our research found a range of ways in which councils apply and interpret "*same or similar in character, intensity and scale*". Some use guidance notes in district plans (for example, proposed Dunedin City District Plan, see Figure 3.3 below), some put parameters around character, intensity and scale in district plan permitted activity rules and standards (for example the Christchurch City District Plan 2016), and some have internal processes to assess compliance with s 10 on a case by case basis (for example, Porirua City Council). What is common to all these methods is that they are all more permissive than s 10 might suggest. There is a general intention to allow for minor improvements and minor increases in floor area. These practices allow risk to increase to a greater degree than a strict application of s 10 would, albeit in a small and incremental way. These practices demonstrate the desire to enable the exercise of perceived private property rights, including potentially encouraging further investment into property in a hazard area without encouragement to modify this investment to address the hazard consequences. Overall, they signal an ambivalent approach to 'holding the line' in the case of risk from natural hazards.



Note 16.3.6A - Other RMA considerations

1. For the purposes of the natural hazards provisions only, with respect to section 10 of the RMA (existing use rights), Council will generally consider that a land use activity is similar in character, intensity, and scale where:
   a. for a residential activity, there is less than 25m² increase in ground floor area of any residential building(s), in any consecutive 10 year period; or
   b. for a residential activity, a new building is to be used solely as a garage or shed; or
   c. for all other natural hazards sensitive activities and natural hazards potentially sensitive activities, the ground floor area of any buildings increases by less than 100% in any consecutive 10 year period.
2. Accordingly, these activities will not usually trigger the provisions for natural hazards sensitive activities and natural hazards potentially sensitive activities in Rule 16.3.6. However, Council will consider specific circumstances associated with the development and how this affects the character, intensity and scale of the land use activity.

Figure 3.3 Application of s 10 in Proposed Dunedin District Plan. Source: Second Generation District Plan, Dunedin City Council, November 2018.

3.4.3 Consideration of Managed Retreat

Interviews with two territorial agencies highlighted where managed retreat had factored into the policy framework of the district plan, with the policy intent being not to foreclose the option of managed retreat in the future. In one case this was achieved by a policy framework that "seeks to make that task [managed retreat] no more difficult by not putting any additional persons or buildings into the area". In the other case, growth planning sought to make provision for future relocation of high-risk communities. This was described as a pragmatic approach (in the absence of any high-level direction) to keep options open, and in line with the practice of dynamic adaptive pathways planning (described in section 2.1.3 of this report). Part of the intent behind keeping options open was described as allowing for new mitigation measures to be employed in the future, ahead of managed retreat. It was also seen as an option while further scientific information was gathered.

3.4.4 Comments on District Plan Approach

As a result of s 10, district plans are not able to reduce risk to existing developments. What they can do is 'hold the line' and stop risk increasing (see Figure 2.1 in section 2.2 of this report). They can provide the option of managed retreat by allowing for relocation of populations in growth planning. This approach would support a regional rule that might be used to reduce risk in the future. Moreover, while council officers expressed a view that district plans were holding the line and not letting risk increase, this view will not match reality unless the risk remains constant and does not change, and the plans are used to stop further development or significantly modify its form in high risk areas through the use of prohibited activity status or restrictive zoning. A tightening up of the application of s 10 by TAs would also be necessary if risk is not to increase. It appears that a policy intent to recognise and facilitate the exercise of property rights, including in hazard situations, is 'winning out' and taking precedence at many TAs over a policy to hold the line and stop risk getting worse. This highlights that the ability to successfully implement a managed retreat at some later time is being complicated by decisions made today that may, unintentionally, increase risk in the future.

3.5 Risk Reduction Implementation Through Rules

Implementation of a policy to reduce risk through the management of existing uses requires the application and enforcement of rules (see text box). Under the RMA, rules have the force of regulation and therefore must be complied with. It is through rules in plans that activities and effects are controlled. For example, a regional rule that prohibits residential use in an existing residential area subject to a significant risk (i.e. modifies or extinguishes an existing use), will be enforced by the regional council enforcement officers. Without implementation through rules, an objective or policy in a plan will be ineffectual (except for those achieved through non-regulatory methods), regardless of the quality of the policy in the planning document.

"What would it look like?" was a recurring question during our interviews, meaning there was a desire to envisage what the policy and rules might ultimately look like. A lack of understanding of how regional rules could be used to reduce risk is one reason why we could expect few examples of rules that do this, both currently and in the future. In an attempt to answer the question "What might the rules look like?" and thereby demonstrate how it could be done, this section of the report explores options for rules that implement a policy of reducing risk by managing existing use, drawing on current examples, and speculating on what frameworks might work best.

Rules in plans can:

- permit activities (activity can be undertaken without the need for a resource consent),
- require a resource consent application for an activity,
- prohibit an activity (no resource consent can be applied for).

Part 6 of the RMA governs the assessment of, and decision-making for, resource consent applications.

Rules in plans are interpreted and applied by resource consent officers at councils. Resource consent officers in our interview groups were able to offer insights on the implementation of policy through rules in plans and resource consent applications that are relevant to implementing a policy to reduce risk. As one interviewee pointed out to us, there is a "need to think about implementation when setting up the plan policy".

3.5.1 The Spectrum of Restriction on Existing Use

We recognise a spectrum of rule frameworks that can be used to manage existing uses to reduce risk, from those that impose minimal restrictions and are generally reactive in their approach to risk reduction, to those that are purposeful and impose greater restrictions (see Figure 3.4 below). We expect that this spectrum would be well suited to a DAPP planning process (see section 2.1.3 of this report), as it allows for different levels of control at different points in time, to respond to changing levels of risk. 'Activity status', 'matters of control or discretion', and 'conditions and durations of consent', are all tools that can be combined in various ways to achieve reduction of risk to existing developments, resulting in different degrees of restriction on existing use. Under s 20A, all activities (except those established by resource consent) must comply with regional rules otherwise the activities cannot take place. In addition, regional rules are able to require change as soon as they become operative, rather than waiting for an event (as in the case of rules controlling re-building following hazard events) or waiting for a developer to propose a development (as is the case with district rules aimed at controlling future development).

Rules controlling rebuilding (discussed further below), although included in plans in advance of an event happening, are a reactive way to reduce risk, as they are only triggered after an event has caused damage, and only when the damage is significant enough to trigger the need to rebuild. It appears that this type of rule is palatable in New Zealand, evidenced by the fact that these are the only types of rules for managing existing uses to have made it into RMA plans to-date (see section 2.7 of this report). These rules represent a minimal encroachment on existing use in the spectrum possible under the RMA. In the following sections, we discuss these reactive rules, and options for more restrictive rule frameworks that would take a proactive approach, both for gradual and more immediate reduction of risk for existing communities.

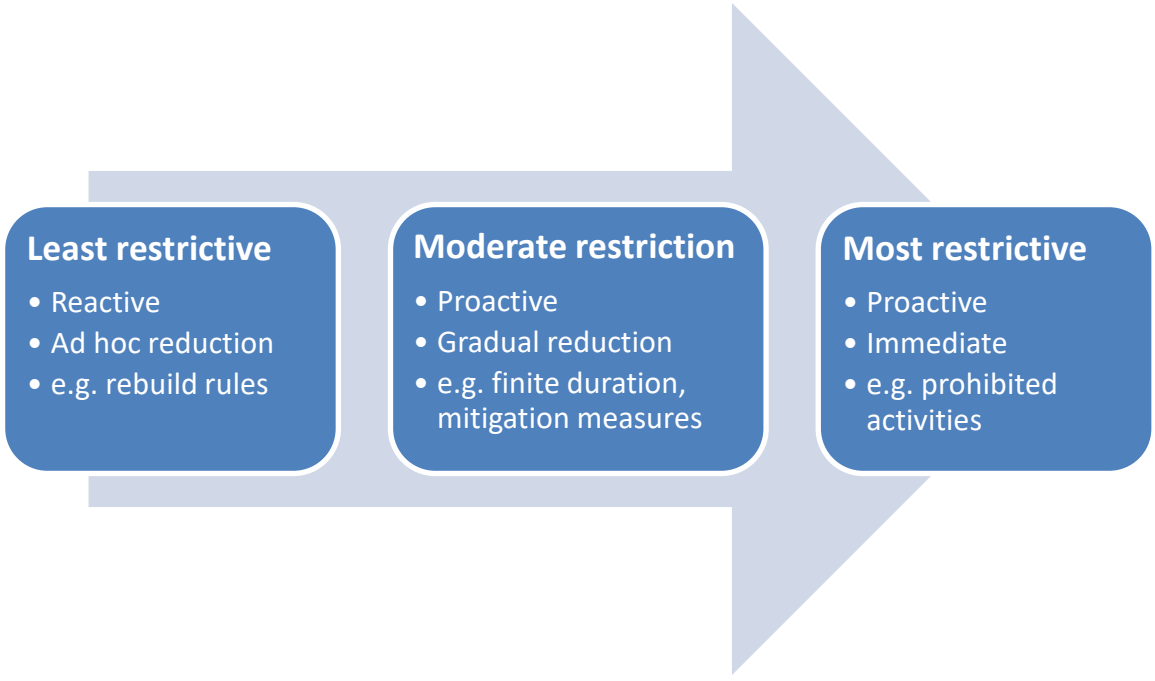


Figure 3.4 The spectrum of rules for managing existing uses to reduce natural hazard risk, based on how restrictive the rules are on existing uses, and showing the relationship to the policy outcome.

3.5.2 Rules that Control Re-Building Following Damage by Hazard Events

As noted in section 2.7 of this report, the rules that currently exist in regional plans to manage existing uses are rules that control re-building following hazard events. Testing the operation of these existing rules was beyond the scope of this project, but we were able to interview a resource consents team leader at Environment Canterbury about the operation of the rule in the Canterbury Coastal Environment Plan. The rule is a permitted activity rule (Rule 9.1(b)). It allows for the reconstruction or replacement of a habitable building damaged or destroyed by the action of the sea, provided some specified conditions are met ((i)–(v) of Rule 9.1(b)). Our assessment is that the conditions are aimed at maintaining the level of risk and not letting it increase through the rebuild process. They specify the minimum lot size that must remain for a rebuild to take place, limit the scale of the rebuild, and that it must not be any further seaward than the original. The conditions therefore incorporate the allowances of s 10 (allowing rebuilding to similar scale) and add more restrictions (specifying a minimum site area). If the conditions cannot be met, an application for a restricted discretionary resource consent is required.

The resource consents team leader confirmed that there had been 72 resource consents applied for under the restricted discretionary activity rule, but none were related to not meeting the standards for rebuilding following a coastal hazard event (the restricted discretionary rule also covers breaches of other standards, not just the rebuilding standards). The team leader was not able to find any staff experience of applications for rebuilding following hazard events. This suggests three possible scenarios:

1. Rebuilding following hazard events is occurring within the standards, and therefore there has been no need to apply for a restricted discretionary consent or,
2. There have been no hazard events that have damaged buildings, and therefore nothing to trigger application of the rules, or
3. Rebuilding following hazard events has occurred that has not complied with the standards, without obtaining a resource consent (in breach of the RMA).

It is difficult to say which of these applies, but (3) seems unlikely as the team leader told us that there is a process in place whereby building consents for buildings in the coastal environment are checked against the Coastal Environment Plan rules by the TAs. Therefore, there would need to be a resource consent application for breaching the standards, or a redesign to meet the standards (meaning no resource consent was needed).

It is difficult to assess the effectiveness of permitted activity rules because they require no resource consent application. The Coastal Environment Plan was made operative in 2005, which pre-dates the second-generation Canterbury RPS (operative in 2013). The objectives and policies that support the rule are not aimed specifically at the reduction of risk – they seek to reduce the cost of erosion events, minimise the need for hard protection structures, and avoid, remedy and mitigate the effects of any works that are required.

Should a rebuild not meet the standards of the permitted activity rule, the matters to be considered when deciding to grant the consent and impose conditions do not include the reduction of natural hazard risk on the site. Instead, they are focused on whether the rebuild would exacerbate erosion, lead to adverse effects from hazards on other properties, and the removal of parts of structures rendered unusable through erosion (Rules 9.2). Given these matters, a rebuild that did not reduce risk would be difficult to decline.

This rule in the Coastal Environment Plan may ensure that rebuilds following coastal erosion events comply with the permitted activity standards and therefore do not increase risk, but the policy the rule is implementing is not explicitly to reduce risk. This helps to illustrate the importance of a clear objective to reduce hazard risk, for rules to effectively achieve risk reduction.

We note that rules that manage the rebuilding of structures following hazard events should be able to reduce risk incrementally over time, provided the policy intent is to reduce risk. Any matters of discretion or assessment criteria included will need to be specific to ensure risk reduction is able to be achieved through a rebuild. For example, the Northland rule (included in section 2.7 above) requires "the design of the building to withstand natural hazard risk" to be considered when assessing the resource consent application. This should ensure that the re-built building is better at withstanding hazards than the original, thereby reducing the vulnerability and risk of the building.

3.5.3 Rules for Proactive, Gradual Risk Reduction

A gradual but purposeful reduction in natural hazard risk can be achieved by introducing a regional rule that requires a resource consent for an existing activity, and by imposing a duration on the consent. For example, consider a residential area identified as needing to be retreated from in 20 years' time. A regional rule could be introduced now that requires a controlled activity consent for residential activities in the area, with the duration of the consent and the timing of achieving risk reduction as matters of control. The consent could then be granted with a term of consent of 20 years. This means that the residential activity is authorised for the next 20 years, after which it must stop, or a new consent be applied for and granted. If risk changes during the initial 20-year period of the consent, the controlled activity status could be modified to a more appropriate status if necessary. This would mean that a new consent for the residential activity could take account of new information about the risk and impose greater restrictions if necessary. Using a controlled activity status provides certainty that the rule will not stop the activity immediately, as controlled activity consents must be granted. But it provides the ability for the regional council to take a step towards preparing for a retreat, without a significant immediate impact on existing activities. This type of rule is relatively simple, in that it imposes just one control, being a finite duration for the activity in its current form.

The option of using regional rules to set time limits for residential or commercial use of land in coastal hazard areas, as a means of facilitating managed retreat, was put forward for consideration by Auckland Regional Council, Environment Waikato (Waikato Regional Council), Environment Bay of Plenty (Bay of Plenty Regional Council) and Thames Coromandel District Council in 2006 (Turbott 2006). The suggestion was that the time limit would be based on the estimated useful remaining life of the property before it succumbed to erosion. It was also considered important that such a rule be accompanied by rules restricting hard protection structures, so that use of these structures would not undermine the outcome sought by the time limit on the land use. We are not aware of any of these councils pursuing such rules, but we note that Environment Waikato and Bay of Plenty Regional Councils are two of the four regional councils that directly address reduction of natural hazard risk for existing development in their RPSs.

A step further along the spectrum of restricting existing use would be a rule that included a finite duration as above, and also a requirement to undertake some sort of mitigation or risk reduction measures. For example, consider a developed area at high risk from flooding, where it is decided that it is necessary and appropriate to require the retrofitting of mitigation

measures to reduce risk. It may also have been decided that it is appropriate to give discretion to property owners as to what the mitigation is, provided it achieves a certain level of risk reduction, and that it is appropriate for there to be a period of five years for the measures to be implemented. To achieve this, a controlled activity rule could be developed, with the level of protection required as a standard, and the method of risk reduction and the timeframe for achieving it specified as matters of control. Controlled activities cannot be declined, so this type of rule would allow the continued underlying use of the properties. But it would allow the regional council to assess the method proposed by the landowner to reduce the risk, and to use conditions of consent to ensure the proposed risk reduction was achieved within five years. The land use consent could also be given a duration, up to 35 years, that would mean when the term was up, either the activity had to stop, or a new consent would be required. A new consent would allow a re-assessment of the mitigation in place and any change in level of risk, or acceptability of risk, in the intervening years. This is a greater restriction on existing use as it requires specific actions to be undertaken to reduce risk. However, the discretion for the landowner to determine the exact method, and the flexibility in the timing, may make this type of rule more palatable than one that was more prescriptive.

Plans could use activity statuses aside from controlled status, depending on the risk reduction outcome sought. A restricted discretionary activity status would allow a consent application to be declined, for example, if the risk mitigation proposed would not achieve the desired level of reduction. The implications of declining a regional consent, in the context of managing existing uses, need to be considered. A declined consent would effectively mean that the activity would have to stop immediately, as an activity that does not comply with a regional rule, and which does not have a resource consent, cannot continue (s 20A). A declined consent, therefore, would achieve immediate risk reduction, and have significant implications for the landowner that may not be intended by the policy (for example, immediate risk reduction is not consistent with a policy approach to reduce risk in 20 years' time). The policy intent therefore needs to be carefully considered when selecting activity status. Controlled activity status may be the most appropriate way to achieve the risk reduction outcomes sought, as it cannot be declined and is therefore enabling rather than limiting. This is important if you are trying to effect substantive change under the RMA and proactively achieve the policy outcome, particularly if you need people to take actions they might otherwise not. Controlled activity status has the effect of applying unilaterally and achieving consistent outcomes, provided the matters of control are specific.

Thought must be given to which activity status to use if the controlled standard(s) is not complied with. For example, if the mitigation proposed by the applicant would not result in the specified level of risk reduction, and instead would achieve a lower level of reduction (or no risk reduction is proposed), then that activity will not be a controlled activity. If the plan does not specify what activity status is given to activities that do not comply with the standards, the RMA states that the activity will be assessed as a discretionary activity (s 87B). Plans will generally specify which 'default' activity status applies to activities that do not meet the standards. If the intention is to achieve consistent outcomes for reduction of hazard risk, prohibited activity status would be the most effective 'default' activity status. A controlled rule, with a prohibited activity status for non-compliance with standards, would effectively compel applicants to comply with the controlled rule, because it is not possible to apply for a consent for a prohibited activity. When a regional rule takes effect that requires a consent application for an activity, the landowner's choice is either to apply for the consent or stop the activity. If there is only one choice in the type of consent applied for, for example, controlled activity consent because the alternative is a prohibited activity rule, then all applications will be for the

controlled activity. As a controlled activity must be granted, the requirements of the rule will be complied with.

3.5.4 Rules for Immediate Risk Reduction

Where immediate risk reduction is to be achieved through the removal of people from areas of risk using the RMA, prohibited activity regional rules would be the most effective. Prohibited activities are those for which consent cannot be applied for. Once a regional prohibited activity rule becomes operative, the activity that is deemed prohibited must cease – there is no other option. Regional prohibited activity rules are therefore highly effective at reducing natural hazard risk. They are at the extreme end of the spectrum of restrictions on existing uses, as they completely extinguish existing uses. They are therefore useful where the outcome sought is immediate and unilateral reduction of risk, with no flexibility as to timing or site-specific variations in reduction.

In this context, 'immediate' means 'without any lead-in time', as for the gradual rules described above. However, a prohibited rule does not take effect until it is operative, which may take several years after it is first notified, particularly if there are appeals. In reality, prohibited rules do come with some notice.

An example of a prohibited activity rule to reduce risk to existing developments is provided by the Bay of Plenty Proposed Plan Change 17 (referred to in this report as the Matatā plan change), which seeks to introduce a prohibited rule to reduce risk from debris flow on the Awatarariki fanhead. The rule, and the objective and policies it is implementing, are set out below (see Figure 3.5). This is a very specific framework, where the rule is clearly implementing the objective and policies. We note that this framework is only proposed at this time and has not yet made it through the public hearing process, and it has faced significant opposition from landowners. For detailed analysis of the process to bring about this plan change, including social implications, see Hanna et al. 2018.

Objective

NH 04	Avoidance or mitigation of debris flow hazard by managing risk for people's safety on the Awatarariki Fanhead.

Policies

NH P6	To assess the natural hazard risk from Debris Flows on the Awatarariki fanhead at Matatā by undertaking a risk analysis using the methodology set out in Australian Geomechanics Society – Landslide Risk Management 2007.
NH P7	To reduce the level of natural hazard risk associated with debris flow on the Awatarariki Fanhead by ensuring existing residential land uses retreat from the high risk hazard area as soon as reasonably practicable.
NH P8	To ensure existing residential land uses retreat from the high risk hazard on the Awatarariki Fanhead by extinguishing existing use rights that would otherwise enable those residential land uses to continue.

Rules

NH R71	**Prohibited - Residential Activities subject to High Risk Debris Flow on the Awatarariki Fanhead at Matatā after 31 March 2021** From 31 March 2021, the use of land for a residential activity is a prohibited activity on any property listed below in Table NH 3.

Figure 3.5 Part of the proposed provisions to reduce risk from debris flow on the Awatarariki fanhead, Matatā. Source: Proposed rule NH R71, Proposed Plan Change 17 (Natural Hazards) to the Bay of Plenty Regional Natural Resources Plan, June 2018.

3.5.5 The Link Between Policy Outcomes and Rule Frameworks

In the preceding sections we have noted the relationship between the policy outcome sought and the nature of the rule framework used. In summary, where reduction of risk to existing development is to be:

- dealt with on a reactive basis, rules that control rebuilding following hazard events can be used.
- addressed proactively and achieved gradually, controlled activity rules in combination with prohibited activity rules, and the use of duration and conditions of consent, can be used.
- addressed proactively and immediately, prohibited activity rules are necessary.

We have also noted that there is a relationship between activity status and whether reduction of risk to existing development is to be achieved consistently across an area or with flexibility. Controlled and prohibited rules are required to achieve consistency, whereas restricted discretionary, discretionary and non-complying rules can be used to provide flexibility in the timing and/or the level of risk reduction to be achieved. A consequence of flexibility is inconsistent outcomes.

Resource consent officers we interviewed demonstrated what happens when rule frameworks do not match policy outcomes. The recurring example given to us was a policy to avoid high hazard areas that is implemented by a non-complying activity status. It was the general view of the resource consents officers we spoke to that prohibited activity status better implemented

a policy of avoidance. This appears to be due largely to the effect of the King Salmon decision, one of the outcomes of which is that 'avoid means avoid'. The question raised by one resource consent officer and reflected in the comments of others is "If the policy says 'avoid', why isn't it a prohibited activity?"

Issues with this combination of an 'avoid' policy and non-complying activity status included:

- A policy to avoid increasing potential risk "puts us in a very difficult situation, because unless they [the applicant] can demonstrate that there is no increase in potential risk, which is quite hard to do, it's setting a very high bar".
- It provides no certainty for applicants, as there is an inherent conflict between the ability to apply for a resource consent, and a policy that requires the avoidance of increased risk.
- It is an onerous process for an applicant to go through if resource consent is not anticipated.
- A plan cannot be effective and will not achieve what the policy intends if consent applications can be granted that would be inconsistent with the policy.

To explain the last bullet point; it is possible under the RMA for a resource consent application to be granted that is contrary to the policies of a plan, provided the effects of the proposal would be minor (s 104D). It is therefore possible that if the effects of a proposal can be shown to be minor, the application can be granted, even if the result would be an increase in risk. This is an issue with risk being assessed on a case-by-case basis in individual consent applications, where consideration of cumulative risk, including into the future, is challenging. Even the strongest and most directive policies cannot overcome this aspect of the RMA. This makes the case for the use of prohibited activities if the intent is to prevent increase in risk. As one resource consents officer said: "In reality, the only thing that stops something from occurring is prohibited activity [status]".

In our interviews, two policy planners explained that as a result of the need for prohibited activities to implement an 'avoid' policy, they were considering the use of the word 'discourage' in policies, rather than avoid, with use of non-complying activity status. Our assessment is that this combination provides more opportunity for resource consent applications to be granted, than the use of the word 'avoid'. This also illustrates the importance of clarifying the outcome being sought by the policy and using the correct term to express it, as the outcome will determine the rule framework required. Specific outcomes (like avoid) require specific and certain rule frameworks (like prohibited activity status), whereas outcomes that allow for more flexibility (like discourage) can use rule frameworks that allow more flexibility (like discretionary or non-complying activity status).

For example, the proposed regional rule in the Matatā plan change (discussed in preceding section) is a prohibited rule, meaning that if it is included in the regional plan, it will apply in the absolute with no exceptions. The reduction in risk will be achieved for all land simultaneously. If the same rule was a non-complying activity, with the support of a policy to reduce natural hazard risk, it would mean all residential activity would need to apply for a resource consent, which may or may not be granted, depending on the circumstances. The outcome may not be unilateral reduction of risk. Risk may be reduced for some properties but not others (by either granting or declining consent), and/or the timeframe for risk reduction may vary from property to property (through the use of conditions and durations of consent on granted applications). Issues of equitability are raised by a rule framework that allows for flexibility or inconsistent

outcomes between people living adjacent to one another and impacted by a hazard in the same way, which do not arise where a rule applies consistently across an area.

3.5.6 District Land Use Tools

The preceding sections have discussed regional rule frameworks, as it is regional rules that are able to manage existing uses. District rules are not able to reduce risk through the management of existing uses. There are three aspects of district land use tools that are worth consideration for their ability to support regional rules that reduce natural hazard risk.

Only district rules can control subdivision. A regional rule is not able to govern subdivision. The control of subdivision is something that should go hand-in-hand with a restriction on existing land uses. For example, it would be prudent to prohibit subdivision in an area where a regional rule was to prohibit or restrict residential use, so that future development potential can be comprehensively controlled. District rules for subdivision should therefore be developed in parallel with regional rules to control existing uses.

In addition, consideration could be given to the use of restrictive zones in district plans when regional rules are used to manage existing uses. This is for the same reason as described for subdivision – so that new developments that might not be managed by the regional rules do not frustrate the achievement of risk reduction. Zoning also considers what an appropriate future use of the area might be, if existing uses is to be completely changed. For example, the Matatā plan change (see section 3.5.4 of this report) includes a corresponding district plan change the zone the high-risk area from Residential to Coastal Protection Zone, thereby limiting future uses of the site (Boffa Miskell 2018).

The third tool is duration of consents. Using durations of consents for regional land use activities was discussed in section 3.5.3 of this report. Land use consents granted by TAs are generally granted indefinitely, without a specified duration, supporting the perception that land use should be able to continue indefinitely. If land use consents were granted for a specified duration, the perception of the permanency of land use would be challenged, at least for activities that required a resource consent. For permitted activities, some sort of limited duration for the activity would be needed within the zone rules. Consideration should be given to imposing durations on land use consents and/or within zone rules in areas of high risk, where it may be necessary to reduce risk in the future.

3.6 When Would Agencies Consider Active Management of Existing Uses?

We were also interested in the circumstances that would prompt regional and TA officers to consider a policy to reduce risk to existing developments through the management of existing uses. We wanted to understand what was required, in the eyes of council officers, to overcome a policy to protect existing uses. This might give some insights into why there are so few examples of active management of existing uses, and what might be needed to see more examples.

Through our interviews we identified two key circumstances where such a decision might be taken:

1. High hazard/risk areas: an area of high hazard or high risk is necessary before extinguishment of existing use rights would be considered. One officer put it this way: “Is the risk so severe that we need to consider extinguishing existing use rights, and/or other actions?”

2. No other option: Managed retreat and extinguishment of existing use rights is the last resort. It would be necessary for all other mitigation options to have been exhausted before it was considered.

These two circumstances are present for the Matatā plan change in Bay of Plenty (see section 3.5.4), where a plan change process is currently underway to introduce a regional rule to extinguish existing uses through prohibiting residential activity in a high-risk area subject to debris flow. The s 32 evaluation report for the plan change (Boffa Miskell 2018) explains that risk assessments have identified a high risk to life and property for an existing community, using a nationally and internationally recognised methodology for risk assessment that is specified in the Bay of Plenty RPS (AGS 2007). The RPS requires steps to be taken to reduce the high risk to a lower level. The s 32 evaluation report (Boffa Miskell 2018) also describes how extinguishment of existing uses is the option of last resort to reduce risk and is pursued after all other options, including engineering solutions and voluntary retreat options, have been exhausted.

To investigate how high the 'high hazard/risk' circumstance needed to be, in the eyes of the council officers we interviewed, we asked them if historical high hazard events and/or current significant risk situations would be enough to trigger consideration of the use of rules to extinguish existing use rights. Most of the circumstances we put to them were not considered significant enough. These were situations such as rebuilding after significant coastal erosion events (ex-tropical cyclones in January 2018), houses located on or adjacent to active fault lines that will cause significant impacts when they rupture (in Hutt Valley and St Arnaud), and rock fall following the Christchurch earthquakes in the Port Hills that presents a significant risk to life and property.

In contrast, the situation of slowly evolving but certain sea level rise impacts were enough to trigger consideration of using rules to manage existing use in two regions we visited. Comparing the current hazard/risk situations described above with the evolving and increasing risk situation of sea level rise, it is possible that having time available before extinguishment of existing use rights might happen makes consideration of this tool more palatable than in situations where it would need to be applied relatively soon (e.g. to prevent re-building following a coastal erosion event or to address rockfall hazards following earthquakes). This may be especially so in the case of hazard or risk that communities have been living with for some time (e.g. buildings on fault lines and flood hazards). We note that the situation in Matatā is one where extinguishment of existing use rights would happen relatively soon (3 years after notifying the rule, at a time when the compensation package is expected to be settled), and that process has raised considerable public opposition even though the risk to life and property is high.

We conclude that both significantly high hazard/risk and the exhaustion or ineffectiveness of all other options is needed before a policy to reduce risk to existing development would win out over a policy to protect existing uses. It appears that the hurdle of significantly high hazard/risk is higher in circumstances where the extinguishment would happen relatively soon, than in the case where the extinguishment would happen at some point in the future. It seems it is a step too far to override the protection of existing uses quickly, but significant lead-in time may make it more palatable, particularly if combined with adequate information and signalling of the risk now. This suggests that the use of rules in the middle of the rule spectrum we have identified in section 3.5 of this report may be a practicable option where there is time to reduce risk. In a situation where palatability of an option is based on perception of the level and immediacy of the risk, it is clear that institutional transparency and openness with affected

communities about the basis for both assessing the level of risk and the threshold of risk reduction, will be important in providing robust justification for action.

It was also apparent from our interviews with council officers that the ongoing cost of maintaining infrastructure in hazard areas or areas subject to sea level rise is a motivator for discussions about actively managing existing uses. This raises questions about whether the community as a whole should carry the cost of providing services through rates to individuals or a small part of the community that lives in high risk areas. We go only as far as to note this point, because it was often raised during our interviews, but it was not within scope of our investigation to consider it further[46].

[46] This issue has been looked at by others, including Local Government New Zealand: https://www.lgnz.co.nz/our-work/publications/climate-change-and-natural-hazards-decision-making-toolkit/

4.0 GOVERNANCE

Shortcomings in governance and inter-governmental cooperation, including a lack of effective coordination between district and regional councils, has been identified as one reason why planning for natural hazards has not been effectively implemented (MFE 2012, Ericksen et al. 2003). It became evident early on in our work that this was also true for natural hazard risk reduction. The RMA provides no clear governance structure or framework for reducing risk through the management of existing uses in high hazard areas. This is not surprising, considering there is no objective or outcome for risk reduction in the RMA.

Leadership and governance for risk reduction is fragmented and poorly defined in New Zealand (LGNZ 2014). There is a mismatch of responsibilities and jurisdiction in the management of existing land uses between territorial and regional authorities under the RMA (Hanna et al. 2018). This provides opportunities for things to get missed or for one decision-maker to consider that an issue is the responsibility of another. It has been recognised that the policy guidance within the statutes that govern natural hazard management in New Zealand remains very high level and hence much is left to the discretion and judgement of those at the sharp end of implementation (LGNZ 2014). We have found this to be the case under the RMA for management of existing uses to reduce natural hazard risk. We have identified a lack of direction in the RMA on risk reduction, and a lack of agreement about what powers should be exercised by whom and when. In our view, this lack of clarity is a contributing factor to the few examples of active management of existing uses and poses a significant hurdle to the reduction of natural hazard risk for existing development.

The purpose of this section is to examine the potential governance impediments presented by the RMA and planning practice in the context of risk reduction and existing uses, and potential options for overcoming these. First, we illustrate the problem by outlining the governance structures of the RMA and the inter-agency roles allocated under it, and how these are applied in practice by regional councils and TAs. We then consider what our interviews told us about the role of regional councils in practice. We highlight two key provisions of the RMA that could be used to overcome the issues cause by the jurisdictional overlap that current practice appears to be overlooking. Further awareness and understanding of these options may help to assist in the development of policies to reduce risk, in the absence of reforms to the legislation to make clear the appropriate approach in this area. We then consider the importance of the relationship between regional councils and TAs and highlight what we found at unitary authorities (a combined governance structure). Finally, we address national direction for reduction of hazard risk and what it may be able to offer to improve the governance of this issue.

4.1 Governance Issues for Risk Reduction in the RMA

We have identified two governance-related issues with the way the RMA assigns functions between regional councils and TAs. The first relates to the function to manage land use, and the second relates to the function to manage natural hazards.

4.1.1 Management of Land Use

The RMA provides for regional councils to use rules to manage existing uses, including the ability to extinguish existing use rights (see section 2 of this report), but in practice regional councils have almost never done this. The lack of uptake by regional councils of this ability under the RMA means there is now a capability gap at the level of local government with the actual power to make the rules. While this is an issue with practice, the RMA itself does provide

some explanation for why regional councils tend not to use land use rules to manage natural hazards. The RMA gives regional councils the function of managing the natural environment, and regional councils generally use rules to manage water quality and quantity, air quality, soil management, and the coastal environment (s 30). This can include managing existing uses in these fields, such as water rights and air discharges. In contrast, the RMA generally assigns the management of the use of land to TAs (district plan rules are land use rules). The ability of a regional council to use land use rules to manage existing land uses is therefore an unusual one under the RMA.

The evident problems with this evolved practice of regional councils not using land use rules were readily acknowledged in our interviews. For example, one regional council interviewee stated: "Regional council planners wouldn't know about how s 10 works and how regional rules can extinguish existing use rights. Regional planners don't deal with land use". In a survey of local authorities undertaken in 2009, regional councils commonly identified the location of the land use planning function primarily with territorial authorities as a key limitation to climate change adaptation (which has parallels with reduction of natural hazard risk) (Britton 2010). These observations reinforce the premise that regional councils do not generally deal with land use rules and have defaulted to the practice of assuming this is the province of TAs alone. It also alludes to a possible capability issue resulting from the confused governance arrangements: i.e., regional council planners may not be aware or have a comprehensive understanding of how to use rules to manage existing uses to reduce hazard risk.

4.1.2 Management of Natural Hazards

The RMA assigns both regional councils and TAs the function of controlling land use for the avoidance or mitigation of natural hazards, with very little distinction between each tier of government, as set out in Table 4.1 below.[47]

Table 4.1 Functions of regional councils and territorial authorities

RMA section	Level of government	Function
S 30(1)(c)(iv)	Regional Council	The control of the use of land for the purpose of the avoidance or mitigation of natural hazards
S 31(1)(b)(i)	Territorial Authority	The control of any actual or potential effects of the use, development, or protection of land, including for the purpose of the avoidance or mitigation of natural hazards

Both regional councils (under s 30(1)(c)(iv)) and territorial authorities (s 31(1)(b)(i)) have the power to control the use of land for the avoidance or mitigation of natural hazards. As discussed in section 2 of this report, this can include the reduction of natural hazard risk, although this is not immediately obvious from the language used in ss 30 and 31. Only a regional council has the power to promulgate rules that would have the effect of managing or extinguishing existing uses. The relationship between ss 20A and 30(1)(c)(vi) is of critical importance in the context of risk reduction as they are the provisions that empower regional councils to manage natural hazards, and in so doing, manage and extinguish existing uses (without this power risk reduction through mandatory 'managed retreat' would be impossible

[47] We have not found any significant practical implications as a result of the subtle difference in the words used for each function, or any judicial discussion of the importance (or not) of the different words used.

under the RMA). Although it seems widely understood that regional councils have this power, to date, it has only been used to impose limited restrictions on existing use such as the rebuilding rules described in section 2.7 of this report (although an attempt is currently being made to extinguish existing uses with the Matatā plan change, see section 3.5.4 of this report).

Our discussions with both TAs and regional councils suggested that there was some confusion over who should take a lead role and a desire to avoid any conflict that might arise from being involved in an issue that was the responsibility of another agency. The RMA allows a joint management approach between regional councils and TAs, but without directly requiring such an approach. A possible consequence of this is that it is easy for no one to take the initiative. Uncertainties as to roles and responsibilities between local authorities has contributed to the failure of integrated management for natural hazards (MFE 2012). Given interviewees described to us a context that includes concerns over public opposition, potential litigation, uncertainty over fiscal liability, and the overall sensitivity of managing existing uses, the absence of strong signalling from the RMA on roles and responsibilities would favour inertia.

Ericksen et al. (2003) looked at the overlapping functions for natural hazards in ss 30 and 31, to see if the overlap encouraged a partnership between regional and local councils. They state that the intention of the MFE policymakers, for natural hazards, was to force regional and local councils to sort out a sensible allocation of functions for themselves. However, their research, like ours 15 years later, found that there was confusion amongst regional and local council staff over the overlapping functions for natural hazards in sections 30 and 31. They concluded, like us, that the overlap of functions had not particularly encouraged cooperation between regional and local governments on the management of natural hazards. In our interviews we encountered both regional council officers and TA officers who pointed to each other as having greater responsibility.

During the development and enactment of the RMA, several submitters urged that the relative duties be spelt out in greater detail in the Act, with regional and district functions clearly distinguished. Others suggested that regional council functions be limited to resources and areas of regional significance (MFE 1991, 18 and 77). Overall, the MFE concluded in a section discussing responsibilities for river and lake beds that:

> *We believe that joint jurisdiction can be made to work better than is the case under current law. In addition, other provisions in the Bill call for a joint approach to resource management, particularly in the area of the land/coast interface and in respect of certain land uses which have regional significance (natural hazards, soil conservation). Thus, the ability to prepare joint plans, to transfer powers, to hold joint hearings, should lend themselves to creating an operational regime which, while not necessarily the optimum arrangement, will nevertheless produce improvements over and the [sic] above the existing regime. (MFE 1991, 21)*

In relation to natural hazards and land use the conflict was directly acknowledged:

> *Some submissions were concerned at a possible overlap between land use management plans prepared by both districts and regions. The change proposed to clauses 27 and 28 [now ss 30 and 31] more clearly distinguishes the district role in general land use planning and the regional role in natural hazard mitigation and soil conservation measures which can be handled in a more integrated manner at the regional level. (MFE 1991, 109)*

It followed that (as is now reflected in the RMA):

> *Different aspects of land use are controlled at different levels of government. Land is generally controlled by the territorial authority unless –*
>
> a. *it is a navigable or large river or lakebed; or*
>
> b. *it needs to be controlled for the purpose of natural hazards mitigation, soil conservation or water body quality purposes (MFE 1991, 56)*

It is our opinion that the intentions expressed in these excerpts from the 1991 assessment have not been realised, and the concerns expressed at the time remain extant. The absence of a specific directive in the RMA that joint management should occur for the management of natural hazards, and/or a clear statement that a regional council is to lead natural hazards management, is one reason there are few examples of active management of existing uses to reduce hazard risk.

4.2 Role of The Regional Council

It is clear that regional councils can use rules to manage existing uses in high hazard areas, so the question remains, whether they see this as part of their role in practice, and moreover, what they consider to be their overall role in the reduction of risk to existing development. It is important to understand whether current perceptions of roles operate as a hurdle that needs to be overcome in order to be able to reduce natural hazard risk for existing developments.

Our findings identified two key roles that regional councils see themselves providing, in the context of managing existing uses in high hazard areas.

1. Science and technical advice
2. Support to TAs for implementation of RPS requirements in district plans

Each of these is discussed further below. But first, we point out in our interviews, making rules to manage and/or extinguish existing uses was not identified as a key role of regional councils, and neither was achieving reduction of risk to existing development. Rather regional council focus was on assisting and supporting TAs, rather than acting themselves. For two regional councils the issue of using regional rules to manage or extinguish existing uses had come up in discussions with TAs, but in neither case was the regional council prepared to go ahead without the TA triggering the action through a direct request for such a rule. We note our analysis of RPSs (discussed in section 3.3 of this report) identified one RPS (Otago) that specifies the trigger for a regional rule to manage existing uses is a TA request. Our findings suggest that although a regional council has the power to make the rules to manage existing uses to reduce hazard risk, there is no perception they could do this on their own. Rather, the perception is that TA support, and in fact initiation, is necessary before a regional council will consider rules to manage existing uses. Even then a regional council may not act, which can lead to the TA considering initiating a private plan change to the regional plan and effectively acting without the support of the regional council. This is what has occurred in the case of the Matatā plan change, which is a private plan change driven by Whakatāne District Council (Hanna et al. 2018, Boffa Miskel 2018). This suggests that the relationship between TAs and their regional councils is of great importance, as in most cases joint action appears to be required, but there is no readily recognisable platform for organising such action (see text box).

The challenges of interagency cooperation for hazards management

The Wellington Natural Hazards Management Strategy (http://www.gw.govt.nz/natural-hazards-management-strategy/) highlights some of the challenges of interagency cooperation for hazards management. The forum behind the strategy involves regional and territorial agencies of the Greater Wellington area. It evolved from an umbrella group that initially wanted to share data and avoid duplication in hazards research. Progressing this to a platform through which agencies can undertake joint initiatives (albeit currently non-statutory in nature) has taken years of work brokering relationships. It is reliant on staff that are: representative across essential departments; positioned to be able to make decisions, able to ensure follow-though within their own organisations and act as a conduit between organisations. Political understanding and senior management support are also essential and building trust is key.

Science and technical advice: Regional councils have dedicated science and technical staff, which, while resourced to different degrees, often have capability in hazard science. Regional council staff interviewed recognised that they have the clear role of information provision to TAs for hazard management and considered that TAs are generally not as well-resourced to provide science and technical information as regional councils are, so regional councils will work with TAs to understand hazard issues. However, we note that provision of technical hazard information to TAs may not significantly help to manage existing uses, as TAs have no ability to use rules to manage existing uses. As noted above, TAs need to request intervention from regional councils, or formally initiate a private plan change themselves, if they are to trigger the use of rules to manage existing uses. Providing hazard information internally, to regional council policy planners, might short cut this process as this would ensure the people with the power to make rules to manage existing uses have the technical knowledge to do so. However, technical knowledge without the requirement to make use of it may be of limited value.

RPS implementation support: Some of the regional council officers interviewed observed that helping TAs to implement the RPS was a key role for them, and Environment Canterbury has a specific unit with staff dedicated to this task. This role of support to the TAs in policy implementation has the potential to build stronger relationships between the two levels of government. However, because of the limited actions TAs can take for risk reduction it is important to remember that a direction in an RPS to reduce hazard risk will need to be given effect to by a regional rule. In this context, it is vital that regional councils implement their own RPS.

It has been observed that political influence in the making of district plans (as a result of the prominent place of public participation in the process) means that TAs have a tendency to promote parochial and short-term interests, and the RMA gives regional councils the role of integrated resource management to counter this tendency (Ericksen et al. 2003). However, our findings on the role that regional councils see themselves having, regarding the reduction of risk to existing development, does not equate to integrated resource management. Rather, there is an expectation of assistance and support to the TAs, with the TAs leading the approach. The original intention of the RMA is not being carried out in practice.

4.3 RMA Provisions That Could Overcome Governance Issues

There are two provisions in the RMA that potentially provide pathways through the confusing governance arrangements under the RMA. Firstly, under s 62, an RPS must explicitly state the local authority responsible for specifying the objectives, policies, and methods for the control of the use of land to avoid or mitigate natural hazards. This gives the RPS the power to assign responsibility between the regional council and the TAs for hazard management. Making it clear that a specific hazard is the responsibility of a regional council could assist such a council in assessing its options regarding risk reduction.

The other potential tool is the ability to transfer functions, powers and duties under s 33 of the RMA. Section 33 provides that local authorities may transfer functions, powers and duties under the Act to another "public authority". Public authority is widely defined and includes other local authorities. It may be possible for a regional council to transfer its ability to make rules controlling or extinguishing existing uses to a TA and, as a result, overcome the conflicting governance issue we have identified.

4.3.1 Assigning of Responsibilities in RPSs

An RPS must identify the local authority responsible for specifying objectives, policies and methods (including rules) for the control of the use of land to avoid or mitigate natural hazards (s 62(1)(i)(i)). The ability of regional councils to assign responsibilities for the management of natural hazards, between regional councils and TAs, is seen as an appropriate approach to ensuring the risks relating to natural hazards are dealt with in the right plan and by the right local authority (MFE, 2012). Assigning the responsibility of managing risk to existing developments to a regional plan is good practice (Grace and Saunders 2016). Our interviewees repeatedly told us that the hierarchy of plans had the potential to help overcome political reluctance to act to manage risk, as regional and district plans are required to give effect to an RPS. This makes allocation of responsibilities in an RPS a potentially useful tool to provide clarity and direction.

We reviewed 'allocation of responsibility' statements in all the current RPSs to assess how useful this tool might be in clarifying roles and responsibilities for the reduction of hazard risk through the management of existing uses (Appendix 3). We found that most RPSs assign responsibilities for the control of the use of land for the management of natural hazards in accordance with the usual areas of responsibility and competencies for regional councils and TAs. That is, regional councils have responsibility for the beds of rivers, lakes and wetlands, and the coastal marine area, and TAs have control of all other land use. Statements of this kind do not specifically support the use of regional rules outside the coastal marine area or the beds of rivers and lakes and therefore do not facilitate inclusion of a regional rule to extinguish existing land use. Although these statements cannot override the ability of a regional council to make land use rules outside the areas identified, they reflect an intention that TAs rather than regional councils will manage land use. We found that this type of statement was typically included in those RPSs that did not specifically address the management of existing uses. This was as expected, as there is no need to signal the allocation of control over land use to the regional council, if the management of existing uses has not been contemplated when developing an RPS.

During the interviews we found one example where such an allocation of responsibility statement was a barrier to a regional council acting on the issue of managing existing use. The Bay of Plenty RPS allocates responsibility to both the regional council and TAs for developing objectives and policies in hazard areas, except for the coastal marine area, which is the

exclusive responsibility of the regional council (Policy NH 14C p201). TAs are assigned responsibility for developing land use rules, with no allocation of responsibilities for land use rules assigned to the regional council. However, there is a note and an explanation that regional councils can use land use rules to address natural hazard risks to existing land uses (BOP RPS, p201). A Bay of Plenty Regional Council officer identified the specific assigning of the ability to make land use rules to the TAs, rather than to (or jointly with) the regional council, as an initial hurdle to the regional council considering a rule to extinguish existing use rights at Matatā when the Whakatāne District Council requested support. Although there is a note pointing out that the regional council retains the ability to use regional rules to override existing use rights, the policy states that TAs are responsible for developing land use rules to manage natural hazards. The regional council's initial interpretation was that it did not have to develop the rules, as this was the TA's responsibility. This hurdle was eventually overcome, when the Whakatāne District Council initiated a private plan change.

This example was echoed in other interviews we conducted, where we encountered TA resentment at RPSs that devolve all the hazard functions to TAs, apparently without much consultation with the TAs. We were told that when TAs ask for help from the regional council, the devolution in the RPS gets quoted back to them as the reason for not helping. This suggests that it may be easier for regional councils to develop land use rules to manage existing uses if this responsibility is clearly and specifically assigned to them in the RPS.

Elsewhere we found examples of allocation of responsibility statements that added more specific responsibilities. For example, the Southland RPS assigns Southland Regional Council additional responsibility for the area covered by the Southland Flood Control Management Bylaw (page 105), and the Canterbury RPS assigns Environment Canterbury additional responsibility within the mapped 100-year coastal erosion hazard zone (page 11–2). These more specific statements should make it easier for these regional councils to use rules to manage land use to reduce natural hazard risk in these areas.

We found two RPSs with a clearly expressed intention that regional rules will be used to manage existing use to reduce hazard risk, and a corresponding allocation of responsibilities to support this. These were the Northland Regional Policy Statement and the Waikato Regional Policy Statement. Both RPSs contemplate regional rules being used to control existing structures in hazard areas. For example, the Northland Regional Policy Statement requires regional land use rules to be used to control the repair and reconstruction of buildings damaged by natural hazard events (Method 7.1.7(8)). To support this intention, both RPSs allocate responsibility for the control of the use of land in high risk areas to the regional council, while land use for other hazard contexts is assigned to TAs. In the Northland RPS, the regional council is assigned responsibility "where buildings have been materially damaged in a 10-year flood or a high-risk coastal hazard area" (Northland RPS, section 1.6, p.8). In the Waikato RPS, the regional council is assigned responsibility for "the control of structures in primary hazard zones" (described as areas of intolerable risk) (Waikato RPS method 4.2.10, page 4–8). This is a very specific assigning of responsibilities.

Such a statement, that assigns regional councils the responsibility for land use in hazard areas, supports an intention to use rules to manage existing uses. We anticipate this would overcome the kind of initial resistance as illustrated in the Matatā plan change example; and is a useful tool to enable regional councils to act.

We also noted specific directions within the Bay of Plenty RPS and the Waikato RPS regarding the allocation of responsibilities, which appear helpful in managing existing uses and reducing risk. Using the Bay of Plenty RPS as an example, along with the policy to allocate responsibility

for land use control for natural hazards discussed above, there is also a policy that allocates responsibility for natural hazard identification and risk assessment (Policy NH 13C p201). The regional council has most of the responsibility for hazard mapping, reflecting the core technical competencies of the regional council (p201). For the risk assessments, the regional council is responsible for hazards with potential widespread consequences such as liquefaction (p201). The TAs have responsibility for all other risk assessments, due to the local expertise on land use and development and associated infrastructure that resides with the TAs (p201). By clearly setting out which authority is responsible for these hazard identification and risk assessment tasks, the RPS takes away the need for regional councils and TAs to negotiate this on a case-by-case basis, potentially enabling a more efficient start to these assessments. However, it also demonstrates that these two regional councils expect the TAs to lead land use responses to risk, which makes action for risk reduction difficult given a TAs limited powers.

A statement of responsibility in an RPS does not, on its own, definitively provide the mechanism for a regional rule to be promulgated – it provides no compulsion. However, it does help to clarify roles and responsibilities, and in this way can make it easier to manage existing uses to reduce hazard risk.

4.3.2 Transfer of Functions

Section 33 of the RMA provides for a local authority to transfer any one or more of its functions, powers, or duties under the Act to another public authority. Turbott (2006) identified this as an option for overcoming the governance issues between regional councils and TAs for making land use rules to reduce risk, and the following statement in the Bay of Plenty RPS offers some justification:

> *Overlapping roles and responsibilities of central and local government agencies can lead to confusion, inefficiencies and frustration. In some cases, clear and consistent delegation and transfer of powers to the appropriate community of interest for decision making and control may be desirable. (Bay of Plenty RPS p45)*

In this section we look at whether a regional council can transfer its s 30(1)(c)(iv) functions to manage land use for the avoidance or mitigation of natural hazards, using s 33. Coupled with the transfer of a power to make regional rules (which is also possible), this would allow a territorial authority to execute rules modifying or extinguishing an existing use. Subject to the detailed requirements of s 33 regarding consultation and agreement between both authorities that the transfer is desirable, we can see no reason in principle why such an approach could not be taken in the context of managed retreat and the reduction of risk to existing developments.

There does not appear to be any judicial discussion regarding the scope of s 33, however, a 2015 MFE stocktake report on s 33 indicates that there have been few instances of actual transfer, although it is identified by most regional councils as a tool. We note that no regional council has transferred responsibilities or regional rule making power to a TA in the context of natural hazard management (although they have done in other contexts, such as noise control) (MFE 2015)). Our review of RPSs noted that RPSs that contemplate the use of regional rules to manage existing uses also contemplate transferring that function to the relevant TA. For example, the Northland RPS and the Waikato RPS both state the regional council will investigate transferring its functions to make regional rules to manage existing uses to the relevant territorial authority (Northland RPS Methods 7.1.7(8), Waikato RPS explanation to Policy 13.2 p 13–6)). Similarly, Method 2.3.8 of the Otago RPS identifies delegating the

administration of a regional rule to extinguish existing uses to address natural hazard risk to the city or district council (ORC RPS 2019, 67).

During our interviews, we had a mixed response from regional councils and TAs about the ability to delegate functions under s 33. Some authorities had thought about the option, and others had not. One TA we spoke to could see a delegation to extinguish existing uses working, based on a similar arrangement for management of noise from a port, but their proviso was that the regional council would have to first confirm that there was no other mitigation option available to reduce risk. This demonstrates our perception that those we spoke to have a strong reluctance to initiate action. Another group of TA officers agreed TAs could make rules under delegation, although the preference would be for this to be done by the regional council.

In theory, we consider the ability to transfer functions to make or administer regional rules to TAs is a useful tool under the RMA to help overcome the confused governance structure for risk reduction through the management of existing use rights. Our interviews and analysis have shown that while regional councils have the power to make these land use rules, it is a more natural fit with the usual responsibilities of TAs to make and administer land use rules.

Concerns were also raised during our interviews about how difficult it would be in practice for TAs to make the hard decision to introduce rules – the perception being that TAs are more strongly connected to their communities, shaped by public views, including on whether there was any need for action, and that territorial politics, with an emphasis on immediate rather than long term strategic matters, would make decisions to modify or extinguish existing uses very difficult. The opinion of the participants was that regional council elected representatives are more buffered from this influence, and that regional councils are better placed, as well as better resourced, to make the hard decisions. However, the 2010 removal of Environment Canterbury councillors and replacement with commissioners because of failures to make progress on water management, suggests difficulties could be faced at any level of local government where the stakes are high, and communities are divided.

In either case, there is a strong need for collaboration between regional councils and TAs, to ensure that rules to manage existing use are transparently justified and that the TA is willing and able to make or administer them. The review by MFE noted that council relationships remain a key factor in determining willingness to transfer responsibilities (MFE 2015, 17).

4.3.3 Importance of The RPS In Overcoming Governance Issues

As discussed in section 3.3 of this report, RPSs are key documents in setting objectives for risk reduction. Because of the requirement in the RMA to ‘give effect to’ higher order planning documents, RPSs can set direction for how existing uses are to be managed under the RMA to reduce hazard risk. This hierarchy, combined with the two tools provided by s 62 (assigning responsibility) and s 33 (transfer of functions), mean that the RPS is able to help overcome the issues with governance that result from the overlapping jurisdiction and unusual power given to regional councils for managing land use for hazard management. We note, though, that this requires action from regional councils, as it is regional councils who promulgate RPSs, and we have highlighted that there is no clear direction in the RMA that requires regional councils to take leadership of this issue.

4.4 Relationships Between Regional and Territorial Authorities

One of the most recognisable features of local government implementation of the RMA is the diversity in the range of approaches adopted throughout the country. This is particularly noticeable in the quality and nature of the relationships between regions and territorial authorities. Integrated management between local authorities is critical to successful planning for natural hazards (MFE 2012) and this requires supportive relationships.

We encountered evidence of 'turf protection' and mistrust between regional and district councils that appears to have been a barrier to coordinated action on existing uses in coastal risk areas. In one case the regional council observed that the larger metropolitan TAs did not want the regional council to intrude on land use issues. In another case, one regional council we spoke to observed that they would be unlikely to act (in terms of including a rule) without this being initiated by a TA. However, another regional council had received a request for help from a rural TA, but a decision was made to deal consistently with all districts and therefore not make a rule unless this was a region-wide request. Elsewhere relationships between TAs and regions seemed to be predominantly through the adversarial statutory process of submitting on plans, thus making proactive, strategic and cooperative action unlikely. Scale of the issue appears to be an important trigger for conversation between regions and TAs. In our interviews this was specifically commented on in the context of sea-level rise impacts on developed sections of coastline with many properties at risk. However, conversations driven by crisis, and even fear of potential liabilities are difficult. In one interview we learnt of a regional council's reluctance to become involved in a situation where there was strong public opposition to what the TA was proposing.

The basis for these relationships between regions and TAs is complex and historical (Ericksen et al. 2003) and becomes significant where there is lack of clarity on roles and no clear platform for dialogue, as is the case of management of existing use for risk reduction. This is an issue that we strongly recommend is addressed, as we have identified that a sound relationship between TAs and regional councils is essential for the implementation of the reduction of natural hazard risk for existing developments.

4.5 Unitary Authorities: A Combined Governance Structure

Counter-intuitively, unitary authorities are not immune from the problems with governance that we have identified. Unitary authorities have the combined functions of regional councils and TAs. Since there is no institutional division in carrying out the functions of regional councils and TAs, we might expect the potential issues caused by the overlapping jurisdiction and confused governance structure between regional councils and TAs to be absent. As one officer of a unitary authority we interviewed said: "Because we are a unitary, and we can influence right across the council, we can have more holistic conversations about hazards and climate change".

Unitary authorities can use regional rules to manage existing uses. As a combined regional council and TA, the institutional separation of land use planning and natural environment planning that occurs for separate TA and regional councils does not exist. As such, we thought it might be easier and more common to see unitary authorities reducing natural hazard risk using rules to manage existing uses. However, neither of the unitary authorities we interviewed were using regional rules in this way. Tasman District Council had come close in a plan change aimed at limiting increases in coastal hazard risks for Mapua/Ruby Bay (see section 2.2.1 of this report), but the council officers acknowledged that their planning documents controlled future potential risk, aiming for no growth in risk, and are not reducing exposure to risk. No

regional rules were used to manage existing uses. What we found happening at unitary authorities reflected what we found at TAs, that is, they were 'holding the line' at best, and were not achieving risk reduction. Unitary authorities (unlike TAs) have the ability to reduce natural hazard risk through managing existing use, but are not using that power.

Resistance to managing existing uses to reduce risk appeared to be just as strong in the unitary authorities we interviewed as in the separate regional councils and TAs. One comment made during an interview was that "politically, unitaries are more like a district, in that the politicians are closer to their communities than separate regional politicians".

Ericksen et al (2003) concluded the being a unitary authority was no safeguard against issues found in other regional or district councils, for example lack of funding, political pressure on timeframes, and lack of effective research early enough in the plan preparation process. Our observations suggest that the institutional arrangements that separate regional councils and TAs are not the main cause of the lack of action on managing existing uses to reduce risk. A combined governance structure, where all the functions are held by one authority, is not enough to overcome the resistance to managing existing uses. Ericksen et al. (2003) found that council capability (commitment and capacity) is a more important factor than institutional form (regional council and unitary authority) in determining integrated environmental management within regions, and we expect this is likely to be the case for reduction of risk in existing developments.

4.6 National Direction

Central government can play a role in the governance of the reduction of risk to existing developments. The RMA provides for three key national-level tools: national policy statements (NPS), national environmental standards, and national planning standards. The purpose of NPSs is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA (s 45 RMA). As noted in section 3.1 of this report, RPSs, regional plans and district plans are required to give effect to national policy statements (ss 62, 67, 75 RMA). National environmental standards are regulations that can prescribe technical standards, methods, or requirements relating to the use of land and resources (s 43 RMA). As regulations, they must be complied with. National planning standards are able to insert content into RMA planning documents (s 58I). In this way they are similar to a national environmental standard in their influence, although they can go further by inserting objectives and policies as well as rules. In addition, MFE will, from time to time, issue guidance documents that are aimed at assisting implementation of the RMA.

The management of significant risks from natural hazards is a matter of national importance (s 6(h) RMA). However, the introduction of this matter into the RMA in 2017 was not accompanied by any specific guidance on how this should be implemented. To date, there is no national policy statement or national environmental standard solely on natural hazards. The NZCPS goes some way for coastal hazard risk. The MFE has produced guidance documents related to natural hazards, the most recent being on coastal hazards and climate change (MFE 2017(a)) and Department of Conservation[48] for the application of the coastal hazards Objectives and Policies of the NZCPS. We note that guidance documents such as these have

[48] https://www.doc.govt.nz/Documents/conservation/marine-and-coastal/coastal-management/guidance/policy-24-to-27.pdf

limited weight in RMA decision-making compared to a national policy statement, national environmental standard, or national planning standard.

Ericksen et al. (2003) point to the importance of policy direction, methods, data, and well-funded capacity building activities from central government on matters of national importance. They state that this support is essential for the devolved and co-operative mandate of the RMA to function properly, because of the substantial discretion given to regional councils and TAs in developing plans under the RMA. Their statistical analysis demonstrated that the absence of this central government support was a significant factor in the fair to poor quality of plans in New Zealand. It also resulted in protracted and costly processes as a result of public hostility and resistance (Ericksen et al. 2003).

When suggesting that greater leadership is required for natural hazard risk reduction, LGNZ (2014) points out that this leadership should support local decision-making and capitalise on the extensive experience that exists in local government on natural hazard management. This is because a core principle of effective hazard management is that collective management decisions should be made closest to the community most affected by the risk.

Lawrence et al. (2015) found that a lack of national instruments was a barrier to consideration of climate change effects and the implementation of responses (which might include managed retreat) by New Zealand councils. They highlighted three areas of particular importance that were echoed by those interviewed for this research: no national risk assessment methodologies; no national standard for sea-level rise; misalignment of RMA river control, building and disaster laws (Lawrence et al. 2015, 309).

There was a strong desire from council officers interviewed, for national direction on the management of risk from natural hazards. The two key reasons for wanting national direction were:

- To overcome the political influence on decision-making at the local level
- To avoid the inefficiencies from individual councils dealing with similar issues on an ad hoc basis

We note that while there was a consistent call for central government guidance, there was a broad range of views, which were undefined as to what direction this could take. Views mainly veered towards the delineation of levels of risk (e.g. significant risk) and the standardising of responses (e.g., what levels of risk trigger certain actions, including managed retreat and the extinguishment of existing use rights). Interviewees were clearly seeking greater certainty and were concerned that while risk perceptions may vary in different places and for different people, the consequences of hazard events required a consistent response. As risk from natural hazards is a complex matter, which agencies are dealing with to varying degrees of success around the country, national direction on the "standards to be achieved" (such as setting a standardised level of risk protection, for example protection from a 1% AEP coastal erosion event) would be helpful. Councils could then be left to determine the 'how'. National environmental standards were favoured by some, over an NPS or further guidance, as compliance with standards is compulsory and takes away the political debate on what needs to be achieved, noting that this debate takes significant resources in terms of time and money. The ability of national planning standards to be helpful in the natural hazard context was raised. Council officers expressed a reluctance to be the first to do new things, like extinguishing existing uses (some stated they were watching what happens with the Matatā plan change process in this regard), and national standards are a way to overcome this reluctance.

Council interviewees appeared motivated to remove the necessity for the potentially contentious and unfamiliar process of determining levels of acceptable, or intolerable risk, and the appropriate risk response, directly with affected communities. This speaks to an unfamiliarity with working with risk, having difficult conversations with communities and to previously mentioned concerns about capacity. The need for national frameworks that enable and support local action is a wider issue than this report but is of such urgency that it clearly coloured the responses of our interviewees. This quote from one of our interviews with a group of TA officers illustrates the reasoning for national direction:

> *… why should different councils and communities accept different levels of risk for the same risk to life and property, and why should councils have to battle their communities to get provisions into plans that end up not really optimal from a risk to life and property perspective.*

Some interviewees also spoke of what they termed a 'complete package' from Central Government on managed retreat. This meant not just how to plan for managed retreat and risk reduction, but also how it would be funded and how issues related to infrastructure should be resolved.

The inclusion of "the management of significant risks from natural hazards" into s 6 of the RMA had not necessarily had a significant impact on practice, and we note that the amendments to incorporate this into the legislation only took effect in April 2017 (15 months before our interviews began). Comments were made that 'significant' is not defined in the RMA, meaning council officers were not clear on what the legislation required, and there is a need to wait for case law on this. It was described as somewhat helpful, but "not a big factor". It did not appear to be providing any sort of national motivation or guidance.

We were also interested to understand the impact of a lack of national direction on the ability of regional councils and TAs to implement a policy to reduce natural hazard risk in existing developments. We found a range of responses from council officers during our interviews. One group of regional council officers described having given up on waiting for national direction and were just getting on with managing natural hazard risk. Another group of officers described being hopeful of national direction on managed retreat and were attempting to 'hold the line' and stop risk getting worse while they waited. For the most part, we observed councils proceeding with managing risk from natural hazards, each figuring out their own processes and responses.

There was a range of understanding of the ability to use regional rules to manage existing uses for reducing natural hazard risk. Most council officers we spoke to were aware of the ability of regional rules to extinguish existing uses completely, citing the Matatā plan change process as raising awareness of this. However, we found that several council officers were not aware of the less-extreme options to manage existing uses, such as using regional rules to require raised floor levels to reduce flood damage when rebuilding following a hazard event. A lack of knowledge of options for reducing natural hazard risk through managing existing uses is also one likely reason for the lack of provisions addressing this issue in RPSs (we found only four RPSs that directly address this issue, see section 3.3) and a lack of regional plan rules to manage existing uses (see section 2.7 of this report).

Several commentators have identified the importance of national direction for natural hazards management in New Zealand (for example, Hanna et al. 2018, Tonkin & Taylor 2016 (including possible content for an NPS), Lawrence et al. 2015, Saunders et al. 2014, LGNZ 2014, Glavovic et al. 2010, Lawrence and Allan 2009 (including possible context for and NPS),

Ericksen et al. 2003). Central government support has been identified as essential for the implementation of planning for nationally significant issues (Ericksen et al. 2003). In the context of climate change adaptation, Lawrence et al. (2015) identified an NPS on all-natural hazards that includes climate change as an enabler for councils to implement flexible measures to address changing climate risk (Lawrence et at. 2015, 310). Tonkin & Taylor (2016) identified that a clear national lead is required on the principle of risk reduction. They recommend that an objective of an NPS be to reduce existing risk of adverse effects, where this is not at a level that is acceptable to the relevant community of interest (p54). They also recommended that an NPS on natural hazards should include objectives and policies to provide guidance and a framework for regional councils and TAs to address existing uses and managed retreat where risks of adverse effects are unacceptable to stakeholders and relevant communities of interest (recommendation 20 p53). The primary reason for these recommendations was that it could "provide the mandate the councils are seeking to address this most challenging of issues" (addressing existing uses and achieving managed retreat) (Tonkin & Taylor 2016, 53). We concur with these commentators and consider that there is considerable scope for national direction in the form of an NPS, national environmental standard or national planning standard to address the governance issues that exist for the management of existing uses to reduce risk to existing developments.

5.0 PRACTICALITIES: THE CHECKS AND BALANCES OF THE RMA

A central and recurring theme of our research has been the practicalities of developing both policy to reduce risk, and associated rules to manage existing uses, through the process set out by the RMA. The RMA regulates not only what is required for sustainable resource management, but also the process by which planning policies are developed and tested and finally made 'operative' (when they take effect). This involves several different assessments, checks and balances, including a prominent role for public input through a formal submission and hearing process. Our interviews highlighted several potential issues and concerns about progressing a policy to reduce risk through the management of existing uses.

In this section of the report, we consider the operation of s 32 as the key assessment of 'appropriateness' prescribed by the RMA for policy development. We also consider assessments relevant to prohibited activities, which are important because, in the context of the extreme example of risk reduction involving moving people from an area ('managed retreat'), not only would a prohibited activity status for residential uses be required, this would also have to be the 'most appropriate' option available to the decision-maker.

Our analysis then turns to consider one of the eminent checks and balances in the RMA: the implications of the very complicated s 85 of the RMA. Section 85 indicates that no compensation is payable in respect of the effect provisions in plans have on holders of interests in land, while also providing some relief from provisions that render land incapable of reasonable use and impose an unfair and unreasonable burden.

5.1 Implementation of Policies to Reduce Risk Under The RMA: Assessments and Related Tests

The RMA contains several assessments and tests that need to be satisfied before provisions to reduce risk through the management of existing uses can be implemented. Each of these assessments and tests involve detailed provisions and it is beyond the scope of this report to consider them, or the policy and plan development process in detail. Nonetheless, it is helpful to outline these in general to provide some context.

Sections 61, 66, and 74 set out matters to be considered when preparing RPSs, regional plans and district plans, respectively. Of relevance to risk reduction and existing use is the requirement that these RMA planning documents be prepared in accordance with:

- The functions of regional councils or TAs under ss 30 and 31(discussed in section 4.1 of this report);
- The provisions of Part 2 of the RMA (purpose and principles);
- The obligation to prepare and have "particular regard" to an evaluation report under s 32; and
- National policy statements, the NZCPS (discussed in section 3.2 of this report), national planning standards.

Sections 62, 67, and 75 are also important. These require that RPSs, regional plans and district plans must give effect to several matters. Those of most relevance to this project include:

- National policy statements
- The NZCPS
- The regional policy statement (for regional plans and district plans only)

Clause 5 of Schedule 1 of the RMA requires the local authority preparing a plan or plan change to prepare an evaluation report in accordance with s 32 of the RMA, and to have regard to that report when deciding whether to proceed. Similarly, when deciding on a plan or plan change, Clause 10 of Schedule 1 requires the local authority to have regard to a further evaluation under s 32AA of the RMA, which reflects the requirements of s 32.

In summary, the RMA requires consideration be given to several matters before provisions can be included in planning documents. The requirements of s 32 are particularly relevant, as is the requirement to give effect to higher order planning documents. We examine these further below.

5.1.1 Section 32 and 'Appropriateness'

Section 32 of the RMA sets out the 'appropriateness' assessment required for all proposed RMA plan provisions. Section 32(1)(a) requires an examination of the extent to which the objectives "are the most appropriate way to achieve the purpose of the Act", and s 32(1)(b) requires an examination of whether the provisions (e.g. policies and rules) are "the most appropriate way to achieve the objectives". Satisfying this test will be a significant hurdle for any policy to reduce risk by managing existing use, particularly considering the RMA's presumptions regarding land use discussed in Section 2.6.

For the assessment of the appropriateness of the provisions (as distinct from the objectives), s 32(1)(b)(ii) requires an assessment of the efficiency and effectiveness of the provisions in achieving the objectives. This assessment must identify the costs and benefits of the environmental, economic, social, and cultural effects anticipated from the implementation of the provisions (s32(2)(a)).

Figure 5.1 sets out the key components of the s 32 evaluation process.

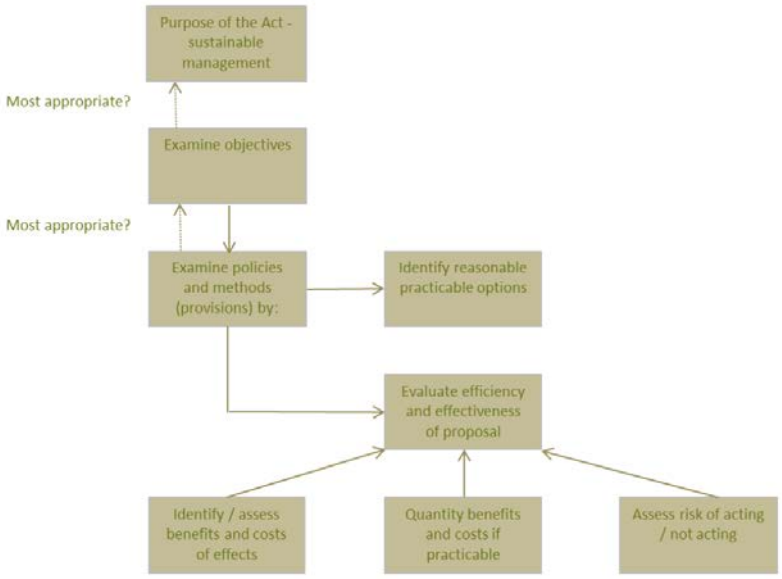


Figure 5.1 Key components of the s 32 evaluation process. Source: MFE 2017a

The meaning of 'most appropriate' in the s 32 evaluation has been found by the Courts to mean "suitable, but not necessarily superior".[49] This means the most appropriate option does not need to be the most optimal or best option but must demonstrate that it will meet the objectives in an efficient and effective way (MFE 2017a).

The requirement for provisions (including rules) for the reduction of risk to be assessed against this criterion of appropriateness under s 32 of the RMA is an important implementation consideration. Unfavourable assessments of appropriateness mean it is unlikely any such provisions will make it into RMA planning documents.

An objective to reduce hazard risk would be assessed against the sustainable management purpose of the RMA, as defined in ss 5, 6, 7 and 8. As discussed in Section 2.3 of this report, s 5 of the RMA refers to the requirement to provide for the well-being and health and safety of communities when managing use and development, among other things. In addition, s 6 of the RMA now includes the requirement to recognise and provide for the management of significant risk from natural hazards. It should be possible, therefore (depending on the circumstances), to make arguments that an objective to reduce risk from natural hazards is an appropriate way to achieve this purpose.

Policies and rules proposed to give effect to the objective would then be assessed for their efficiency and effectiveness at achieving this reduction. Effectiveness assesses the contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address (MFE 2017a, 18). Efficiency measures whether the provisions will be likely to achieve the objectives at the lowest total cost to all members of society or achieve the highest net benefit to all of society (MFE

[49] *Rational Transport Soc Inc v New Zealand Transport Agency* HC Wellington CIV-2011-485-2259, 15 December 2011. See also *Royal Forest and Bird Protection Soc of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51

2017a, 18). Given that reduction of natural hazard risk to current development requires management of existing uses, policies and rules that actively manage existing uses would certainly be assessed as effective and efficient at achieving reduction of hazard risk.

Obviously, a full assessment under s 32 of the RMA will be much more complicated than the preceding two paragraphs suggest. However, our point is to identify the support for the appropriateness of an objective to reduce risk from natural hazards in the RMA. It also illustrates the importance of such an objective to the success of rules to actively manage existing uses. The assessment hierarchy in s 32, which requires the assessment of the objective against the purpose of the RMA, and then the assessment of the policies and rules against the objective, puts a great degree of importance on the objective. Rules to manage existing uses directly achieve the reduction of natural hazard risk. Such rules will therefore be assessed favourably against an objective that requires the reduction of natural hazard risk. It would be more difficult to reach a favourable assessment of the appropriateness of rules to manage existing uses if the assessment was undertaken against an objective that was less specific, such as a requirement to manage risk with no clearly stated outcome. The requirements of s 32 mean that an objective to reduce natural hazard risk for existing development will be a strong basis for, and make it easier to justify, policies and rules to manage existing uses.

We note that the s 32 evaluation reports for the four RPSs (Northland, Waikato, Bay of Plenty, Otago) that clearly express an intention to reduce hazard risk through the use of regional rules to manage existing uses, would provide useful insights for the assessment of the appropriateness of these provisions. However, review of these documents was beyond the scope of this project. We can point to the s 32 evaluation report prepared for the Matatā plan change as an assessment of provisions to reduce hazard risk (Boffa Miskell Ltd 2018). In this assessment, the directive policy in the Bay of Plenty RPS to reduce high levels of risk, and associated risk assessment methodology providing the rationale and explanation for 'high' risk, were important factors, as the proposed provisions clearly "give full effect" to the RPS policies (Boffa Miskell Ltd 2018, 11). The overall evaluation concludes that the proposed change to the regional plan is the most appropriate option because it is "the only statutory mechanism available to give full effect to the RPS, by reducing high risk to a medium or lower level" (Boffa Miskell Ltd 2018, 46). The RPS policy to reduce risk, and the requirement in the RMA to give effect to this, was pivotal to arriving at this conclusion.

5.1.1.1 Prohibited activities and s 32 assessments

Regardless of how the decision is reached, if it becomes necessary to move people away from an area exposed to an unacceptable level of risk, then the only RMA tool that could be employed would be to classify existing activities as prohibited (see discussion in section 3.5.4 of this report). Other options, such as voluntary acquisition or acquisition under the Public Works Act 1981[50] may be possible. In such a case the ownership of the land in question would

[50] We note that there is a question in this context about whether the Public Works Act 1981 could be employed where the purpose was not to undertake a 'public work' but rather acquire the land for the purposes of non-use. Perhaps the strongest argument in this context is that a local authority acquires the land for the purpose of a reserve, but it is not immediately clear that this would work to achieve the desired ends. Moreover, unless use as reserve was the true purpose a decision to take land for an ancillary purpose may be subject to judicial review as unlawful. However, as this is not related to the powers under the RMA to reduce risk we do not consider it in detail here.

transfer to a body not intending to use the land (or at least not intending to use the land for its previous purpose), and that body would also be able to control who entered onto it. However, where it is seen as desirable to pursue a policy of risk reduction by shifting people away from the risk using the provisions of the RMA (including concerns about compensation being a barrier to reducing risk) then prohibited activity status may be the only option.

During our interviews, some council officers identified the assessment of costs and benefits in s 32 as an onerous requirement in the context of using prohibited activities to extinguish existing use rights. In their view, the current emphasis in s 32 on costs and benefits of provisions focuses the assessment on economic effects, rather than on the other aspects of wellbeing (environmental, social and cultural). Because a regional prohibited activity rule would preclude existing and future development, the perception is that they have no economic benefit, and therefore do not measure up well in an assessment of costs and benefits. This is compounded by the subsections of s 32 that require consideration of opportunities for economic growth and employment that might be provided or reduced by the provisions (see s 32(2)(a)(i) and (ii)). Officers considered that the cost to landowners would be too high and it would be necessary to have strong evidence of the risk, and economic impact of the prohibition, to support the use of prohibited activities. We make three points in response to these views.

Firstly, we note that the appropriateness assessment for prohibited activities is no different than for other RMA plan provisions. However, s 32(1)(c) does specify that the level of detail in the report must correspond to the scale and significance of the environmental, economic, social and cultural effects anticipated from the provisions. A prohibited rule that would remove dwellings and residential occupation would be considered to have significant effects, on those residents at least, and likely require a high level of detail.

Secondly, we note that in the context of risk from natural hazards, and particularly in the case of reduction of risk to existing developments, prohibited activities can be shown to have economic benefits. Although a regional rule to prohibit residential use in a high hazard area would result in a loss of development opportunity and a reduction in the value of existing assets, it also has the potential to avoid future losses by removing people and structures from an area of significant risk, and this avoidance of loss can be regarded as an economic benefit of the rule that can be quantified and given a monetary value (Grace et al. 2017). This would allow a quantified benefit to be assessed against the costs of the rule, including to the individuals directly affected by the rule and whether any compensation is to be paid.

Thirdly, we note that there are other options besides cost-benefit analysis that are available to evaluate options under s 32. The MFE guidance on s 32 lists eight such methods, one of which is cost-benefit analysis (MFE 2017a). Cost-benefit analysis can be problematic for assessing options to reduce risk from high consequence, low recurrence events, as the discounting applied due to the low recurrence can negate the benefit, even when an option would reduce risk. Multi criteria analysis, which is one of the methods identified by MFE (2017a) can be a more useful method for assessing risk management options. A version of multi criteria assessment was recently applied in the Hawke's Bay in a process that took a DAPP approach (see section 2.1.3 of this report) to planning for coastal management (Lawrence et al. 2019).

The focus by practitioners on economic effects and use of the methodology of cost-benefit analysis, supported to an extent by the focus on this aspect in the RMA in s 32(2)(a)(i) and (ii), appears to be a barrier to consideration of the use of prohibited activities. The courts have considered this issue and have stated that a s 32 assessment can apply a wider exercise of

judgment than just economic, while also having regard to the cost-benefit analysis evidence,[51] and that economic analysis is just one of the threads of s 32.[52] In addition, the court has stated that the changes made to s 32 in 2013, which included the addition of the requirement to consider opportunities for economic growth and employment, has not changed the fundamental analysis required by s 32.[53] This jurisprudence suggests that practitioners may be putting more emphasis on the economic aspect of s 32 than they strictly need to.

We note that the Matatā plan change discussed in the previous section introduces a prohibited activity rule, and that the policy in the RPS was critical in the s 32 assessment. This concurs with advice from LGNZ that prohibited activities will be easier to justify if higher order planning documents provide a substantial basis for using them (LGNZ 2018, 11). The more directive the RPS or national document is, the more support it will provide for rules in regional and district plans to implement them. The advice from LGNZ goes on to recommend that TAs and regional councils work together to ensure that the RPS is consistent with the objective they are trying to achieve (LGNZ 2018, 12), and we support this advice. If the objective is reduction of risk to existing development, the RPS should specifically identify this.

5.2 Section 85: How Far Is Too Far?

A significant potential barrier to the successful implementation of a policy to reduce risk by controlling existing use (particularly one that involves a managed retreat), will be the operation of s 85.[54] Section 85 regulates how far a planning provision is able to go in restricting the use of private property. Section 85 states that no interest in land will be "taken" or "injuriously affected"[55] as a result of any provision in a plan (unless otherwise provided for by the RMA). The effect of this section is to take away any rights of compensation that may have arisen as a result of interference with property rights. However, where a rule would render land incapable of reasonable use, *and* be unfair and unreasonable, various powers are provided to remedy the situation, and these include the possibility of acquisition of the land under the Public Works Act 1981 (although this is subject to the affected landowner's consent). Figure 5.2 provides a simplified explanation of the steps set out by s 85 that test how far a planning provision (e.g. a rule) can go.

[51] *Contact Energy Ltd v Waikato RC* (2007) 14 ELRNZ 128 (HC).

[52] *Carter Holt Harvey Ltd v Waikato RC* [2011] NZEnvC 380 at [181] and [202].

[53] *Port Otago Ltd v Otago Regional Council* [2018] NZEnvC 183 at [51].

[54] For the full text of s 85 see Appendix 6.

[55] For the origins of this term see the discussion in Cassin (1988) and *Belfast Corporation v O D Cars* [1960] AC 490 (HL).

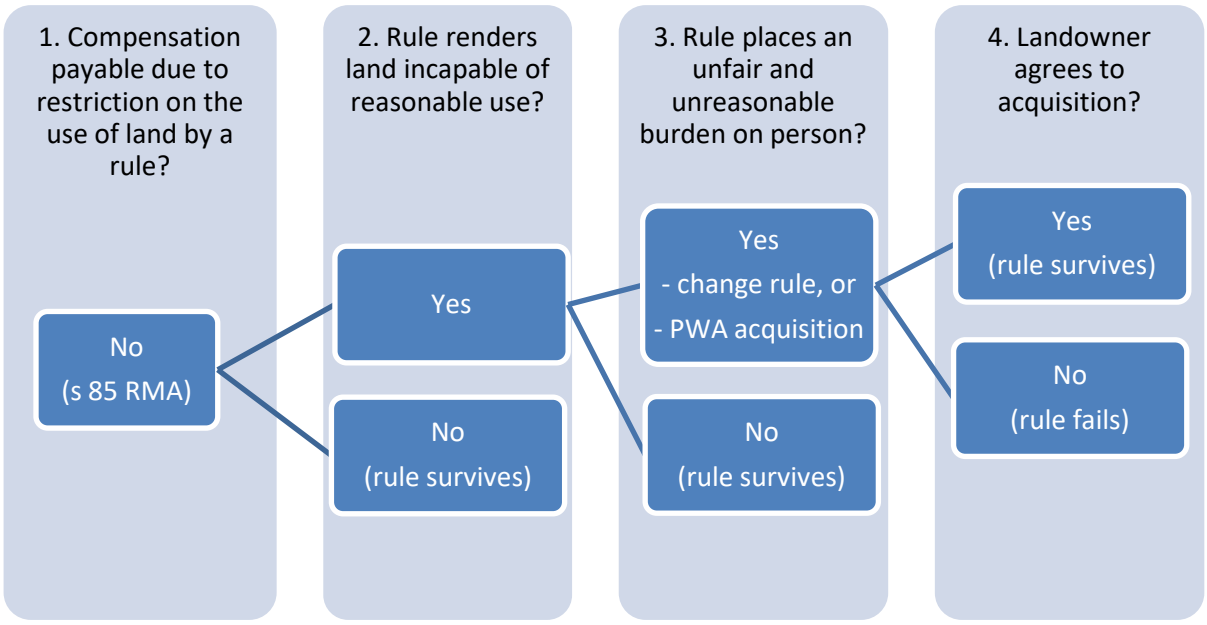


Figure 5.2 Steps in s 85 of the RMA that test how far a planning provision can go in restricting the use of land.

In the following sections we attempt to assess how s 85 might impact on the successful implementation of a policy to extinguish existing uses, and the implementation of a policy of managed retreat. We comment in particular on steps 1 to 4 in Figure 5.2, and also on the influence that ideas about private property might play on the interpretation of s 85. However, we note that precisely how s 85 will operate in the context of managing existing uses and particularly managed retreat, is unclear and it will almost certainly require further case law before firm conclusions can be drawn.

When considering the importance of s 85 and how it might operate in the context of risk reduction, some alternate scenarios are offered.

The first might arise where a regional council decides that following a flood event, floor levels of affected buildings must be raised above a certain height when rebuilding. Another might be a requirement to rebuild at a different location within a property after a coastal erosion or inundation event. These rules would essentially control and modify existing uses but would not interfere with the use of the land generally. They are the equivalent of rules controlling re-building, at the less restrictive end of the rule spectrum described in section 3.5.2 of this report. Both examples illustrate how risk might be reduced, both might be a significant interference with existing uses, but neither attempt to extinguish existing uses completely. In our view, such rules are unlikely to be difficult to implement (providing that the other tests mentioned above are satisfied).

The second is much more extreme, and the question of implementation is correspondingly more difficult. This scenario will arise where a regional council[56] notifies a rule which would prohibit any activity on the land, thereby removing the ability to use it completely (or a more limited scenario whereby those with interests in the land may still use it for passive recreation or farming, but not for residential use). This type of rule is at the most restrictive end of the rule

[56] Note that this discussion simply talks about regional councils for ease of description (as regional councils are the bodies with the clear power to extinguish existing uses under s 20A), other local authorities (or even individuals) could initiate the same thing by way of a private plan change. The Matatā experience also illustrates this point.

spectrum described in section 3.5.4 of this report. These rules would be necessary in circumstances of a risk reduction activity involving moving people away from an area in light of the risk posed by a particular natural hazard or sea level rise, in order to achieve immediate risk reduction. Although we accept that managed retreat may be from any type of land use of a private nature, here our focus is on a managed retreat from residential use of land. This is because we expect the most restrictive type of rules will not always be welcomed by those affected by them, especially in the absence of compensation. This example highlights the shape of the arguments that might be run in relation to the operation of s 85, and the ability of a landowner to cause the rule to fail.

In our view, these different scenarios may result in different outcomes when s 85 is considered and should be borne in mind during the following analysis, although the focus here is on the extreme example of managed retreat. Potentially different outcomes might be reached under s 85 depending on the precise nature of the hazard, the level of risk, and the existing uses proposed to be modified or extinguished.

5.2.1 Section 85: No Compensation for Restrictions on the Use of Land

The overall purpose of s 85 is to prohibit compensation claims by people affected by planning restrictions imposed under the Resource Management Act (Palmer 1997, Barton 2003, Thomas 2002, Berry and Vella 2010). This is made clear by s 85(1) which states that:

> *(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*

These words are a clear statement of Parliament's intention that the development of a 'takings' or 'regulatory takings'[57] doctrine should be avoided in New Zealand planning law (Barton 2003).[58] That is, that no compensation is payable for the impact that planning provisions may have on the use of private land.

Nonetheless, for those whose homes would be affected by a rule prohibiting existing residential activity, they may think that the local authority was illegitimately 'taking' (or at least preventing the use of) their property, and to be aggrieved by the fact that this could be done without compensation (Berry and Vella, 2010). There is certainly a cultural perception that the 'government' ought not to be able to do this, although this perception does not match legal reality in most cases (Barton, 2003). Certainly, public perception is often driven by the situation in other jurisdictions, in particular the United States of America, which have constitutional provisions that limit state powers in this sphere. For example, in the United States there are "enormous" (Barton, 2003) amounts of literature and case law dedicated to the question of 'takings law' that has arisen as a result of the Fifth Amendment to its Constitution.[59] The doctrine of 'regulatory takings' (which involves asking whether a rule regulating the use of land

[57] For a discussion of the history of land use planning regulations and their interaction with private property rights see Barton, 2003 and Thomas, 2003. For the origin of the words "injuriously affected" see *Belfast Corporation v O D Cars Ltd* [1960] AC 490.

[58] This provision can be contrasted with s 126 of the Town and Country Planning Act 1977 (Repealed), which provided for compensation in some circumstances.

has gone so far as to amount to a 'taking')[60] is of particular relevance to managed retreat in the United States.

While some have argued that New Zealand, and in particular the RMA, should pay particular attention to private property rights and adopt a 'takings' regime (Ryan, 1998; Joseph, 2001; McShane, 2002), the law in New Zealand is very different from that in the United States (Barton, 2003). In essence, there is no constitutional protection of private property in New Zealand like that found in the United States or Australia (Commonwealth of Australian Constitution Act 1900, s 51(xxxi)). It is perfectly possible for Parliament to pass legislation either affecting, or acquiring, land without compensation (Barton, 2003). However, there remains a strong presumption against acquisition without compensation. As noted by Sir Geoffrey Palmer:

> *… it is a recognised principle that the state should not appropriate private property for public purposes without just compensation. But in New Zealand, absent any statutory obligation such as that contained in the Public Works Act, it is a principle that has to be honoured by the executive and Parliament. It cannot be implemented by the Courts (Palmer, 2001 at 168)*

In this context, s 85(1) seems to be a very clear articulation of Parliament's intention regarding planning law in New Zealand. It is a clear statement that no provision of a plan can amount to a taking or to have injuriously affected land. It follows that Parliament has precluded the deployment of takings, or regulatory takings, arguments where a provision in a plan impacts on a landowner's use of their land; even where that provision will have the effect of prohibiting an existing residential use.

5.2.2 The Proviso to s 85

Importantly, the broad statement of principle outlined in s 85(1) is immediately qualified by the next two subsections, which establish a proviso to the rule. Overall, these provisions suggest that where a rule in a plan would render land incapable of reasonable use, and would be unfair and unreasonable, the rule must be modified or withdrawn. Alternatively, the land can be acquired, but only if the landowner consents.

There are two jurisdictional routes that will trigger the proviso (or elements of it). The first is in s 85(2) which provides, in essence, that any person who has an interest in land and considers that a provision in a plan (or a proposed plan) would render that interest in land "incapable of reasonable use",[61] may challenge that provision in a submission on a proposed plan or private plan change. This section appears to provide an avenue for dissatisfied landowners (or others with estates or interests in the land) to challenge a provision in a proposed plan or a plan change, during the plan preparation or change process. It also provides an ability for an existing provision in a plan to be challenged by way of an application for a plan change. Clearly, where a regional council has undertaken a s 32 assessment and determined that a rule extinguishing an existing use is the most appropriate response, a challenge may be quite difficult. It would require the decision-maker not to adopt a rule, the purpose of which is aimed

[61] The meaning of this phrase is discussed below.

at extinguishing the existing use. If successful, however, this would lead to a change to the rule or its withdrawal.

The second jurisdictional route to the proviso to principle outlined in s 85(1) is in s 85(3), which indicates that the offending provisions may also be challenged in the Environment Court, either by way of an application to change a plan, or by way of an appeal against a provision in a proposed plan, or plan change.

In discussing the relationship between these two different procedural routes the Environment Court has observed that s 85(2) provides some grounds whereby dissatisfied landowners can challenge provisions in a proposed plan or plan change. The relevant local authority can consider those submissions as part of its hearing process. If there is dissatisfaction with the local authority's final decision, that can be appealed under cl 14 of Schedule 1 of the RMA and this can be considered by the Environment Court 'de novo' (that is, the Environment Court will consider the issue afresh) (*Gordon v Auckland Council* [2012] NZRMA 328 at [24]). Alternatively, or in addition to this process, the affected holder of an estate or interest in the land may launch an application directly to the Environment Court (s 85(3); *Re McAuley Trust* [2009] NZRMA 189).

Whichever route is taken, once the issue becomes before the Environment Court, s 85(3A) provides that the court may direct the local authority to choose to take one of two alternative steps (unless the plan or proposed plan is a regional coastal plan). In the first instance, the local authority can be directed to modify, delete or replace the provision in question. Alternatively, the local authority can be directed to acquire all or part of the estate or interest in land in question under the Public Works Act 1981, providing, among other things that the person with the estate or interest in the land (or part of it) agrees.

This latter power was inserted into s 85 by amendments made to the RMA and which came into effect in April 2017.[62] It was inserted as a form of additional, and alternative, remedy to the previous position which was restricted to directing a local authority to modify, delete, or replace the problematic provision (MFE 2016). Two things should be noted about this particular proviso. Firstly, any acquisition under the Public Works Act 1981 must be with the agreement of the holder of the estate or interest in land. That person must *agree* to the acquisition. Where that person does not agree, the only option then available to the local authority is to modify, delete or replace the provision. Alternatively, it might be possible for the local authority to compulsorily acquire the land using different legislative powers (for example under the Public Works Act 1981 itself (assuming the provisions of that Act can be satisfied)).

Secondly, the provision (and indeed all of s 85) applies to anyone who has an "estate or interest" in the land. This includes the holder of the fee simple but would also include those with a possessory estate in the land, such as a life interest holder or a lessee. It would also include non-possessory holders of interests in the land such as mortgagees, those benefiting from easements and covenants, and beneficiaries of express or constructive trusts. Thus, there is a potentially very wide class of people who may have standing to object to a provision, or proposed provision in a plan under s 85.

[62] See Resource Legislation Amendment Act 2017, s 68.

To summarise, in the most restrictive example of a local authority wishing to impose a prohibition on existing residential activity, if the Environment Court is convinced the land would be rendered incapable of reasonable use (and a number of other matters discussed below), then the local authority can elect to be directed to either: change or modify the rule (although it is not clear in this context how this could be achieved without undermining the purpose of the exercise overall); or acquire the land, with the landowner's consent, under the Public Works Act (with the attendant compensation scheme mandated under the Act). Overall, for risk reduction involving managed retreat that may not be palatable to all those impacted, especially in the absence of compensation, s 85 may be a very difficult to overcome. This is further underlined by a closer examination of the detailed provisions of s 85.

Crucially, s 85(3B) makes it clear the applicant (or appellant) challenging the rule must be able to demonstrate that the provision or proposed provision both:

- Makes any land incapable of reasonable use; *and*
- Places an unfair *and* unreasonable burden on any person who has an interest in the land (emphasis added).

In the context of any step to manage existing uses, especially in the context of risk reduction, the correct approach to the interpretation of these provisions will be critical.

5.2.3 "Incapable of Reasonable Use"

What is meant by "incapable of reasonable use" will be crucial and there does not appear to be an authoritative discussion of this point to date. In *Steven v Christchurch City Council* [1998] NZRMA 289 the Environment Court notes that the test is not "conceptually difficult, although there may be factual situations where it is difficult to decide" (at [15]); "… the test is simply whether the plan or proposed plan in question renders the land incapable of any reasonable use" (at [36].) Nonetheless, the authorities suggest that the provision is perhaps not as straightforward as this statement suggests, although the cases do provide some useful guidance (Berry and Vella 2010).

The first thing to note is that s 85(6) contains a definition of reasonable use:

> ***reasonable use****, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.*

This definition has been identified as providing a useful guide to the legislation (*Landco Mt Wellington v Auckland City Council* NZEnvC Auckland W042/08, 9 July 2008 at [17]), and aspects of the case law do provide an illustration of how the courts may approach the provision. As noted in *Landcorp v Auckland Council* [2012] NZEnvC 203, [2013] NZRMA 1 effects are not confined to those which are necessarily adverse, nor "do the *effects* on *any aspect of the environment* or *any person* have to be serious" (at [64] (emphasis in original)) (see also *Gordon v Auckland Council* [2012] NZEnvC 7, [2012] NZRMA 328 at [27]). It follows that a wide range of potential uses may be available to the holder of an interest in land affected by a rule or a proposed rule in a plan. That said, any activity that would generate significant adverse effects will not meet the definition (Berry and Vella 2010).

A particularly difficult aspect of interpretation is whether reasonable use means any use, or whether it means a particular use considered desirable and reasonable by the person affected. In assessing the sorts of uses that may be reasonable, *Fore World Development Ltd v The Napier City Council* (NZEnvC Wellington W029/06, 13 April 2006), suggests that the question

really is: “what other purposes could the land be put to?” In that case the owners of land argued that because the land in question was not capable of economic use as farmland, the proposal that the land be zoned ‘main rural’ in a proposed plan, rendered the land incapable of reasonable use (the developer would have preferred some sort of urban zoning) (at [122]). However, the court noted that it was not the zoning of the land which resulted in its low productivity, but rather the inherent quality of the land itself. The court stressed that a:

> *… landowner’s wish to use land in a way that maximises its value [does not make] that use alone reasonable, and others unreasonable. Put another way, although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use … (at [122]–[123]).*

The court highlighted that reasonable use is not synonymous with optimal financial return.[63] A range of permitted activities could still be undertaken, and further activities could (with the exception of constructing buildings and structures on part of the land subject to a coastal hazard overlay) be the subject of applications for consent. None of this could be seen as imposing unreasonable restrictions on the use of the land.

What these cases suggest is that whether or not land remains capable of reasonable use as a result of the provision, will depend greatly on the circumstances, including the nature of the land and the use to which it is currently being put. It is possible that in some cases of risk reduction affecting existing use, the land may remain capable of ‘reasonable use’ even though the current existing use of the land is no longer permissible. This is likely to occur where, for example, the rule requires a building to be relocated on the site if it is being rebuilt, or if the building must be rebuilt at a certain height or configuration. It is much more difficult where what is proposed is to move people away from the land. It is also unclear how the provision might be interpreted where there was an attempt to impose a rule requiring a change to an existing building (such as a requirement to re-site a home) in circumstances where there had been no damage to the building and no need for a rebuild (such as the rules in the middle of the rule spectrum described in section 3.5.3 of this report). Certainly, such a rule would not appear to render the land incapable of reasonable use, even if the rule states that residential buildings with floor heights of lower than a certain measurement would be prohibited from a certain date.

Section 85(3B)(a) will be engaged where it is proposed to insert a provision into a regional plan attempting to prohibit the current use of land for all residential purposes. Whether or not the land in question remains capable of reasonable use, notwithstanding the prohibition of residential activity, will depend on whether the land can be used for anything else and what those uses may be. In Matatā, for example, the proposed prohibited activity status under the regional plan, is to be coupled with a proposed coastal protection zone under the district plan. The effect of these combined provisions is to prohibit all activities in an area identified as “high risk”, “other than those that relate to transitory recreational use of open space” (Boffa Miskell Limited, 2018). It seems at least possible that such a rule could be interpreted as rendering the land affected “incapable of reasonable use”.

The case law does not consider the precise point, probably because there has never been an attempt to use the provisions of the RMA to prohibit residential activity in an area where people

[63] A point also made in *Landco Mt Wellington v Auckland City Council* Envc Auckland W042/08, 9 July 2008 at [18].

are already living. Certainly, where planning controls impose an "all or nothing quality to the landowner's options for the property" (*Steven v Christchurch City Council* [1998] NZRMA 289), land can be considered incapable of reasonable use (Berry and Vella, 2010). *Steven* involved a heritage listing preventing demolition, that had been placed over an old house situated in the middle of a piece of land. In concluding that this listing did render the land incapable of reasonable use the court noted (at [38]):

> *Nor is this case similar to, for example, a rule in a rural area whereby a territorial authority makes clearance of indigenous vegetation a discretionary activity. In such a case other factors may come into play: while the land may not be able to be used for grazing or other farming or forestry it might be possible to allow it to be used for residential purposes or even subdivided for that purpose. And of course, as part of a discretionary consent some vegetation could be removed for a building site. Alternatively, it might be possible to fence the area off if it is not a large part of the title so that the land, as a whole, can be seen as having reasonable use. There are no other choices in this case …*[64]

It is possible that any managed retreat involving moving people away from an area traditionally used for residential purposes would impose a similar "all or nothing quality" on the landowner's choices. As a result, it seems possible that in these circumstances the first requirement of s 85(3B) would be satisfied.

Conversely, where a piece of land has been used for residential and other purposes (such as farming for example) and it is proposed to prohibit the use of the land for residential purposes only (and to continue to allow farming) it may be possible to argue that the land is still capable of reasonable use. Ultimately, this will depend on the approach the courts adopt to interpreting the section as discussed below.

In the context of a managed retreat to address a particular risk, an alternative argument may lie in cases such as *Francks v Canterbury Regional Council* [2005] NZRMA 97. In that case the provisions of a proposal regional coastal environment plan imposed a building restriction line that prevented new buildings on the seaward side of the line. The Environment Court concluded that the land was at risk from erosional forces and set the line in a position that meant the appellants were unable to use part of their land for the erection of a dwelling larger than 25m^2. On appeal to the High Court the appellant objected to the location of the line, but also against the Environment Court's failure to conduct an analysis under s 85. In dismissing the appeal, the High Court observed:

> *I think there is weight in [the submission] that once the building line was drawn by the Court so as to position [the relevant lots] to the seaward side, the cause was*

[64] For an example of these sorts of factors in action see *Gordon v Auckland Council* [2012] NZEnvC 7, [2012] NZRMA 328. This case involved a headland on Waiheke Island on which the site of a Pa was located. The land had been continuously farmed since the 1860s. It was proposed that this site be scheduled as an archaeological site, however, the landowner wished to build a house on the headland. It was argued, among other things, that the proposed scheduling would render the land incapable of reasonable use under s 85. However, the court concluded that while some restrictions were to be placed on the headland these did not render the entire landholding incapable of reasonable use. Moreover, it was possible for the landowner to apply for a discretionary resource consent to subdivide or change the use of the land. There were also a number of potential building sites outside the area to be scheduled. The court also noted that the burden placed on the landowner was not unfair or unreasonable (see the discussion below). For a further example of a successful application under s 85 see *Mullins v Auckland City Council* Planning Tribunal A35/96, 14 April 1996.

lost. A s 85 evaluation was not going to avail the appellants. How could the Judge find that the land was at risk from erosional forces on the one hand, and conclude in terms of s 85 that building upon it was reasonable use which had to be permitted on the other? [at [74]].

In the context of a managed retreat it might be possible to argue that if the land in question is at significant risk from a particular hazard or sea level rise, and that risk renders the land incapable of reasonable use, that the rule in a plan prohibiting that use is not itself rendering the land incapable of reasonable use. In other words, it is the risk posed by the hazard that renders the land incapable of reasonable use, not the rule.[65] The definition of reasonable use in s 85 may assist this argument, particularly its reference to effects that would not be significant. As discussed in section 2.3.2 of this report, risk is an effect under the RMA. A reasonable use for the purposes of s 85 is therefore one that does not result in significant risk. As such, it could be argued that the continuation of a residential use that results in significant risk (use contributes the consequence aspect of risk, which is multiplied with the likelihood of the hazard) is not a reasonable use of land. The argument would be that if there was no reasonable use in the first place, the rule does not render the land incapable of reasonable use.

This argument is likely to be resisted by landowners who may argue that they should be able to voluntarily assume the risk. We note that the definition of reasonable use in s 85 states that the consideration is of effects (risk), other than on the applicant making the challenge to the rule. This appears to mean that an individual could voluntarily assume a risk, but it also requires consideration of any risk that exists to others. This suggests that it is consideration of overall risk, such as risk to a community, that is required, rather than consideration of risk to the individual making the challenge. To the limited extent this has been discussed in the cases so far it appears that the courts will take a robust approach and in resolving the issue "… [t]he Court's concern must be whether such risk is acceptable on all of the facts presented to it, rather than whether such risk is able to be avoided absolutely".[66]

The *Francks* situation contemplated future development and did not consider the effect of an existing use. It follows that an argument based upon *Francks* immediately runs into the problem that, if the problematic rule did not exist, the use of the land could continue by current plan rules and protections extended to existing uses. Such an argument could conclude that it is artificial to argue that the rule is not rendering the land incapable of reasonable use. This may lead a court to interpret the opening words of s 85 "an interest in land shall be deemed not to be taken or injuriously affected *by reason of any provision in a plan* …" strictly, and focus on the effect of the provision, rather than the risk posed to the land by the hazard itself.

5.2.4 An "Unfair and Unreasonable Burden"

The second requirement of s 85(3B) is that the rule or proposed rule, in addition to rendering the land incapable of reasonable use, "places an unfair and unreasonable burden on any person who has an interest in the land". In the context of a managed retreat this provision will be central. For example, in the s 32 evaluation report prepared for the Planning Provisions for

[65] See, for example, in the context of future development *Gallagher v Tasman District Council* [2014] NZEnvC 245, where the nature of the risk posed to a property (including stormwater and seawater inundation) appears to have justified the Council's proposal to limit or prohibit future subdivision of it.

[66] *Hemi v Waikato District Council* [2010] NZEnvC 216 at [77]. See also Gluckman (2016).

Debris Flow Risk Management on the Awatarariki Fanhead at Matatā (Boffa Miskell Limited 2018), it is noted that a risk assessment concluded that an area should not be occupied due to the high risk associated with another debris flow event. In these circumstances, and in light of the risk to life posed by a future debris flow "the proposed controls are not considered to place an unfair and unreasonable burden on those with interests in these properties" (Boffa Miskell Limited 2018).

Ultimately, as Berry and Vella have identified, the question of whether a provision is unfair and unreasonable "is likely to come down to the level of risk that is posed to a particular property (supported by scientific information) and whether it could be considered "reasonable" to build on that property given that level of risk" (Berry and Vella 2010, para 6.34). We suggest that there would also need to be clear policy support in either national documents or within an RPS. In the context of existing residential uses, if the test is what use the land could reasonably be put to if it was hypothetically undeveloped, this may ignore the weight a court might give to the fact that a dwelling is already on the land, and the extent to which existing private property rights on land may impact on the interpretation of s 85 generally (see below). While we are prepared to accept that it is arguable that in a situation of extreme risk a rule prohibiting residential use may be neither unfair nor unreasonable, similar reasoning may not apply where the risk is less significant (perhaps to property rather than life), or if the risk is quite uncertain, or whether, while the risk is inevitable, the magnitude and timing of the risk is uncertain (such as inundation from the sea). In the context of risk reduction in anticipation of the effects of climate change, this may be a real problem in attempting to determine whether the risk is significant enough to pass the tests establishing the provisos to the general rule laid down in s 85.

There are a number of matters that will be considered by the courts in assessing whether a rule imposes an unfair and unreasonable burden on the holder of an interest in land. Guidance on this point is provided by *Steven v Christchurch City Council* [1998] NZRMA 289. The Environment Court in that case notes that it is difficult to distinguish between "unfair" and "unreasonable"; although it queried whether "unfair" might relate to the qualitative aspects of the burden, and "unreasonable" to the "quantitative". The court in *Steven* suggested that the use of the word 'burden' indicates that some impositions on an owner will be acceptable; the question being one of fact and degree to be decided by the court. Overall, the court observed that:

> *Whether there is an unfair and unreasonable burden cannot be considered in the abstract but in the context of the Act and in particular with (differentially weighted) reference to:*
>
> 1. *the natural and physical resources in this area;*
> 2. *that no reasonable use can be made of the land (that is whether the first test in section [85(3B)] is satisfied);*
> 3. *Part II of the Act (the purposes and principles) because these underpin everything else in the Act*[67]

[67] Although this statement must now be read with some caution and in light of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*) discussed above.

4. *Part III of the Act and in the inference from section 9 that real property rights prima facie meets the purposes and principles of the Act – Part III and section 9 are expressly referred to in section [85(3C)] so there can be no doubt of their relevance;*
5. *the relevant provisions of the proposed plan …*
6. *the rebuttable presumption that the proposed plan is effective and efficient – otherwise work on the (proposed) plan is wasted;*
7. *the personal circumstances of the applicant, looked at objectively – because in assessing a burden one has to look at who is carrying it.*

Overall, there are very few cases that consider this aspect of s 85, perhaps because the courts do not often find that a rule in a plan renders the land incapable of reasonable use.[68] One of the few examples of a successful argument is *Mullins v Auckland City Council* Planning Tribunal A35/96, 17 April 1996.[69] This case involved five pieces of land on which there were cross lease building sites for new dwellings. The sites had been created before the notification of a proposed district plan, which contained density rules that would have prevented use of the sites unless a resource consent for a non-complying activity was obtained. A range of different factors (including that dwellings complying with all of the other rules in the plan could be built) led the Planning Tribunal to conclude that:

> *… the density rule of that plan renders each of the building sites the subject of these proceedings incapable of reasonable use. Further, because in each case the building site was acquired for erection of a dwelling to be built on the site, which cannot now be built on it, we find that the density rule places and unfair and unreasonable burden on the persons who bought those interests. (at 6)*

Expectation created by the type of zoning and/or permitted activity rules appears to play a role in this decision. In assessing whether a rule imposes an unfair and unreasonable burden on an individual, what an individual thought about what they could do with their land will be a relevant (and potentially important) factor. This is reinforced by other comments made by the Tribunal in the course of its decision:

> *… in each case there was an expectation of being permitted to erect a separate dwelling; that expectation was frustrated only by the density rule of the proposed plan; and the building site can accommodate a dwelling that would comply with all the other rules of the proposed plan. (at 2)*

In the context of a de-habitation to reduce natural hazard risk, perhaps the strongest argument that a provision in a plan is fair and reasonable, would arise in circumstances where the provisions were in response to a high risk to life. As with the question of reasonable use, the reasoning would be that because the land in question is already unsafe (as a result of the

[68] Indeed, a recent survey by Ministry for the Environment found that between 1991 and 2013 only 15 cases had involved applications under s 85, and of these only three had been successful: *Hastings v Manukau Harbour Protection Society Incorporated* Environment Court A068/2001, 6 August 2001; *Mullins v Auckland City Council* Planning Tribunal A35/96, 17 April 1996; and *Steven v Christchurch City Council* [1998] NZRMA 289. No cases appear to have been decided since 2013 that would change these statistics. See Ministry for the Environment. 2017. *Resource Legislation Amendments 2017 – Fact Sheet 14*. Wellington: Ministry for the Environment. INFO 784o.

[69] For further analysis of this case see Palmer, 1997 6.

natural hazard risk), imposing a provision prohibiting residential activity imposes neither an unfair nor unreasonable burden. Potentially, the reasoning in *Francks* (that building on land subject to risk from natural hazards cannot be a reasonable use under s 85) might also apply here. Such reasoning certainly seems to underpin the approach adopted in relation to the proposals relating to the Awatarariki Fanhead at Matatā noted above (Boffa Miskell Limited 2018).

There are at least two potential problems with this reasoning in the context of the reduction of risk and the modification or extinguishment of existing uses. The first is that the wording of the section is clearly focused on the provisions of a plan, or proposed plan. For example, s 85(3B) states:

> *The grounds are **that the provision** or proposed provision of a plan or proposed plan—*
>
> a. *makes any land incapable of reasonable use; and*
>
> b. *places an unfair and unreasonable burden on any person who has an interest in the land. (emphasis added)*

The language here is clearly focused on what the provision does, not the characteristics of the land. Where a provision indicates that residential activity is prohibited, it might be highly artificial to suggest that the hazard is the cause of the burden and not the provision. Notwithstanding the risk posed by the hazard, the provision itself may still be both unfair and unreasonable.

The second is that if the question of the unfairness or unreasonableness of the risk is linked to the level of risk posed on a particular property, then not all risks that a council may want to reduce are likely to be caught. For example, a prohibition of residential activities in a situation such as that at Matatā might be fair and reasonable (because the risk of loss of life from a debris flow has been assessed as 'high' (Boffa Miskell Limited 2018)). Conversely, in circumstances where the risk is only to property, or where the risk to life is low, or where the magnitude of the risk is uncertain, or the consequences may only be realised at some point in the future, a court may conclude that a provision is both unfair and unreasonable. An example is a situation where a local authority wants to move people from an area based on the predicted cost of continuing to service the infrastructure on which it relies due to the impacts of sea level rise. It might be very difficult to argue that a landowner's interest is not rendered incapable of reasonable use. Given the uncertain nature of the timing of the impact to the land involved, it might be difficult to establish that the provisions were also not unfair and unreasonable. It would be even more difficult if the impacts to the community in question had a longer timeframe that those to the road into the community (under which all the other infrastructure such as water, sewerage and power sits). Conversely, it may depend on how the managed retreat was to be implemented, over what timeframe and whether only RMA provisions were to be employed.[70]

[70] We stress that there are a range of options available to councils wishing to implement a managed retreat, although our narrow focus here is on the ability to achieve this using only the RMA provisions as currently enacted.

5.2.5 Outcomes Under s 85

If the court were to uphold a challenge under s 85, and no alternative rule would achieve the same result, it appears arguable that a landowner (or even a mortgagee) may be able to stymie any rule change by simply refusing to agree to an acquisition under the Public Works Act as is required by s 85(3)(a)(ii)(A). Ultimately, this may undermine a regional process of risk reduction, including managed retreat.

Conversely, these provisions would not be triggered if the provision does not impose an unfair and unreasonable burden on the holder of an interest in the land. The rule would become operative and, at some point, the residents on the land would have to leave, or be subject to the enforcement mechanisms under the Act for those undertaking prohibited activities. The overall effect of this would be that a regional council would have extinguished an existing use with no requirement to pay compensation.

5.2.6 Compensation for Interference with Land Under Other Aspects of the RMA

The provisions in s 85 can be contrasted with those of the Public Works Act 1981, which states that if the Crown (or other authorised public bodies, including local authorities) wishes to acquire land for a public work, and the land cannot be acquired voluntarily it can be acquired compulsorily. Under either approach s 60 of the Public Works Act requires that 'full compensation' must be paid. The Public Works Act also provides for compensation to be paid where the land is not taken but is 'injuriously affected' (s 63).

It is important to recognise that, outside s 85, other parts of the RMA adopt the processes under the Public Works Act. For example, where land is required for a designation, s 185 allows the owner of an estate or interest in the land to apply to the Environment Court for an order obliging the authority responsible for the designation to acquire or lease the land under the Public Works Act. The court may make an order if the owner has tried, but been unable, to enter into an agreement to sell the estate or interest affected (for a price not less than the market value the land would have had but for the designation), and the designation prevents reasonable use of the owner's estate or interest (s 185(3)).

Similar provisions apply to heritage orders under the Act (s 198). In contrast to natural hazards the designation and heritage order power can only be exercised in the context of district plans (see ss 166 and 187), in part because "designation and heritage protection orders do not lend themselves easily to regional administration" (MFE, 1990, at 21). In light of these provisions, what decisions the framers of the RMA would have made regarding hazards and the management of existing uses had today's challenges been well recognised at the time it was being developed is an interesting question. In the context of managed retreat, it is somewhat odd that where land is affected by a designation or a heritage order, the Environment Court can order the land be acquired under the Public Works Act, but this is not true for a provision in a plan prohibiting residential activity (unless the provision renders the land "incapable of reasonable use" and is both "unfair" and "unreasonable", at which point an acquisition becomes technically possible).

Section 86 specially empowers local authorities to acquire land by agreement under the Public Works Act in order to:

- terminate or prevent any non-complying or prohibited activity in relation to that land: or
- facilitate activity in relation to that land that is in accordance with the objectives and policies of the plan.

This enables the Public Works Act provisions around acquisition and compensation to be triggered without the need for there to be a 'public work' as is usually required by the Act. This suggests Parliamentary recognition that to achieve the desired result under a plan it may be necessary, from a practical perspective, to acquire land and pay compensation. These provisions also recognise the role that private property concepts of private property continue to play in this sphere.

5.2.7 Private Property and the Interpretation of s 85

That ideas about private property continue to play a role, albeit a subsidiary one, in the interpretation of RMA provisions certainly seems to be the overall thrust of the reasoning regarding private property outlined in *Falkner v Gisborne District Council* [1995] 3 NZLR 622. That case involved an area of coast that had historically been protected by erosion protection works erected and maintained by a TA. In 1992 the council decided to discontinue the protective works and to follow a long-term process of managed retreat of residential occupation from the area. The landowners affected argued that there was "a common law duty incumbent on the Crown to preserve the realm [being everything over which the Crown holds sovereignty] from inroads from the sea" (at 625), and also that there was a similar common law right for those with property fronting the sea to protect their properties. A central issue in the case was, if such rights and duties existed at common law, had they been modified or extinguished by the RMA.

When the matter reached the High Court, Baker J noted that (at 631):

> *The final and crucial issue is whether the common law right and duty such as they are, have been abrogated or modified by the Act. This question comes down to a simple exercise in statutory interpretation. Each side advanced a number of interpretative principles or maxims in the course of argument which, although useful as tools of analysis, do not of themselves provide definitive answers.*
>
> *The Court's interpretative task should be approached in a manner mindful of the legislative background. As has been acknowledged both academically and judicially, the statutory implementation of integrated planning and environmental regimes represents a clear policy shift towards a more public model of regulation, based on concepts of social utility and public interest. Private law notions such as contract, property rights and personal rights of action have consequently decreased in importance (see D A R Williams, Environmental Law (1980), para 109; Attorney-General, ex rel Munday v Cunningham [1974] 1 NZLR 737, 741; Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132, 140–141).*

In addition, his honour noted that (at 623–633):

> *The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it … The effect of all this is simply that, where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable … there is nothing in the scheme of the Act to suggest that the common law right cannot be infringed – quite the reverse. The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources.*

On the question of compensation in general and s 85 in particular the Judge noted:

> *It was further submitted for the residents that an intention to take away property without giving legal right to compensation is not to be imputed to the legislature unless that intention is expressed in clear and unambiguous terms (Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd [1919] AC 744, 752). The Act contains no such unequivocal intention … In any event, it may be emphasised that the above rules are rules of construction only and depend on the precise wording and purpose of the particular statute and instruments created under it. They will not of themselves render a plan ultra vires. The relevant statute in the present proceedings deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights.*
>
> *I expressed concern at the hearing that a seemingly insensitive application of a "managed retreat" policy, as advocated by the respondents' officials, ignored the fact that the discontinuance of protection works would seriously affect the viability in the long term and the marketability in the short term of the appellants' properties. Many of the appellants have invested their life savings in a Wainui beach property.*
>
> *Counsel for the second respondent referred me to s 85 of the Act which does not appear readily adaptable to the present situation. The compensation provisions in the predecessors of the Act –- the old Town and Country Planning Acts – were notoriously opaque. I for one never encountered anybody who had mounted a successful claim under them, although I knew of several attempts …*

The judge concluded his decision by noting that what was really needed was a scheme for compensation in this context similar to one adopted under the United Kingdom Coast Protection Act 1949. He recommended "to those responsible for revising the Resource Management Act as offering some resolution of the resident's understandable concerns at the prospect of losing their homes without compensation and without the ability to erect coastal protection works."

The situation that would arise under a risk reduction policy aimed at retreating from an area (as opposed to refusing to maintain protection works), makes the issue even more stark. Although the judge in *Falkner* is clear that ideas of private property will not trump planning provisions when there is a clear conflict and that there is nothing to prevent rights at common law (such as rights of private property) from being infringed, it will depend on the 'precise words of the statute'. Where there is ambiguity (as there clearly is in relation to the operation of s 85), it seems possible (if not likely), that arguments based on private property rights and the expectations of landowners will be raised if there is an attempt to prohibit residential activities in an area through plan provisions. Certainly, it seems clear from *Falkner* that while property rights concepts have decreased in importance, they remain relevant and it is noteworthy that the judge in *Falkner* was clearly concerned about the effect the council's decisions would have on the value of the landowners' properties.

Later case law tends to reinforce this view, and there is some suggestion that the law of 'takings' may nonetheless apply in the resource management context, although the circumstances are likely to be very constrained. In *Waitakere City Council v Estate*

Homes Ltd[71] a developer applied for resource consent for a subdivision. The local authority had a policy of requiring developers to build an arterial road as opposed to the type of road required by the development. The local authority would then pay the developer the difference between the cost of the arterial road and the road required by the development. The parties initially negotiated that a local road be constructed for the development. However, the consent granted specified a collector road. This difference in the type of road would have resulted in the developer being paid substantially less by the local authority. Ultimately, the developer claimed in the Environment Court that no road was necessary at all. When the case made its way to the Court of Appeal that court held that the condition of the resource consent requiring the building of an arterial road amounted to a 'taking' of private property by the local authority and that the relevant legislation should be interpreted in light of the presumption against takings without compensation.[72]

The Supreme Court rejected this argument, finding that the roading condition was appropriately applied, although there was an argument in relation to the quantum of compensation. In reaching this conclusion the court considered the law of takings in New Zealand noting that while there is no constitutional protection of private property in New Zealand, a general measure of constitutional protection is provided by Magna Carta 1297, c 29. This remains statutory authority that anything amounting to a taking (or acquisition) of private property must be authorised by a statute allowing for the acquisition in clear terms (at [45]; Imperial Laws Application Act 1988, Schedule 1). A further effect of this statute is that a statutory practice has developed whereby fair compensation is provided where land is taken for public purposes under a statutory power. As the court notes "the Courts have been astute to construe statutes expropriating private property to ensure fair compensation is paid."

The Supreme Court[73] immediately notes that there must in fact be a taking for these principles to be engaged (at [46]), although it does not address the question of whether the taking could be 'regulatory' rather than actual. The court does, however, observe that generally speaking, rules which restrict the development potential of land, and thereby reduce its value, are treated as a form of regulation and not takings of land (at [47]). As a result, the court notes that where a lawful condition of a subdivision consent requires the developer to give up land (for example for a road) in exchange for the right to subdivide, then there is no taking and "the common law presumption of interpretation will not apply to the empowering legislation" (at [48]). If a condition was unlawfully imposed the correct approach would be to challenge the scope of the condition in the courts by way of an appeal; rather than attempting to strike it out by way of a declaration that it amounted to a taking.

The Supreme Court ultimately concluded that there was no taking in this case because the developer had a choice about whether to proceed with the subdivision when confronted with the council's requirements regarding the road (at [52]). In these circumstances the presumption of interpretation flowing from Magna Carta did not apply because (at [53] citing *Lloyd v Robinson* (1962) 107 CLR 142 at 154):

> *The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to*

[71] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.
[72] *Estate Homes Ltd v Waitakere City Council* [2006] NZRMA 308.
[73] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

> *obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act.*

The court does appear to leave open the possibility that a taking might occur under New Zealand resource management law (at [51]):

> *Professor Stoebuck, writing in relation to the constitutional position in the United States, observes that a distinguishing characteristic of eminent domain transfer is that it involves the transfer of rights which "may be compelled over the transferor's immediate, personal protest". The notion is that there is a forced acquisition of a landowner's rights under a power belonging to the state which allows the landowner no choice. In our view, that absence of choice must be present in a taking of property before the principle of statutory interpretation applied by the Court of Appeal in this case can be invoked.*

It is difficult to think of a situation under the RMA where a situation like that contemplated by the Supreme Court would eventuate in the resource consent context, and certainly such an approach to provisions in plans seems categorically ruled out by the clear words of s 85(1). Indeed, *Waitakere City* was concerned with resource consent conditions and not plan provisions. Choice is a distinguishing factor; there is always a choice about whether to implement a consent or not. In contrast there is no choice about complying with plan rules. This may make it more likely that provisions in a plan might come closer to a 'taking' than in the resource consent sphere. The possibility of such an argument appears to inform the opening words of s 85, which stress that "an interest in land shall be deemed not to be taken … by reason of any provision in a plan …"

It is important to recognise that the provisos in s 85 (as discussed in detail above) appear aimed at balancing the consequences that no provision in a plan will 'take' property, against the fact that sometimes a provision will render land incapable of reasonable use and that that burden might be unfair and unreasonable. This suggests that Parliament was aware of the general presumption that legislation which impacts on private property rights should be clearly worded and accompanied by compensation. Although it did not wish to go so far in the context of plan provisions, it has fashioned an alternative remedy for provisions which go "too far". Parliament appears to have decided that if a provision is so restrictive as to render the land incapable of reasonable use and place upon its owner an unreasonable burden, then it can only proceed if the Environment Court directs the local authority to do whichever the local authority considers appropriate out of the two options of either modifying, deleting or changing the rule, or acquiring the land (if the landowner agrees). This position seems readily explained in light of the general protections extended to private property and the decision that planning provisions would not entitle landowners to compensation.[74] As compensation is not payable, provisions in plans are limited; they ought not render land incapable of reasonable use, unless the burden is not unfair and unreasonable. Notwithstanding the comments made in *Faulkner*, the courts may be minded to acknowledge at least the ethos of the principles touched on in *Waitakere City* and *Falkner* in interpreting s 85.

[74] Indeed, prior to its amendment in 2017 the title to s 85 was: Compensation not payable in respect of controls on land.

Evidence that the courts will consider these matters in the context of s 85 is found in the Environment Court's comments in *Hastings v Manukau Harbour Protection Society Incorporated* Environment Court A068/2001, 6 August 2001 that:

> *[92] … we take it that legislation regulating use of natural resources may modify the general principle that a landowner's right to use land in its natural state should not be taken away without compensation. From section 85 we take it that in enacting the Resource Management Act 1991, Parliament deliberately ruled out rights to compensation for planning controls and provided two other remedies instead. First, a person having an interest in land affected by a plan provision that would render the interest in land incapable of reasonable use (without significant effects on the environment) can challenge the provision in a submission on the plan when it is proposed. Secondly, such a person is able to apply for a change to the plan, if it renders the interest in land incapable of reasonable use (without significant effects on the environment), and places an unfair burden on any person having such an interest …*
>
> *[96] We hold that even where the owner of an interest in land considers that proposed zoning would render that interest in land incapable of reasonable use, the remedies intended by Parliament are those described in section 85; and that on a challenge to such zoning the tests derived from the Act are to be applied to the merits of the case …*

In addressing the private versus public tensions evident in s 85 it also observed that the primary focus is not on private property rights:

> *[98] Section 85 contemplates an owner of an interest in land challenging a plan provision on the ground that it renders an interest in land incapable of reasonable use. On a reference derived from such a submission, the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.*

This passage appears to be suggesting that the sustainable management purpose of the RMA will override personal interests in land. Our comments in section 5.2.3 suggest there is a possible argument along these lines based on the requirement in the definition of reasonable use in s 85 to consider risk beyond that accepted by the landowner. However, the precise meaning and effect of the last statement is not clear, and it has not been commented on by other courts when considering s 85. In *Hastings* the very restrictive open plan (conservation) zoning proposed to apply to an entire site was found to render the land incapable of reasonable use and was unfair and unreasonable. There is some merit to the criticisms of the court's statement by Thomas who suggests that the court's reasoning could ultimately lead to a claim that the public interest is in the maintenance of the controls in a plan, with the effect that local authorities could make rules with impunity (Thomas, 2002). The words used by s 85 appear to focus on the effect of the provision, and the provision's effect both on the land, and the person concerned. There may be some merit in Thomas' suggestion that private property rights are an appropriate a focus of the section (Thomas, 2002). As he notes, support for this proposition

can be taken from comments made by the Minister for the Environment in 1991 when the RMA Bill was read for a third time:

> *People can use their land for whatever purpose they like. The law should restrain the intentions of the private landowners only for clear reasons and through the use of tightly targeted controls with minimum effects … the Bill provides us with a framework to establish objectives by a physical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair. (Upton, 1991)*

There is nothing specific in the court's statements in *Hastings* that can be read as suggesting that private property rights are irrelevant to the interpretation of s 85. Neither does it rule out consideration of the long tradition within the Western approach to private property (outlined in Section 2) when considering whether a burden in a particular case is unfair and unreasonable. The focus of the tests in s 85 which, if satisfied, empower the Environment Court to change the rule or order acquisition, appears to be on whether the burden would be unfair and unreasonable for the person concerned. That will require an assessment of what level of burden is appropriate in the circumstances, taking into account the purpose of the RMA, the hierarchy of planning documents, the provision in question, and the general principle that where property rights are engaged courts will be cautious.

This may be an important factor in circumstances of risk reduction, particularly where a proposed provision will operate to extinguish the existing residential use of a landowner's property. There is already some suggestion in the case law that the courts will be mindful of the importance generally accorded to private property rights when interpreting s 85. For example, in *Landco Mt Wellington v Auckland City Council* NZEnvC W042/08, 9 July 2008 the Environment Court noted that:

> *[15] In line with the philosophy that if the public wishes to compel the use of private property in a particular way, then the public should be prepared to pay for it, we accept that it is generally inappropriate to zone private land for open space purposes without the consent of the landowner. See Capital Coast Health v Wellington CC (WIOI/1998) and (W004/2000). And we accept that that general view applies whether the open space zoning is expressly set out in a Plan or is effectively put in place through some other means. But in the resource management context the position is not absolute. All such decisions are subject to Part 2 of the Act, and its overarching purpose of the ... sustainable management of natural and physical resources. It might be that the characteristics of a particular piece of land would dictate that, measured against Part 2, any activity upon it, other than some passive open space activity, would so conflict with that overarching purpose that the wishes of the owner should not prevail. While that would be an outcome requiring compelling reasons, it can and does happen, and s 85 allows for it.*

In light of the *King Salmon* decision it is unclear the extent to which the Part 2 factors mentioned here would now influence a court. However, this does highlight the important of the hierarchy of plans and the care that will be needed in preparing them when a policy of risk reduction is seen as desirable (see discussion in section 3 of this report).

In assessing how to approach the interpretation of s 85 in *Steven v Christchurch City Council* [1998] NZRMA 289, the Environment Court noted the provisions now contained in s 85(3C):

> *Before exercising its jurisdiction under subsection (3A), the Environment Court must have regard to—*
>
> a. *Part 3 (including the effect of section 9(3); and*
>
> b. *the effect of subsection (1) of this section.*

Part 3 of the RMA includes s 10 (which is also specifically mentioned in s 9(3)), which protects existing uses. Moreover, as noted by the court in *Steven* (and discussed in s 3 above):

> *Section 9 of course states, in effect, that a landowner may use their land as they like … unless the activity is controlled by a rule in a district plan. … One of the more puzzling aspects of section 85(3) – a section otherwise devoid of guidance as to Parliament's intentions – is the express reference to Part III of the Act and section 9 in particular. We infer that Parliament intended us to give some emphasis to the fact that land resources have, unlike air and water, a well-defined system of property rights to which members of the community can attribute their own subjective values. The market in that system of land use rights is, leaving aside externalities controlled under the authority of and for the purposes of section 5(2)(a) – (c), and the principals in section 6 and section 7, apparently trusted by Parliament to be a self-regulating (and efficient) method of sustainable management of natural and physical resources.*

These cases suggest that the courts will certainly be cognisant of private property rights when approaching the tests under s 85. However, what an unfair and unreasonable burden will look like will depend very much on the context, and in particular the level of risk that is being managed (Berry and Vella 2010). As Berry and Vella note, it is possible for plans to contain provisions which severely restrict the use to which land can be put (and these will include prohibited activities), where there is a high level of risk to life and property (at 6.34). In their view, "… whether proposed … provisions will render the land incapable of reasonable use requires consideration of the extent of the impact of the proposed provisions on a particular property in light of the level or risk that is posed to that property" (at 6.35). They also note that "[i]f a rule completely precludes the building of a dwelling on a property, that may be considered to be incapable of reasonable use depending on the particular circumstances". Berry and Vella do not closely consider a situation where a provision in a plan is aimed at extinguishing an existing residential use completely, although they do note that where a council seeks to extinguish an existing use in a hazard prone area the provisions would likely be tested under s 85 (at 6.43).

If the risk to life is so extreme as to render use of the land to be objectively unreasonable, then perhaps the courts will conclude that the burden imposed by a provision prohibiting residential use (which would take away the ability to use the land for this purpose) is fair and reasonable. Where the risk is not certain, or is not sufficiently extreme, the courts may consider that the general presumption that clear statutory language and compensation are needed when there is an interference with private property should apply. This should inform their approach to assessing what level of burden is appropriate for the holder of an estate or interest in land to bear.

The recent amendments to s 85(3A), which inserted the ability for the Environment Court to order an acquisition of the land in question under the Public Works Act (subject to the owner's consent), may provide further support for such an approach. The purpose of this amendment was to "allow flexibility for when a council would prefer to keep the plan provisions in place, rather than change, delete or remove them" (MFE 2017, 4). If a local authority wishes to pursue

a course which will impose unfair and unreasonable burdens on the holder of an interest in land it may do so, providing it acquires the land and pays compensation. This is a clear echo of the common law position, similar to provisions in relation to designations and heritage protection orders and is likely to inform the courts' approach to interpreting the section.

The result may be that in all but the most extreme situations of risk, the courts will conclude that a rule prohibiting existing residential activity imposes an unfair and unreasonable burden. In these circumstances a local authority wishing to achieve a managed retreat would have the option (subject to the landowner's consent) to acquire the land under the Public Works Act and at the level of compensation mandated by that Act.

In the context of risk reduction, particularly managed retreat, there are two problems with such an outcome. Firstly, it might pose a prohibitive level of cost on the local authority. Under the Public Works Act compensation is assessed on the basis of a number of factors, including a rule that the value of the land is to be assessed on the basis of the amount the land would realise if sold on the open market by a willing seller and a willing buyer (s 62). Not only could this end up costing a lot, there is a question as to whether this would be a fair basis for compensation in the context of a retreat driven by a risk and where the land may have no value at all and be unable to be put to any other sort of productive use (Dudley Tombs and France-Hudson, 2018). It also does not take into account circumstances where a risk has been known for a long time and the landowner has chosen to take that risk (Dudley Tombs and France-Hudson, 2018).

Secondly, under s 85(3A) (a)(ii)(A), an acquisition can only occur with the consent of the person who has the affected estate or interest in the land. Given the personal connection such a person is likely to have with their home and the difficulties they may have moving somewhere else (Wane, 2019), it is possible such consent would not be forthcoming. Indeed, given it is possible (and probably simpler) for a local authority to negotiate a voluntary managed retreat, if a local authority attempts to advance a managed retreat through planning provisions this may indicate that something has gone wrong in the process of attempting to negotiate a voluntary solution. In such circumstances it is unlikely consent will be forthcoming and the policy of risk reduction will be frustrated with no clear indication of what should then happen.

5.3 Other Protections of Use in the RMA

In addition to s 85 we also considered whether there are any other aspects of the RMA that might provide an impediment to the extinguishment of existing uses and a policy of managed retreat to reduce risk. Of these the strongest is the operation of resource consents, and the difficulty of modifying them once they are granted. Other aspects of the RMA, for example, existing use certificates under s 139A do not appear to prevent the extinguishment of existing uses.

5.3.1 Resource Consents

In the context of risk reduction, the role that resource consents play (as opposed to the existing use provisions) may be very important in some circumstances. Section 9 states that no one may use land in a way that contravenes a national environmental standard, a regional rule or a district rule unless expressly allowed by a resource consent. It follows that where an activity is undertaken by virtue of a resource consent, whether the activity can be stopped will depend on the conditions of the particular resource consent and the provisions of the RMA relating to resource consents and their modification.

This may be problematic in the context of managed retreat because where a land use consent has an unlimited term (s 123(b)),[75] once it has been given effect to and continuously exercised,[76] the consent may not be discontinued (McDonald 2002). For example, where a land use consent has been granted to allow a dwelling to be built upon a recognised flood plain (perhaps subject to conditions but none relating to time), then it is unclear how that consent could be cancelled. If a regional council was to insert a rule in the regional plan prohibiting residential activity in that area, that would not impact on the continued exercise of the resource consent. Section 20A would not apply because resource consent would already have been obtained for that activity.

We note that it appears to be established knowledge that a use approved by a regional resource consent (granted for a fixed period of time) cannot be extinguished by a new regional rule until that rule becomes operative and the resource consent expires and needs to be renewed (Northland Regional Council 2019, 1). In our view, the same position is likely to apply to a use established by a land use consent.

While it is now possible under s 128(1)(bb) for a consent authority to review the conditions of a land use consent in light of a relevant regional rule (for example a new rule prohibiting residential use), an initial analysis suggests that the power to cancel a consent is limited to circumstances where "there are significant adverse effects on the environment resulting from the exercise of the consent".[77] Given our comments in section 2.3.2 that risk is an effect, there may be an argument that the continuation of an activity in a situation of high risk would allow conditions of a consent to be reviewed. However, while a consent authority may be able to modify the conditions of the consent in these circumstances it appears unlikely it could be cancelled completely. Furthermore, while it appears that there is a broad power to change conditions, these must not go so far as to affect the continued viability of the consent.[78]

While this would be problematic in the context of risk reduction, it is unclear how much of a problem it is likely to be in practice. Uses established by resource consent are likely to be those not anticipated within a zone, or those that have the potential to generate significant effects, which would generally be a minority of uses. If this included consents for the infringement of bulk and location standards, the scope would be much greater.

Ultimately, a full analysis of these provisions is beyond the scope of this report, which is closely focused on existing uses established by s 10 of the RMA. But we recommend further work is done on this matter to understand if the law does operate in this way and whether it is a significant practical issue or not. While management of existing uses may be the biggest component in implementing a policy to reduce natural hazard risk to existing development, it may be that an alternative method is required to address uses established by resource consent.

[75] Which states that, subject to some exceptions, the period for which any other land use consent, is granted is unlimited, unless otherwise specified in the consent.

[76] Resource Management Act 1991, 126.

[77] Resource Management Act 1991, 132(4)(b)

[78] *Golden Bay Marine Farmers v Tasman DC* EnvC W019/03, 27 March 2003 at [468].

5.3.2 Existing Use Certificates: s 139A

If resource consents operate to limit regional council powers to adopt a policy of managed retreat, it is also necessary to consider the effect of s 139A of the RMA.[79]

Section 139A provides that where a person is using land in a manner allowed by s 10, that person may apply to a consent authority for the issue of an existing use certificate. The request must describe the use of the land and specify the character, intensity and scale of the use on the date on which the authority issues the certificate. If satisfied that the use of the land is allowed by s 10, the consent authority must issue an existing use certificate. Sections 139A (2) and (5) provide a similar mechanism for activities carried out under s 20A.

Section 139A was added to the RMA in 2006 following the High Court's decision in *Duncan v Dunedin City Council* (2004) 10 ELRNZ 315 which suggested that s 139 (which provides for certificates of compliance) could not be used to confirm that an activity was protected by the existing use provisions of the Act (Brabant, 2013).

The leading judicial discussion of how the provision should be construed is found in *Marlborough District Council v Franklin* [2013] NZRMA 323. The case concerned the existing use rights attaching to a boat yard and the operation of a s 139A existing use certificate. The primary issue in the case was interpretation of the section (in particular, the meaning to be accorded to the word 'use' in ss 139A(1)(a), (b) and (c)) and how the certificate affected periods where the use had been discontinued. In the course of the discussion the judge made some observations regarding the purpose of s 139A which might lead to an argument that activities with an existing use certificate gain all of the protections that apply to a consented activity and may operate to frustrate a policy of managed retreat. The judge notes that "the function of the certificate is not to provide official confirmation of the existence of latent but resumable existing use rights. It is to furnish the equivalent of "an appropriate resource consent" (at [54]). Although the court did not conclude what the ultimate effect of the words "appropriate resource consent" had it did note that:

> ***[48]*** *But the certificate adds something to these s 10 rights. Most importantly, it is "treated" as a resource consent for an activity which otherwise would be unlawful: s 139A(9). It cannot readily be impeached. What is described within it may be done. Enduringly, because these are the equivalent of land use consents. Existing use rights run with the land in any case.*

Thus, as one commentator has noted "[the] words in s 139A(9) "is treated as an appropriate resource consent" is a statement that the certificate is a deemed resource consent" (Babrant,

[79] Section 139 should also be noted. It allows for a person to ask a local authority to issue a certificate of compliance in circumstances where an activity is undertaken lawfully without resource consent. It allows the person concerned to confirm that activity is lawful. It is primarily useful for those wanting to protect against plan changes for uses that are not yet established (as opposed to those who already enjoy existing use protections). Section 139(10) indicates that this certificate will be treated as "an appropriate resource consent" subject to the provisions in the relevant plan or national environmental standard. However, in contrast to s 139A where a certificate is treated as a resource consent under this section it is expressly subject to sections 10, 10A, and 20A(2). As a result, if a rule in a regional plan prohibited that activity (and resource consent could not be obtained under s 20A) the activity would have to cease (see the discussion above). See also *North Canterbury Clay Target Association Inc v Waimakariri District Council* [2016] 3 NZLR 764 and *Vipassana Foundation Charitable Trust Board v Auckland Council* [2019] NZCA 100. As the provision does not appear to limit the ability of regional councils to extinguish existing uses, we do not consider it further.

2013). If true it would follow that if land use consents are for an unlimited period, and the existing use in question involved land use, then the existing use certificate, treated as an appropriate resource consent, would also be indefinite. This could be an important factor in attempting to achieve a managed retreat, particularly given s 139A does not appear to give the consent authority any discretion regarding whether or not to recognise the existing use. If a land user became aware of a proposal for a managed retreat, there may well be a race between the land user applying for a certificate under s 139A or a regional council putting in place a plan change to affect the retreat (or a district council applying for a plan change).

The question that then arises is whether an existing use certificate as "an appropriate resource consent" is immune from the provisions of s 20A and the ability of regional councils to extinguish existing uses. In this context it is useful to set out s 139A (9) in full. It states that:

> *An existing use certificate is treated as an appropriate resource consent. The provisions of this Act apply to the certificate, except for sections 87AA to 119, 120(1A) and (1B), and 123 to 150.*

Sections 87AA to 119 deal with resource consents and the procedure for obtaining one. Sections 120(1A) and (1B) outline the rights of appeal in relation to applications for resource consent. Sections 123 to 150 deal with the duration of consents, review of consent conditions, transfers of resource consents, and proposals of national significance.

Two observations can be made, the first is that s 139A distinguishes between the treatment of existing uses under s 10 and those under s 20A. An application for recognition of an existing use to which s 20A applies must, in addition to describing the activity and specifying its character, intensity and scale, also describe the period for which the activity is allowed under s 20A. This is different from the provisions applying to s 10 activities and is an explicit recognition that an activity under s 20A can only continue if the person undertaking it has applied within six months of the rule becoming operative for a resource consent and pending the outcome of that application. As a result, if a person was undertaking an activity by virtue of s 10, and that activity became subject to a rule in a regional plan requiring resource consent, then that person could apply for an existing use certificate to recognise an activity that was now allowed under s 20A (rather than under s 10, which is expressly limited to uses that contravene a district plan).

The second is that the rules and presumptions around the duration of resource consents provided by s 123 (and the presumption that land use consents are indefinite (s 123(b)) do not apply to existing use certificates. It cannot be assumed that an existing use certificate for a land use will gain indefinite status, nor that this status could change. An existing use of land under s 10 does not require indefinite status as it cannot be extinguished by a territorial authority (unless its character or intensity changes). Section 139A operates to confirm the use rather than giving the use further protections. In particular, s 139A does not appear to affect the ability of regional councils to impose land use rules and trigger the necessity to get resource consent under s 20A. Until resource consent is obtained the activity is no longer undertaken by virtue of s 10, but rather the use can continue under s 20A, which permits the activity providing resource consent is applied for (subject to the detailed provisions of the section). If it is not possible to get resource consent as an activity has been classed as prohibited, then the existing use would be extinguished at the time when the rule became operative.

Further support for the idea that an existing use certificate does not affect a regional council's ability to impose rules requiring activities to obtain resource consent can be obtained from the High Court and Court of Appeal decisions in *North Canterbury Clay Target Association Inc v*

Waimakariri District Council [2014] NZHC 3021, (2014) 18 ELRNZ 133, [2016] NZCA 305, [2016] 3 NZLR 764. This case involved a certificate of compliance under s 139 and whether the activity in question was subject to the noise rules in the District Plan. In particular, it considered the application of those district rules to the changing environment surrounding where the activity took place. Both the High Court and Court of Appeal stressed that the certificate of compliance regime was different to the resource consent regime under the RMA. As the Court of Appeal noted, the High Court had held that:

> *[26] … … that a certificate of compliance is not the equivalent of a resource consent issued under s 88 of the Act. A resource consent may authorise departure from a plan, and it is granted after a detailed assessment of the merits and circumstances in which competing interests and values are weighed. A certificate of compliance does not employ the same processes and does not authorise any activity that is inconsistent with the plan. The object of s 139 is not that of deeming a certificate to be a resource consent for all purposes. Rather, it confirms that an activity that has yet to be established complies with the relevant plan, so protecting the holder from changes to the plan after the certificate was sought.*

Later the Court of Appeal observed:

> *[34] The legislation stated that a certificate was deemed to be an appropriate resource consent, but it immediately went on to specify that only prescribed sections of Part 6 apply to it … None of the Act's provisions for notification, hearings and decisions on resource consents apply; in particular, there is no provision ensuring decision-makers have regard to adverse effects of the activity on the environment, or for the imposition of conditions intended to limit adverse effects.*

Although the context is different, similar observations can be made regarding existing use certificates under s 139A, which also exclude the RMA's provisions on notification and hearings. Section 139A goes further and excludes the provisions relating to reviews of consent conditions and a range of other factors that can be important in the resource consent context.

Overall, it is incorrect to say that an existing use certificate under s 139A is deemed to be a resource consent or has the same effect as a resource consent under s 9. Rather, an existing use certificate is treated as an appropriate resource consent to the extent that it does not conflict with other provisions of the Act. Certificates under s 139A that recognise activities under s 10 are still subject to s 20A and the ability of regional councils to impose rules that may extinguish existing uses, in the same way a regional rule can extinguish an existing use under s 10.

6.0 FUNDAMENTAL FINDINGS — UNDERSTANDING, ABILITY AND IMPERATIVE TO ACT

The following discussion sets out our findings about local government agencies' understanding of reducing risk for existing development by managing existing use, as well as what ability, and imperative there is for them to act. This allows us to see where the tensions lie between the need for agencies to have a vehicle for land use planning that addresses risk to existing communities and the ability of the RMA in its current form to provide that.

6.1 Understanding of the Ability to Reduce Risk by Managing Existing Use

We have identified four key areas where a lack of understanding (or misconception) by decision-makers is a significant barrier to being able to reduce risk through the management of existing uses:

1. What it means to reduce risk for existing developments
2. The relationship between private property and public regulation
3. Roles and responsibilities (i.e. who can do what?)
4. How regional rules work

6.1.1 Reduction of Risk to Existing Developments

Our interviews suggested there is a lack of understanding about what it means to reduce risk to existing developments. Often, an approach believed by a council officer to be reducing risk was, in practice, only holding the risk at current levels, or reducing the extent to which the risk would increase over time. Moreover, some approaches aimed at 'holding the line' were too narrowly focused on a single parameter of hazard consequences and therefore did not address other aspects of risk meaning the overall risk profile would continue to worsen. An approach that reduces potential future risk, so that new developments have acceptable levels of risk, was more readily understood, but the idea of addressing risk to existing developments, through the modification of land use, had not been widely contemplated by those we spoke to.

To understand why this might be, it is important to recognise that there is a current shift in thinking about risk and its place in planning in New Zealand. We are in a period of transition, from an historical focus on the presence and likelihood of a hazard, to a focus on the level of risk and, through this, a greater appreciation of the possibility of addressing risk by managing consequences. Coupled to this, most land use planning decisions involving risk management have been future focused and aimed at mitigation for new development. The need to address increased or advancing risk for existing developments is a comparatively new position for local governments to be facing (albeit growing).

While this new approach is becoming mainstream and has already been accepted by the courts, decision-makers are still working to develop a comprehensive understanding of the implications. Risk (unlike hazards) is a socially constructed idea and how people view and value the consequences of a hazard event and the resulting mandate they give to agencies to protect them from this (i.e. acceptable or unacceptable risk), is the product of negotiation occurring at a range of scales, and involving central government, local government, the general public and, in the face of specific events, directly affected communities. In our interviews, we found uncertainty and a lack of understanding amongst local government officers about how this negotiated meaning of risk translated into planning and policy decisions and they were eager to see stronger national guidance. While this uncertainty remains, (and its translation

into a reluctance to raise the option of managed retreat with communities), we are unlikely to see proactive approaches to managing existing uses to reduce natural hazard risk.

6.1.2 The Relationship Between Private Property and Public Regulation

The importance of the policy choice made under the RMA— that a person may undertake any activity on their land, unless it is controlled by a lawful constraint —cannot be overstated, because a policy to reduce hazard risk through managing land use will normally involve an interference with a person's private property.

This approach sets the tone for all discussions of policies to control land use, and helps to explain the importance of s 9, and the protections extended to existing uses under s 10. It also reinforces some of the cultural and jurisprudential ideas of private property that are dominant in our society and, to some extent, within the legal system. The idea that people should be able to do what they want, with what they own, is a strong one in our society (albeit that it is very rarely true in practice). This view is in direct conflict with the whole body of resource management law, and there can be no argument that planning law is not a central, and essential, aspect of modern life. Nonetheless, the deference given to private property colours this area of law and is of central importance in the context of risk reduction and the modification of existing uses. The protections extended to existing uses under the Act, coupled with a desire to protect against arbitrary planning decisions, have led to a regime that appears to be quite protective of private property and the way it is used by those who own it. This view is often supported by judicial comments that suggest that while it is perfectly possible for the legislature to reach out and take away a property right, until it does so it remains an "ancient" and "basic right" (*Ashburton Borough v Clifford* [1969] NZLR 927 at 933).

The end result of this is that planning practitioners have a better understanding of how existing uses are protected under the RMA than how to manage existing uses to reduce risk, and this understandably gives rise to a reluctance to engage communities on measures that will interfere with existing use. While we did not explore this issue with local government elected representatives, it would be safe to assume this was echoed in the political context that is such a critical component of decision-making under the RMA.

6.1.3 Roles and Responsibilities (I.E. Who Can Do What?)

We observed variation in what local government officers understood of the roles and responsibilities of their agencies in respect of reduction of natural hazard risk. We also identified confusion and overlapping jurisdiction in the RMA on this matter. Regional councils have the ability to make land use rules that manage existing use, but not necessarily the understanding of how to do this. In contrast, TAs have an understanding about how to make land use rules but cannot make rules to manage existing uses. It was evident from our interviews that regional councils would be unlikely to act to make rules to manage existing uses without being prompted by a TA. This is significant, given the importance of the RPS for the reduction of natural hazard risk. However, TA action is still possible without regional council support, evidenced by the Whakatane District Council initiating a private plan change to the Bay of Plenty Regional Plan (see section 4.2 of this report). However, we do not consider this an ideal situation, as it brings the two levels of local government together through an adversarial process. It is necessary that both levels of local government understand their roles and powers and recognise the need to work together on this issue. Since our interviews and RPS analysis showed little difference in how unitary authorities were addressing this issue we conclude that it is important they recognise their ability to use regional rules to manage existing uses.

6.1.4 How Regional Rules Work

While our interviews showed there was high-level understanding of the option of prohibiting residential uses as part of managed retreat (in part due to the publicity surrounding the Matatā plan change process in Bay of Plenty), importantly there was a practical lack of understanding of how regional rules can be used to reduce natural hazard risk. We identified three regional plans with rules to manage rebuilding following hazard events, but we observed little knowledge of these rules outside the regions in which they apply. Understanding of the options to manage existing uses to reduce risk that impose restrictions less than a full retreat, is clearly lacking. Greater understanding of these options, such as the spectrum of rule frameworks identified in this report, is likely to facilitate closer consideration of their use by local government.

We also observed uncertainty around the assessments and checks and balances under the RMA for rules to manage existing uses, particularly prohibited activity rules. Prohibited activity rules are essential in a rule framework to manage existing uses to reduce risk, as regional prohibited activity rules can achieve unilateral reduction of risk. There is lack of clarity in two important areas:

1. How to assess the costs and benefits under s 32 of the RMA of rules to reduce risk to existing developments, and
2. what constitutes an unfair and unreasonable burden under s 85 of the RMA

Uncertainty on these matters, combined with the threat of judicial review of a council's decision to reduce risk to existing developments, is a barrier to the use of rules to manage existing uses to reduce hazard risk.[80]

6.2 The Ability of Decision Makers to Act

Our review found that the RMA provides local authorities with the ability to act to manage existing uses to reduce risk in most circumstances that fall short of complete extinguishment of existing uses.

We have identified two key abilities to act under the RMA:

1. Regional councils can manage existing uses to reduce risk through the use of regional rules.
2. RPSs can be used to provide strong direction on the management of existing uses to reduce risk to existing developments.

We have also noted the ability of TAs to initiate private plan changes to regional plans, in order to introduce regional rules in the absence of regional council agreement or support.

However, difficulties are likely to be encountered where complete extinguishment is contemplated, due to s 85 of the RMA.

[80] See for example *Weir v Kapiti Coast District Council* [2013] NZHC 3522, (2013) 15 NZCPR 28 and the political developments following that case.

6.2.1 The Ability of Regional Councils

Our assessment is that the RMA provides support for objectives to reduce risk to existing developments from natural hazards. The combined effect of s 20A and s 30(1)(c)(vi) empowers regional councils to implement such an objective through the management of existing uses, including extinguishing existing uses, in most circumstances. This means a regional council can use regional rules to overcome the protection provided to existing uses by s 10 of the RMA and regional rules can require the modification of existing uses to reduce natural hazard risk.

We have shown that there are a range of options for rules to manage existing uses. Rules can be used in various ways, depending on the:

- time available to achieve reduction of hazard risk
- degree of consistency of outcome sought
- degree of restriction on existing use.

These factors are tightly tied to the objective set for reduction of natural hazard risk, that is, the outcome to be achieved by the rule.

If there is a large amount of time available to achieve risk reduction, the infringement on existing use can be limited initially, and become greater over time. For example, initially a finite duration can be placed on an existing use, depending on the nature of the risk and how far in the future a response might be required. When the duration is up, the situation and risk can be reconsidered, and further restrictions imposed if necessary.

If the outcome for risk reduction is to be achieved consistently, rather than on an ad hoc or case by case basis, then the combination of controlled activity and prohibited activity status can be used to achieve change on a consistent basis. If case by case reduction of natural hazard risk is appropriate, then restricted discretionary or discretionary activity status will be more appropriate.

The highest degree of restriction on existing use is prohibited activity status. As well as achieving consistent application of the policy, prohibited activity status achieves 'immediate'[81] reduction of risk and will be necessary where risk is significant.

Our interviews revealed that prohibited activity rules to extinguish existing uses are considered a last resort and would require an extremely high or significant risk to be present before they would be considered. This appears to be strongly linked to the reluctance to restrict private property 'rights', and the fact that the restriction/extinguishment would happen 'immediately'. However, at the opposite end of the spectrum for restriction, controls on rebuilding following a hazard event have made it into plans. We suggest that rules that provide for gradual changes in existing use, with a reasonable lead-in time for the restriction, will be more palatable than the extinguishment of existing uses at short notice, even when there is a significant risk.

6.2.2 The Importance of the RPS

The RMA gives significant power to the RPS, making it a key document for enabling the management of existing uses to reduce natural hazard risk. This is due to several reasons: the

[81] In the context of a planning process that takes some time.

planning hierarchy established by the RMA, which requires lower order documents to 'give effect to' higher order documents; the ability of the RPS to assign responsibilities between regional councils and TAs; and the way the checks and balances of the RMA, such as s 32, require assessment against objectives.

We have identified flexibility in the RMA and NZCPS for the management of natural hazards, which allows risk reduction to be pursued while not being specifically directed. We have also identified confusion in the governance arrangements for natural hazards under the RMA, where both regional councils and TAs are responsible for the management of natural hazards but without being required to work together, and a lack of practice experience in using land use rules to manage hazards at the regional level.

In this context, an RPS can provide clarity on roles and responsibilities and fill the gap in the national direction for management of existing uses for the reduction of risk to existing developments. This holds for unitary authorities just the same as for separated regional councils and TAs. The RPS can do this by:

- Setting the reduction of natural hazard risk as an objective or outcome
- Directly identifying the use of regional rules as a method for achieving the objective
- Directing subdivision controls that support land use controls
- Clearly assigning responsibility for the management of land use to reduce natural hazard risk to the regional council/regional plan
- Identifying the option of transferring the functions for making regional rules to manage existing uses to TAs.

A strong and directive RPS can help overcome issues we have identified with governance arrangements and clarity of outcomes, as well as provide strong support for regional rules to manage existing uses. For example, the assessment of a prohibited activity rule under s 32 of the RMA will be easier if the RPS provides strong direction on the reduction of risk and the circumstances in which this should happen.

6.2.3 Relationships between Regional Councils and TAs

Our findings suggest that regional councils and TAs need to work very closely on the management of existing uses to reduce risk. This is because regional councils appear reluctant to trigger a process to consider the use of regional rules to manage existing uses without a prompt from the TA. And even with a prompt, it has still proved difficult to overcome regional-level political reluctance to take action in New Zealand. While TAs can act on their own through the initiation of a private plan change to a regional plan, this adversarial approach is not ideal, being costly, time consuming and unlikely to cement good practice arrangements for future situations. Given that regional councils are the ones with the ability to promulgate RPSs and make regional rules to manage existing uses, a strong relationship between regional councils and TAs is essential.

6.2.4 What Might Not Be Possible Under the RMA

Sometimes it may be impossible to act. The way the RMA treats resource consents, for example, suggests that where an activity is allowed by virtue of a resource consent it will be able to continue regardless of the steps taken by an authority in relation to existing uses. Moreover, it seems generally understood that s 10 of the RMA stops territorial authorities from

modifying existing uses. Under both scenarios there is clearly limited room for movement under the current legislative framework.

Perhaps the biggest unknown factor controlling the ability of decision-makers to act to reduce risk by managing existing use is how s 85 will operate. It seems clear that the intention behind s 85 is to prevent claims for compensation flowing from the restriction on the use of private property inherent in the operation of the RMA. Simply because a rule in a plan restricts the landowner's ability to use the land as he or she wishes does not mean that the landowner is entitled to compensation.

Rules to reduce risk that have the effect of modifying or extinguishing existing use straddle the uneasy boundary between things the RMA deems get compensated (such as onerous designations or heritage orders) and those that it states do not: provisions of plans that 'take' or 'injuriously affect' interests in land. As our analysis suggests, some rules to reduce risk, such as requirements to rebuild with higher floor levels, or on a different part of a building site are unlikely to be problematic and are clearly the types of rules that are generally anticipated by the legislation and provided for under s 20A. However, rules that might require a landowner to change the floor levels of an undamaged house or move the house in advance of a hazard occurring are more difficult. More difficult again would be rules that prohibited residential activity altogether with the intention of requiring people to move from the area in question. Whether or not these sorts of rules are able to be implemented depends on s 85, which sets a limit on local authority power to promulgate provisions where the effect of those rules would render the land incapable of reasonable use, and the effect would be to impose an unfair and unreasonable burden on the owner.

Whether a provision renders land incapable of reasonable use will depend greatly on what the land is currently being used for, the nature of the proposed provision, as well as the nature of the risk. There is a reasonably strong argument that where the risk is such that a person on the land is in significant personal danger, any rule prohibiting use of the land is not rendering the land incapable of reasonable use; rather the inherent nature of the land itself renders it incapable of reasonable use. However, it is not clear that this argument would be successful. In particular, the words of s 85 seem clearly aimed at the effect of the provision in question. If, but for the provision, the land could be used (even if at some risk) then logically it is the provision that would be rendering the land incapable of reasonable use.

The level of risk present and process by which it is assessed is likely to be very important. It would only be where the risk was robustly assessed as making the land incapable of reasonable use that it could be argued that the land itself (not the provision) was limiting the uses to which it could be put. The treatment of the view of the landowner in the risk assessment process will be a factor determinative of its robustness. It may be that a landowner is willing to accept a higher level of risk than the technical experts recommend. How to address this divergence of opinions on risk is not something directly addressed by the RMA, but the definition of reasonable use in s 85 appears to suggest that it is risk beyond that to the landowner that must be considered. The RMA does not provide any guidance at all on how to assess risk. An RPS that provides a robust methodology for weighting all the factors to be considered in the assessment of risk, including landowner views, will greatly assist the robustness of the assessed level of risk, and therefore, we suggest, the willingness of the Court to rely on it.

In a situation such as that currently occurring at Matatā (where the risk to life posed by the potential for debris flow is high) it might be possible to argue that the land is already incapable of reasonable use and the provision prohibiting residential use of the land does not trigger s

85 (we stress that this is simply a possible argument, we have no view on whether or not it is correct). However, where the risk is lower (for example a future risk contingent on anticipated sea level rise) the argument is much weaker.

Likewise, whether a provision imposes an unfair and unreasonable burden will involve a complicated balancing exercise assessing the risk posed, the nature of the risk and the impact on the individuals concerned. Quite how this might play out in practice is difficult to assess in the abstract. Certainly, what an individual anticipates they could use their land for seems to be an important factor. Again, it appears that it will be easier for decision-makers to avoid the provisos in s 85 where the risk to life is high.

Ultimately, it is not possible to assess how the courts are likely to approach these issues in the absence of cases that consider them. At present, s 85 appears to impose a significant constraint, particularly where the risk is low, or if the risk is high but is unlikely to be realised in the short term.

Private property theory and its application in law is likely to colour any judicial discussion of the operation of s 85. As is already evident from the cases that consider s 85, the courts will almost certainly be cognisant of the protections traditionally afforded to private property, such as the presumption that the taking of private property will be authorised by clear statutory language and accompanied by compensation. While the clear words of s 85 indicate that a provision in a plan will not amount to a taking, the provisos to the section are aimed at providing some relief where a provision crosses the boundary between the legitimate scope of planning provisions and the fact those provisions impact on private property. Parliament has indicated that where the land is rendered incapable of reasonable use, and that is unfair and unreasonable, relief is available (including the availability of acquisition under the Public Works Act). In hard cases, where the question is essentially what level of coercion private property owners must accept where it is seen as necessary to reduce risk by modifying existing use, the philosophy, history and law that is generally applied to private property will be important. This is further reinforced by the fact that RMA takes a reasoned approach to both designations and heritage protection orders, indicating in relation to both the circumstances where an acquisition of the land may be ordered.

The express recognition in s 86 that land can be acquired to facilitate the imposition of a prohibited activity status is also noteworthy. It might be presumed that had the framers of the RMA anticipated the effects of climate change and the modern understanding of risk they may have developed a similar system for the modification of existing uses. This is an area in which further consideration of the options would be useful. Even though clear direction from higher order planning documents might assist local authorities to impose rules to reduce natural hazard risk, it may be better to develop a bespoke legislative scheme that works through these issues (including the level of compensation (if any) that is appropriate), rather than doing it on an ad hoc basis.

6.2.5 The Timing Conundrum

From our discussions with local government agencies and analysis of existing regional rules to manage existing uses, we have concluded that rules that impose limited restrictions on existing uses are more palatable to decision-makers in New Zealand than rules that impose heavy restrictions. We have also concluded that rules that impose the heaviest restriction, i.e. the extinguishment of existing uses, may be more palatable if there is a long lead-in time to their implementation. Imposing prohibited activity rules that force an immediate withdrawal have an extremely high threshold to get past decision-makers, requiring a balancing of the

degree of restriction on use of private property against the degree of risk present. This leads us to recommend that the use of rules to manage existing uses should be proactive and begun well in advance of the need for a complete withdrawal from an area.

However, our analysis of s 85 suggests that for a prohibited activity rule that requires immediate withdrawal to pass the test set in s 85, there must be a significant risk, such as a risk of major consequences that is likely to occur. Otherwise, it is possible that the burden posed by the rule will be considered unfair and unreasonable. This would mean that the decision-maker would be required to withdraw or modify the provision or go through the Public Works Act process to acquire the land, but only if the landowner agreed. If the landowner did not agree, the rule could not proceed unless modified so that it no longer imposed an unfair and unreasonable burden. This suggests that it may be quite difficult to introduce a prohibited activity rule to require withdrawal in advance of a risk becoming significant.

We have called this the 'timing conundrum' and recommend that further work is done on it. It may have an impact on the ability of adaptive planning approaches, such as DAPP, to achieve complete risk reduction through land use planning. Adaptive plans to reduce risk are likely to have steps in them to manage existing uses through land use planning, beginning with less restrictive measures and identifying options for moving to more restrictive measures as risk increases over time. The final step in one of the pathways is likely to be extinguishment of existing uses to achieve a complete withdrawal to reduce risk. However, the 'timing conundrum' suggests that it may not be possible to be proactive about reducing risk through withdrawal. It is unclear if the inevitability of sea level rise effects, the magnitude and timing of which may be uncertain, would be a significant enough risk to pass the provisos to s 85. This would leave any long-term plan to manage a gradual but purposeful reduction in risk to existing developments with an uncertain last step, as it would not be clear if the final withdrawal was possible until the process to bring in a prohibited activity rule was underway. There are many reasons why this is an inefficient approach and we recommend changes to the legislation are considered to remove this barrier.

6.3 Imperatives to Act

The scope of this work did not consider any potential legal requirement to reduce risk (see Hodder 2019) or the political question of how or when a decision to reduce risk might be taken. It did, however, assess what factors inherent in the structure of the RMA might prompt, or facilitate, a decision to reduce risk.

We make two key findings on imperatives to act:

1. There is no clear risk reduction outcome in the RMA or national planning documents.
2. Governance arrangements provide no imperative to act to reduce natural hazard risk to existing development.

6.3.1 Risk Reduction Objective

There is flexibility but not direction within the RMA and the NZCPS for a local authority to pursue a policy to reduce risk by managing existing uses, as neither the RMA nor the NZCPS provides any clear outcome for the management of significant risk from natural hazards, nor the reduction of risk. An implication of affording flexibility for a difficult issue such as reduction of risk to existing developments, which faces significant hurdles such as the protection of existing uses inherent in the RMA, is that it is easy for a local authority to sit on its hands and not address the issue directly. Flexibility provides no imperative to act.

Couple with this, the ‘avoid and mitigate’ language of the RMA does not sit easily with the language of risk reduction, meaning there is no clear narrative on risk reduction in the RMA. RPSs have tended to reflect the use of ‘avoid and mitigate’ and focus on hazards rather than risk. Adherence to the ‘avoid and mitigate’ approach provides no specific direction that risk should be reduced. While the RMA now requires the management of significant risks from natural hazards, the direction to ‘manage’ is weak and ensures no consistent outcomes. And the functions of regional councils and TAs remain to avoid and mitigate the effects of natural hazards.

Outcomes (or objectives) for risk reduction are starting to be seen in RPSs. We identified four out of 17 RPSs with a clear objective to reduce natural hazard risk to existing developments. But we note that there is a difference between an RPS that provides an ability to act through its objectives and policies, compared to an RPS that provides an imperative to act. Strong policy frameworks that use directions such as ‘must’, ‘shall’, ‘reduce’, ‘ensure’ are likely to provide a stronger imperative to act than weaker policy frameworks that use directions such as ‘encourage’, ‘consider’, or ‘manage’. If an RPS has an objective to reduce risk, but the policies are to ‘consider’ the use of exit strategies, or ‘encourage’ activities that reduce risk, it will provide a high degree of flexibility for how a regional plan or district plan gives effect to it. While it provides an ability to act, it does not provide a strong imperative to act.

A clear objective is important to ensure the rest of the planning framework (the policy and rules/methods) carries through and achieves the objective. The hierarchy of planning provisions set out in the RMA, and the requirements of s 32 of the RMA make objectives the pivotal provisions in RMA documents. Under s 32 of the RMA, objectives are assessed against the purpose of the RMA, and the provisions that implement the objectives (the policies and the rules) are assessed for their appropriateness in achieving the objective. An objective that provides a strong imperative to act should result in policies and rules that implement that imperative. A clear objective to reduce risk should result in rules that reduce risk. The objective can influence the type of rule framework used, as an objective to reduce risk slowly over time or to reduce risk immediately are implemented by different rule frameworks.

Consideration should be given to whether flexibility is the appropriate approach for the legislation and national policy direction to take in the context of reduction of natural hazard risk. Flexibility results in outcomes for risk that vary across the country. While it can be argued that this is allowing for region-specific responses to region-specific hazard issues and is in line with the RMAs devolved decision-making and the concept that decisions should be made as close as possible to those affected by them, the issue is not that simple. The management of existing uses to reduce risk is a complex matter. It faces significant challenges, including a lack of understanding of the concept of risk and how to reduce it, entrenched concepts of the protection of private property ‘rights’, confused language and direction in the RMA, overlapping jurisdictions for hazard management between regional councils and TAs, and a mismatch between where the power lies to make the rules (regional councils) and the understanding of how these rules work (TAs), to highlight a few. This complexity puts the issue of managing existing uses to reduce hazard risk in the ‘too hard’ basket. Clear and strong direction is needed in the face of this level of complexity. An outcome of risk reduction at the national level would provide an imperative to act.

6.3.2 Imperative for Regional Councils

We recommend that an outcome for risk reduction should be accompanied by direction on which authority is responsible for achieving it. We have highlighted that the RPS is a key tool for managing existing uses to reduce natural hazard risk; and it is regional rules that are

required to achieve an outcome of risk reduction. Regional councils promulgate RPSs and regional rules, so regional councils are key actors in this field.

There is no imperative for regional councils to act to reduce natural hazard risk in the RMA. There is no specific directive in the RMA that joint management between regional councils and TAs should occur for the management of natural hazards, and no clear statement that a regional council is to lead natural hazards management. While some regional councils are acting by promulgating RPSs that include direction on the management of existing uses to reduce risk, these are the minority. We suggest that if regional councils were mandated under the RMA, national policy statement or equivalent, we would see more action to reduce risk in RMA plans.

7.0 CONCLUSIONS AND RECOMMENDATIONS

We have undertaken interviews with RMA practitioners, analysed RPS documents and the planning system under the RMA, including governance arrangements, and applied legal analysis in order to better understand the tensions between managing existing uses and reducing risk to existing developments under the RMA. Our overall conclusion is that it is possible to use the RMA to implement a policy to reduce natural hazard risk in most circumstances. However, there is considerable uncertainty around the ability of local authorities to completely extinguish existing uses and thereby achieve immediate (or complete) risk reduction. This is in part due to a lack of judicial commentary on the operation of s 85 of the RMA in the particular circumstance of reducing risk to existing developments.

We have identified reasons why it is uncommon to see rules that reduce risk to existing developments by managing existing uses in regional plans and identified options available under the RMA for overcoming hurdles to reduce risk. These reasons and options fall into four themes: (i) fundamental concepts of risk and existing uses and how these are dealt with under the RMA, (ii) the structure and intention of RMA policy documents, (iii) clarity of roles and responsibilities through governance arrangements under the RMA, and (iv) the practicalities of how policies and rules to reduce risk through managing existing use meet with the checks and balances established by the RMA for policy and rule development.

It is important to realise that in a situation where existing communities face natural hazard risk that has increased or is increasing, local authorities are not merely driven by a requirement to respond to the content of the RMA, but need the RMA to provide them with the tools and the guidance to act in a way that their obligations to community wellbeing and safeguard demand. We have identified issues that affect local authority understanding, ability, and imperative to act under the RMA. To improve the viability for local authorities to pursue a policy to reduce risk through the management of existing uses, we recommend practice and implementation issues are addressed, that legislative reform is considered, and identify some key areas for further research. We also identify the steps that local authorities can and should take under the current system to progress action in this area.

7.1 Improving Practice and Implementation

We recommend the following issues of practice and implementation are addressed:

a. **Education and capacity building** for those working under the RMA (council staff, decision-makers, consultants, lawyers, engineers and others) on:

i. Key concepts of natural hazard risk and risk reduction, including climate change effects, and how policy approaches under the RMA affect risk outcomes.

Understanding of the changing nature of risk to existing developments is critical, as is an understanding of the concept of changing existing and established uses to reduce risk (rather than just an understanding of how to manage risk to future developments).

ii. Land use planning for reduction of risk to existing developments, for those working at the regional level and/or unitary authorities.

Particularly, a greater understanding of the spectrum of rule frameworks for managing existing uses to achieve risk reduction. This should include how different combinations of activity status, consent conditions and consent durations can be used to achieve either gradual or immediate risk reduction, either with certainty or flexibility.

Education and capacity building activities could be led by Ministry for the Environment as the administrators of the RMA (and which provides the Making Good Decisions programme for RMA hearings commissioners), national industry bodies such as the New Zealand Planning Institute (which runs a continuing professional development programme) and Local Government New Zealand, and/or by education institutes as part of planning, legal or related qualifications.

b. Encouragement of strong coordination and collaboration between regional councils and TAs on natural hazard management, and particularly for the reduction of risk to existing developments. This should include collaboration on outcomes sought for risk reduction in the region, and on policy and rule frameworks to achieve the outcomes, including regional land use and district subdivision rules, and TA application of s 10.

There are several ways this could be achieved, including through directions in an NPS or national planning standard (both of which are promulgated by MFE). MFE, as administrator of the RMA, could lead collaborative practices between regional councils and TAs. Local authorities within a region could learn from other regions by sharing experiences of successful collaborations between the two levels of government, supported, for example, by Local Government New Zealand.

c. Development of a national planning document under the RMA for the management of natural hazard risk

This could be either an NPS, national environmental standard, or through use of national planning standards (all of which are promulgated by MFE). It is essential that such a document provides a clear objective or outcome for reduction of risk to existing developments. A change in the current flexible approach is required to achieve consistent outcomes for risk reduction. The relative success of the NZCPS in influencing the creation of rules at the coast that make small inroads towards risk reduction should be replicated for all natural hazards, but with a stronger and more directive policy framework than currently included in the NZCPS, to be more efficient and effective at achieving outcomes.

d. **National level development of implementation tools and frameworks** that are needed to support the use of the RMA to manage existing uses to reduce risk.

These include tools and frameworks relating to compensation, infrastructure, how risk is assessed, how levels of risk trigger actions, and public engagement on risk. Some of these issues, such as those related to risk assessments, could be addressed in the national document recommended in (c) above, but others, such as compensation, are likely to require additional frameworks and/or tools.

7.2 Recommendations for Legislative Change

We recommend that the following legislative changes are considered:

e. **Clarification of the operation of s 85** of the RMA in the case of extinguishment of existing uses for reduction of natural hazard risk to existing developments, including:

   i. Consideration of the ability of the holder of an interest in land to frustrate a policy of managed retreat by refusing consent to an acquisition, where the rule renders the land incapable of reasonable use and is unfair and unreasonable.

   ii. Whether the option of extinguishment of existing uses should be available in advance of the risk becoming significant, and changes needed to s 85 to allow this to happen. This is particularly important in the circumstances of the inevitable impacts of sea level rise, the magnitude and timing of which is uncertain, and which may not be considered a significant risk.

   iii. Consideration of whether the complexities of these issues require a bespoke piece of legislation that addresses both the power to extinguish existing uses and other maters including appropriate compensation and funding.

f. **Changes to the language of the RMA** to provide a consistent narrative on addressing natural hazard risk.

   These changes should clarify the place of 'reduce' among (or instead of) 'avoid and mitigate'. The stronger the direction in the legislation, the better. This would need careful consideration as there are several sections of the RMA to be considered. We offer three 'starting points' for this consideration:

   i. Make a distinction in the RMA between the 'management' of risk to future developments, and the 'reduction' of risk to existing developments.

   ii. Add a second limb to s 6(h) of the RMA so that reduction of significant risk to existing developments is to be achieved as part of the management of significant risk.

   iii. Add 'risk' and 'reduction' to ss 30 and 31 and consider the appropriateness of retaining 'avoid and mitigate'.

g. **Development of a statutory requirement to act**, (rather than just an ability) for regional councils or TAs to reduce risk to existing developments through the management of existing uses.

   This requirement should clearly be assigned to one level of local government, either regional councils or TAs. We suggest further consideration of which level would be most appropriate, as our research has identified the issue and current options to overcome it but has not gone as far as to investigate the implications of assigning a statutory requirement to one level over the other. We note that:

   i. Assigning a requirement to act to regional councils would leverage existing tools within the RMA, being the RPS and regional rules, to play a greater role in risk reduction. We recommend that if the requirement is assigned to regional councils, significant support, including through the education and capacity building measures identified above, is provided.

ii. If TAs are assigned the requirement to act, a change to s 10(4) of the RMA to also exclude land use controlled under s 31 (district rules for natural hazard management), as well as under s 30(1)(c) (regional rules) would support this change. However, such a change to s 10 alone would not provide a requirement to act (it would just provide an ability), would not address the governance issues we have identified, and the potential for unintended consequences would need to be carefully considered.

iii. If joint management of this issue is intended, then we recommend that the RMA is changed to clearly mandate this, and that this is also supported by implementation measures.

We recommend that any changes to the RMA are accompanied by substantial guidance on how they are to be implemented.

7.3 Key Areas for Further Research

We consider that further research would be helpful to enhance understanding of two related issues:

h. The implications of our findings for adaptive planning processes such as DAPP that seek to plan for adjustments to changing levels of risk in the future. Particularly, what the implications might be for implementation of an option of complete extinguishment of existing uses to reduce risk under the RMA, in advance of the risk become significant.

i. How existing uses established by resource consent can be managed to reduce risk to existing developments, and consideration of whether the existing provisions regarding the modification of resource consents are likely to cause problems in practice or not.

7.4 Action Under the Current System

Our advice to local authorities facing the need to consider the reduction of risk to existing developments through the management of existing uses under the RMA is that there is much that can be done under the current planning system and there is no need to 'wait' for national-level direction or changes. Our key recommendation is that the use of rules to manage existing uses to reduce risk should be proactive and begun well in advance of the need for a complete withdrawal from an area.

We recommend that local authorities facing this situation look closely at:

- What is meant by reduction of risk to existing developments and the management of existing uses under the RMA, including the options for how rules can be used to achieve risk reduction outcomes.
- The hierarchy of RMA documents that applies in the region, focusing particularly on the RPS, and what changes might be necessary to these documents to ensure an objective to reduce risk to existing developments is clearly articulated through the hierarchy and roles and responsibilities are clearly set out. It is essential that the RPS provides the direction needed to make policy and rules in regional plans to reduce risk to existing developments.

- Governance arrangements between the regional council and TA, and the state of the relationship between the two levels of local government. Coordination between regional councils and TAs will result in better outcomes for reduction of risk to existing developments.
- The checks and balances established under the RMA, particularly the operation of s 85, and the requirements of s 32.

This research has looked specifically and in considerable detail at what is possible under the RMA for managing existing uses to reduce risk to existing developments. We encourage local authorities to pursue policies and rules under the RMA to achieve risk reduction where this is considered necessary, and we encourage central government to provide the tools and assistance required for local government to undertake this task.

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APPENDICES

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APPENDIX 1 STEERING GROUP

Resilience to Nature's Challenges 2017–19 contestable funding: Retreating from impending disaster – addressing existing land uses in hazard areas for managed retreat.

Steering group:

Dr Iain Dawe	Senior Policy Advisor – Hazards, Greater Wellington Regional Council
Jeff Farrell	Manager– strategic projects & development and compliance, Whakatāne District Council
Julia Harker	Principal Policy Analyst, Auckland Council
Dr Judy Lawrence	Senior Research Fellow Climate Change Research Institute, School of Geography, Environment and Earth Sciences, Victoria University
Dr Wendy Saunders	Senior natural hazards planner, GNS Science
Dan Zwartz	Senior analyst climate change, Ministry for Environment

APPENDIX 2 LIST OF INTERVIEWS

A low risk ethics notification was provided to the Massey University Human Ethics Committee for the interviews (Ethics Notification Number: 4000019501). The following statement is included as a result of the notification: *This project has been evaluated by peer review and judged to be low risk. Consequently, it has not been reviewed by one of the University's Human Ethics Committees. The researchers named in this document are responsible for the ethical conduct of this research. If you have any concerns about the conduct of this research that you want to raise with someone other than the researchers, please contact Dr Brian Finch, Director (Research Ethics), email humanethics@massey.ac.nz.*

All interviewees were invited to voluntarily participate and were recruited to speak from their knowledge as professionals. Interviewees were advised at the start of the interview that the interviews were being conducted to understand the range of opinions and experiences; names of individual participants would be kept confidential, and interviewees were advised that they would not be quoted without permission. Agreement to record the meetings was sort on the basis that this was to support note taking, and that recordings would be securely managed and disposed of. Table A2.1 lists the roles and organisations of those who participated in the interviews.

Table A2.1 List of formal interviews.

Date	Type	Organisation (roles)
March 2018	Individual	Bay of Plenty Regional Council (regional planner)
June 2018	Group	Christchurch City Council (surface water planner, senior policy planner, team leader resource consents)
	Group	Environment Canterbury (integrated planning team)
	Individual	Environment Canterbury (consents team leader)
	Individual	Dunedin City Council (senior policy planner)
	Individual	Otago Regional Council (manager policy)
	Group	Otago Regional Council (planning and development Otago CDEM, acting natural hazards manager, policy planner, acting manager science team)
July 2018	Group	Greater Wellington Regional Council (environmental policy team leader, senior policy advisor, hazards, flood protection)
	Group	Wellington region territorial authorities (policy manager, consultant planner, policy planner)
	Group	Nelson City Council (group management, environmental management, team leader planning, manager environment, principal planner, planning advisor hazards)
	Group	Tasman District Council (hazards scientists, coastal consents planner, land use consents team leader, LIM officer, urban and rural regional policy, natural hazards policy, principal planner, regional consents planner, strategic infrastructure planners)

APPENDIX 3 REVIEW OF REGIONAL POLICY STATEMENTS

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
Bay of Plenty (2016)	Objective 31 Avoidance or mitigation of natural hazards by managing risk for people's safety and the protection of property and lifeline utilities	Policy NH 3B, 4B, 5B, 12A = use of the term 'reduce'	Key for reduction: - City/district and regional plan implementation (phased) - resource consents, notices of requirement and when changing, varying, reviewing or replacing plans.	Land use control for hazards assigned to both TAs and regional council, except in the CMA. (Policy NH 14C) Note that right to extinguish existing use rights sits with the Regional Council.	Strong risk reduction focus
Canterbury (2013)	Objective 11.2.1 Avoid new subdivision, use and development of land that increases risks associated with natural hazards 11.2.2 Adverse effects from hazard mitigation are avoided or mitigated.	Use of avoidance, not reduction	N/A to reduction (but incl: obj, pols, methods for critical infrastructure, provide and make available NH info)	RC = 100-year coastal erosion, areas subject to sea level rise. joint responsibility in areas subject to seawater inundation –RC non-regulatory methods, TA methods including rules	Avoid or mitigate where the risk from natural hazards is assessed as unacceptable
Chatham Islands (2018)	Obj 4.8.1 To avoid or mitigate the adverse effects	Pol. 4.8.1.1 Use, devt and subdivision should not occur in areas prone to hazards unless the hazard can be mitigated	N/A to reduction (but incl. rules, consent conditions, information)	Unitary authority, so no statement necessary.	Avoid or mitigate

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
Hawkes Bay (Regional Resource Management Plan 2006, Ch3 repub 2014)	Objective 31 The avoidance or mitigation of the adverse effects of natural hazards on people's safety, property, and economic livelihood.	Policy 55 – use of non-reg methods as the principal means of addressing hazard avoidance and mitigation	N/A to reduction (but incl: Liaison with territorial authorities, works and services, prioritising areas at high risk from NH)	RC = beds of rivers, lakes and wetlands, and CMA, and TAs all other land.	Avoid, remedy or mitigate
Manawatu-Whanganui (2014)	Objective 9-1: Avoid or mitigate the adverse effects of NH	Policy 9-4: manage future development and activities in areas susceptible to NH events in a manner which: - avoids or mitigates risk - is unlikely to cause a significant increase in the scale and intensity of NH events.	N/A/ to reduction (but incl: research, info and advice	RC = beds of rivers, lakes and wetlands, and CMA, and TAs all other land.	Avoid or mitigate
Northland (2016)	Objective 3.13: The risks and impacts of natural hazard events (including the influence of climate change) are minimised by: (f) Promoting long-term strategies that reduce the risk of natural hazards impacting on people and communities	Policy 7.1.3: In coastal zones potentially affected in next 100yrs, redevelopment or changes in land use that reduce the risk of adverse effects from coastal hazards are encouraged Policy 7.1.4: In 10-year and 100-year flood hazard areas and	Method 7.1.7(3): District councils shall set out rules in district plans classifying the following as prohibited or non-complying activities: (a) New subdivision proposals that do not comply with policy 7.1.3. Method 7.1.7(8): Regional council land use consent required for repairs or reconstruction of buildings that	Method 7.1.7(8) explanation identifies ability of regional council to extinguish existing use rights. Regional council to investigate transferring its functions back to the relevant district council. Regional council responsibilities = CMA, beds of rivers, lakes and other water bodies. Where buildings have been materially damaged in a	Risk reduction focus – primarily in flood prone and coastal hazard zones. Clear recognition that extinguishing existing uses/managed retreat a future possibility.

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
		coastal hazard areas, managed retreat noted as a mitigation measures to reduce natural hazard risk to existing development	have been damaged by a NH event (link to existing use rights) Method 7.1.9(3): Regional and district councils shall, in consultation with affected communities, investigate and initiate methods to reduce the risk to existing development on land prone to NH, incl. property acquisition	10-year flood or high-risk coastal hazard area. All other land and surface water in lakes and rivers	
Otago (operative 14 Jan 2019)	Objective 4.1 Risks that natural hazards pose to Otago's communities are minimised Objective 4.2 Otago's communities are prepared for and able to adapt to the effects of climate change	Policy 4.1.7 – reducing existing NH risk incl. relocation Policy 4.2.2 Encourage activities that assist to reduce or mitigate the effects of climate change	Method 4.2 City and district councils to implement policies by requiring site specific investigation where there is limited information available on natural hazard or climate change risk or effects; b. Requesting the regional council develop a regional rule for the purpose of extinguishing existing use rights under Section 10 of the RMA to address specific natural hazard risk. Method 6.1	Method 2.3 Regional council may, at the request of city or district councils: 2.3.7 Make a regional rule for the purpose of extinguishing existing use rights under Section 10 of the RMA to address natural hazard risk; 2.3.8 Delegate the administration of that regional rule to the city or district council Regional council will control the use of land for the management of NH in the beds of rivers, lakes and wetlands, and the CMA.	Strong risk reduction focus - Minimise NH risk, reduce existing NH risk. Clear recognition that extinguishing existing uses/managed retreat a future possibility

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
			Devt. of non-RMA natural hazard strategies and community relevant responses	City and DC = management of NH outside the beds of rivers, lakes and wetlands or the CMA.	
Southland (2017)	Objective NH.1 Communities becoming more resilient The risks from the effects of natural hazards are understood and avoided, remedied or mitigated.	Policy NH.4 Avoid sig. risk from NH by adopting precautionary approach, mitigate effects, undertake physical works to reduce NH effects Policy NH.5 Avoidance of new subdivision and devt in areas at sig risk from NH	N/A to reduction (but incl. research and investigation, information sharing etc)	RC = obj, pol, rules for CMA, beds, Southland Flood Control Management Bylaw coverage; obj and pols only for natural hazards on all other land. Shared responsibility with TA for Obj and pols for all hazards, but RC has rules only for flood control area.	Avoid areas at high risk, mitigate in other areas
Taranaki (2010)	Objective 1 To avoid or mitigate natural hazards within the Taranaki region by minimising the net costs or risks of natural hazards to people, property and the environment of the region	Policy 1 Reduce the susceptibility of the Taranaki community and environment to natural hazards by improving community awareness, responsibility and planning for the avoidance and mitigation of natural hazards.	N/A to reduction (but incl. regional and district plans, provision of advice and hazard info)	RC = beds of rivers, lakes and wetlands, and CMA, and TAs all other land.	Avoid or mitigate

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
Waikato (2016)	Objective 3.2.4 The effects of natural hazards on people, property and the environment are managed by: b) reducing the risks from hazards to acceptable or tolerable levels	Policy 13.1 NH risk managed to ensure it does not exceed an acceptable level, new intolerable risk is not created, existing intolerable risk is reduced to tolerable or acceptable Policy 13.2 Activities are managed to reduce the risks from NH to an acceptable or tolerable level Policy 6.2.4 Coastal devt setback	Use of risk management framework. ID options for reducing risks to communities to an acceptable level and the relative benefits and costs. Establishment of a regional natural hazards forum.	Regional council to take the role of managing existing structures in primary hazard zones, but to avoid overlap regional council will investigate transferring its functions back to the relevant territorial authority.	Intention to reduce intolerable risk to tolerable or acceptable levels
Wellington (2013)	Objective 19 The risks and consequences to people, communities, their businesses, property and infrastructure from natural hazards and climate change effects are reduced.	Policy 29: Avoiding inappropriate subdivision and development in areas at high risk from natural hazards – district and regional plans Policy 51: Minimising the risks and consequences of natural hazards – consideration	N/A to reduction (but incl. regional and district plans, provision of advice and hazard info)		Avoidance of areas at high risk, minimisation of risk. Reduction is not the focus.

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
West Coast (notified 2015 – at hearing of further submissions stage)	1. The risks and impacts of natural hazard events on people, communities, property, infrastructure and our regional economy are avoided or minimised.	1. Reduce the susceptibility to natural hazards by improving planning, responsibility and community awareness for the avoidance and mitigation of natural hazards. 4. The appropriateness of works and activities designed to modify natural hazard processes and events will be assessed by reference to: d) The effectiveness of the works or activities and the practicality of alternative means, including the relocation of existing development or infrastructure away from areas of natural hazard risk.	N/A to reduction (but incl. regional and district plans)	RC = beds of rivers, lakes and wetlands, and CMA, and TAs all other land.	Avoid and minimise used in the objective, reduce in the policy. Reduction used in terms of future potential risk. More of a holding the line stance than reducing the level of existing risk.
Auckland (2016) Unitary Authority	B10.2.1. Objectives Risks are not increased in existing areas; new development avoids the creation of new risks. The effects of climate change on natural hazards is recognised and provided for.	B10.2.2. Policies (9) Encourage activities that reduce, or do not increase, the risks posed by natural hazards, including any of the following: (b) managing retreat by relocation, removal or abandonment of structures	Not specified	Unitary authority, so no statement necessary.	No new risk created, and existing risk is not increased

RPS	OBJECTIVES	POLICIES	METHODS	RESPONSIBILITY	POLICY INTENT
Gisborne District (2017) Unitary Authority	B5.1.2 Objectives A pattern of human settlement that: Avoids or mitigates the risk and doesn't worsen the effects of NH	B5.1.3 Policies Do not induce or worsen the impacts of natural processes	N/A to reduction (but incl. regional and district plans, provision of advice and hazard info)	Unitary authority, so no statement necessary.	Avoid or mitigate
Marlborough District (1995) Unitary Authority	7.4.2 Objective Avoid or mitigate potential effects	7.4.3 Policy Restrict activities in areas on known natural hazard, or which would increase NH risk	N/A to reduction (but incl. regional and district plans, provision of advice and maintain register of hazard info)	Unitary authority, so no statement necessary.	Avoid or mitigate
Nelson City (1997) Unitary Authority	DH2.2 Objective Minimise adverse effects of NH	DH2.3 Policies Prohibit devt in hazard prone areas where effects cannot be avoided or adequately mitigated.	N/A to reduction (but incl. regional and district plans, provision of advice and hazard info)	Unitary authority, so no statement necessary.	Avoid or mitigate
Tasman District (2001) Unitary Authority	Obj 11.1 Reduced risks arising from flooding, erosion, inundation and instability and earthquake hazards	Policy 11.1 The Council will seek to reduce risks to the use and development of land subject to NH.	N/A to reduction (but incl. research, regional and district plans, provision of advice and hazard info)	Unitary authority, so no statement necessary.	Avoid or mitigate

APPENDIX 4 RISK REDUCTION IN THE CDEM ACT

The Civil Defence and Emergency Management Act 2002 (CDEM Act) is particularly important to risk reduction. The CDEM Act requires that a risk management approach be taken when dealing with natural hazards (Saunders et al. 2007). It is framed around the 'four Rs' of reduction, readiness, response and recovery (LGNZ 2014). One of the purposes of the CDEM Act is to "encourage and enable communities to achieve acceptable levels of risk", including by "identifying and implementing cost-effective risk reduction" (s 3(b)(iii) of the CDEM Act).

The National Civil Defence and Emergency Management Plan (the NCDEM Plan, National Civil Defence Emergency Management Plan Order 2015 (LI 2015/140), 2 June 2015), prepared under the CDEM Act and promulgated by order-in-council, defines the 'reduction' R as follows: *identifying and analysing risks to life and property from hazards, taking steps to eliminate those risks if practicable, and, if not, reducing the magnitude of their impact and the likelihood of their occurrence to an acceptable level* (clause 2(1)(a) of the NCDEM Plan). This definition incorporates the idea of both eliminating and reducing risk, giving preference to eliminating risk, and then reduction if elimination is not achieved. The Oxford Dictionary (https://www.lexico.com/en/definition/eliminate) defines 'eliminate' as "completely remove or get rid of (something)". If complete removal is not possible, the CDEM Act definition suggests reduction to acceptable levels is required. The use of 'reduction' in this way suggests it is not the same as complete removal or 'elimination'. This supports the suggestion in section 2.4 of this report that 'reduction' is similar to 'mitigation' in the RMA.

Prior to 2015, the NCDEM Plan did not address risk reduction (LGNZ 2014). The Guide to the National Plan (MCDEM 2006) indicated that reduction could be achieved through other pieces of legislation, including the RMA, but lacked explanation on how this could be achieved. This led to calls for stronger linkages between the CDEM Act and the RMA, and the suggestion that Regional Policy Statements (prepared under the RMA) could be used to fill the reduction 'gap' in the legislation (Saunders et al. 2007).

Part 6 of the 2015 NCDEM Plan now specifically addresses risk reduction. Under the NCDEM Plan, the objective of risk reduction is "to take preventative steps to avoid or mitigate adverse consequences" (clause 87 of the NCDEM Plan), and the principles of reduction include reducing risks to communities by (among things) "modifying factors that affect exposure and vulnerability to consequences before, during and after an emergency" (clause 88 of the NCDEM Plan). Part 6 identifies 15 other pieces of legislation that address risk reduction, including the RMA (clause 89 of the NCDEM Plan). A key premise of Part 6 is that "every person, community, organisation, and agency has a role to play in reduction" (clause 88 of the NCDEM Plan). Using the RMA to achieve risk reduction through land use planning, which can modify exposure and vulnerability of communities to consequences of natural hazards, is a legitimate exercise that is consistent with the CDEM Act and NCDEM Plan.

APPENDIX 5 THE HISTORY OF EXISTING USE PROTECTION UNDER NEW ZEALAND PLANNING LAW

The detailed history of existing use protection under New Zealand planning law is interesting but outside the scope of our report. The first planning legislation in New Zealand was introduced in 1926, however, it made no provision for the recognition of existing uses. It did provide for compensation to be paid to a person who was seriously affected by any rules in a district plan (and it also provided a payment for betterment from those who benefited from those rules) (Palmer 2015 at 3.67).

The first provision recognising existing activities and providing for continuation of them (subject to some limits) was the Statues Amendment Act 1941, s 76. Section 76 was a penal section that made it an offence to use any building or land in a manner not in conformity with the town planning scheme. However, the section did not apply in relation to an existing use or anything done pursuant to a consent given under s 77 of the Act.

Section 6 of the Town Planning Amendment Act 1948 is also relevant. It introduced a provision controlling new works on land, however it did not apply to existing uses (or to anything done pursuant to a consent given under s 77 of the 1941 Act) (for a review see *One Tree Hill Borough Council v Lowe HC Wellington* M270/1984, 25 March 1986 at 4–5). In 1948 councils were also empowered to take land compulsorily if necessary, to terminate any existing use (subject to the payment of compensation) (Palmer 1984 at 16).

The first Act to make specific provision for existing uses was the Town and Country Planning Act 1953 apparently as a "pragmatic acceptance of the reality that existing activities and non-complying properties could be allowed to continue, subject to no further detriments arising to the environment" (Palmer 2015 at 3.67). Both this Act, and its successor (the Town and Country Planning Act 1977) empowered local authorities to compulsorily acquire non-complying properties, although funding limits and political realities meant that this power was rarely exercised. (Palmer 2015 at 3.67).

Under the 1953 legislation, existing uses were still provided for in the penal section of the Act (see s 38A and *Lendich Construction Ltd v Waitakere City Council* EnvC A077/99, 20 July 1999) (essentially the provision exempted existing uses from the offence provisions).

Wording that is very similar to s 10 of the RMA had been settled on by about 1980. However, a crucial distinction between the Town and Country Planning Act 1977 and the RMA provisions is that under the RMA it is the **effects** of the use that are measured against the lawfully established use, whereas under the old legislation a comparison of the uses themselves is prescribed (see the Town and Country Planning Act 1977, s 90(1) and *Russell v Manukau City Council* [1996] NZRMA 35).

APPENDIX 6 SECTION 85 OF THE RESOURCE MANAGEMENT ACT 1991

85 Environment Court may give directions in respect of land subject to controls

(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.

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

(a) in a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or

(b) in an application to change a plan made under clause 21 of Schedule 1.

(3) Subsection (3A) applies in the following cases:

(a) on an application to the Environment Court to change a plan under clause 21 of Schedule 1:

(b) on an appeal to the Environment Court in relation to a provision of a proposed plan or change to a plan.

(3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—

(a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:

(i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court:

(ii) acquire all or part of the estate or interest in the land under the Public Works Act 1981, as long as—

(A) the person with an estate or interest in the land or part of it agrees; and

(B) the requirements of subsection (3D) are met; and

(b) in the case of a regional coastal plan or proposed regional coastal plan,—

(i) report its findings to the applicant, the regional council concerned, and the Minister of Conservation; and

(ii) include a direction to the regional council to modify, delete, or replace the provision in the manner directed by the court.

(3B) The grounds are that the provision or proposed provision of a plan or proposed plan—

(a) makes any land incapable of reasonable use; and

(b) places an unfair and unreasonable burden on any person who has an interest in the land.

(3C) Before exercising its jurisdiction under subsection (3A), the Environment Court must have regard to—

(a) Part 3 (including the effect of section 9(3); and

(b) the effect of subsection (1) of this section.

(3D) The Environment Court must not give a direction under subsection (3A)(a)(ii) unless—

(a) the person with the estate or interest in the land or part of the land concerned (or the spouse, civil union partner, or de facto partner of that person)—

(i) had acquired the estate or interest in the land or part of it before the date on which the provision or proposed provision was first notified or otherwise included in the relevant plan or proposed plan; and

(ii) the provision or proposed provision remained in substantially the same form; and

(b) the person with the estate or interest in the land or part of the land consents to the giving of the direction.

(4) Any direction given or report made under subsection (3A) has effect under this Act as if it were made or given under clause 15 of Schedule 1.

(5) Nothing in subsections (3) to (3D) limits the powers of the Environment Court under clause 15 of Schedule 1 on an appeal under clause 14 of that schedule.

(6) In this section,—

provision of a plan or proposed plan does not include a designation or a heritage order or a requirement for a designation or a heritage order

reasonable use, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.

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