

29 March 2021

By Email: George.Swanepoel@fndc.govt.nz

Far North District Council
Private Bag 752
Kaikohe
Northland 0405

ATTENTION: George Swanepoel

LEGAL OPINION - COASTAL EROSION AND LIABILITY ISSUES

We refer to your email of 12 March 2021 seeking our advice in relation to the Far North District Council's (**Council**) liabilities around coastal erosion.

YOUR QUESTIONS

1. You would like our advice on the following:
 - (a) Where Council needs to protect its own assets:
 - (i) From works such as seawall constructed legally or illegally on neighbouring properties which result in scouring and damage to council reserves, property and assets; and
 - (ii) Building seawalls to protect council owned property and assets.
 - (b) Where Council consents to third parties building seawalls:
 - (i) On their own land; and
 - (ii) On their own land and Council granting a licence to occupy for a seawall to be built by the third party on council reserve or land.
 - (c) Council assistance is requested and granted to build a seawall on private land but with a community benefit.
 - (d) Council's refusal to grant consent to a seawall being built.

EXECUTIVE SUMMARY

2. Council is not obliged by a common law duty to protect the coastline from natural coastal erosion by building hard protection structures (or seawalls).¹ However, this does not dispose of Council's duties and responsibilities under the Resource Management Act 1991 (RMA) and Local Government Act 2002 (LGA) to promote the environmental well-being of communities, including by managing risks from coastal erosion and other natural hazards.
3. New Zealand environmental planning is moving away from using hard protection structures to manage the effects of natural hazards such as coastal erosion. This is because of the long-term effects caused by these structures which pose a threat to unprotected shorelines further down the coast. Accordingly, building new seawalls is discouraged under national planning instruments. The preferred approach to managing the effects of coastal hazards such as coastal erosion is early education and engagement with the community and the protection, restoration or enhancement of natural defences.
4. The liability for a seawall would, in most cases, fall on the owner of the land upon which the structure is built. There may be resource consents, building consents and / or covenants attached to a structure which formally impose liability on a particular party. In the context of reserves or public land, the administering body will generally be liable for the maintenance or repair of a structure on its reserve, however, liability can vary, so we encourage Council to assess each structure on a case by case basis.

ANALYSIS

What are Council's liabilities for works such as a seawall constructed legally or illegally on neighbouring properties which result in scouring and damage to council reserves, property and assets?

5. There is a general duty of care on an occupier of land, on which a hazard to a neighbour arises, to remove or reduce the hazard. The standard of care is to require the occupier of the hazardous land to do what is reasonable to manage the risks of the hazard having regard to the circumstances of each individual.²
6. This duty of care, however, only applies in circumstances where the hazard is *not* a product of natural causes. It does not, for example, impose an obligation on a landowner to establish, extend or maintain its coastal protection works to provide support to a neighbour's land where it is subject to natural coastal erosion. The High Court has

¹ *Falkner v Gisborne District Council* [1995] 3 NZLR 622, at page 35.

² *Goldman v Hargrave* [1967] 1 AC 645 (PC) and applied by the High Court in *Atlas Properties Ltd v Kapiti District Council* (HC Wellington CP 172/00 19 December 2000 Durie J).

observed that, given the extent of coastal erosion in New Zealand, imposing such an obligation would have widespread ramifications for councils and landowners in the country.³ Rather, the duty of care would require a landowner not to abandon an existing seawall in a condition that created a hazard to persons or other property, and to take reasonable steps if the seawall were failing and / or became hazardous or unsafe.

7. If this duty of care is established, then Council could require the neighbouring landowner(s) to adequately repair their coastal defence structure(s) to reduce, for example, the presence of hazardous broken rock, or require the structure(s) to be removed all together if its condition were creating a hazard. This could be achieved by issuing a notice in accordance with section 125(1) of the Building Act 2004 on the basis that the structure is likely to cause injury, death, or damage to another property.⁴ The private landowner would bear the burden of compliance. However, Council would need to be certain that the landowner does, in fact, own the structure to which the hazard relates.
8. The maintenance, repair, or removal of permitted hard protection structures are permitted activities under the Northland Regional Council Proposed Regional Plan (the **PRP**), provided the works comply with the permitted activity standards.⁵ The activity is otherwise restricted discretionary.

What are Council's liabilities around building seawalls to protect Council owned properties and assets?

9. Territorial authorities in New Zealand have traditionally managed the threat posed by natural coastal erosion by building hard protection structures. However, these works often do not achieve, on a long-term basis, what owners expect them to achieve. They can create adverse effects on the environment's natural coastal processes, coastal amenity, and other properties further down the coast; and they can be hugely expensive to ratepayers to build and maintain.
10. Under the PRP , the erection of a new hard protection structure (or seawall) is a discretionary activity provided it is not located within a protected mapped area.⁶ The same activity status applies where a proposed seawall is directly associated with significant or

³ *Knowles v Manukau City Council* (HC) Auckland CIV-2004-404-532, 30 November 2004.

⁴ See definition of 'Dangerous Building' at section 121 of the Building Act 2004.

⁵ Northland Regional Council Proposed Regional Plan, see C.1.1.8, permitted activity standards include; 10 working days notice to Regional Council's Compliance Manager; compliance with conditions of C.1.8; no increase in length, width or height; and the structure is authorised (unless the structure is being removed).

⁶ Northland Regional Council Proposed Regional Plan, see C.1.1.22.

See also I Maps – Ngā mehere matawhenua) which includes Nationally Significant Surfbreak, or Outstanding Natural Feature in the coastal marine area, or Area of Outstanding Natural Character in the coastal marine area, or Historic Heritage Area, or Site or Area of Significance to tangāta whenua.

core local infrastructure.⁷ The activity is otherwise non-complying under the Proposed Regional Plan.⁸

11. Whilst the option is open for Council to construct a new seawall by way of regional consent, hard coastal protection structures are discouraged under policy 25 of the New Zealand Coastal Policy Statement (NZCPS). Pursuant to policy 26 of the NZCPS, “natural defences” are to be provided where appropriate. This could include the protection, restoration, or enhancement of “natural defences” such as beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes, and barrier islands, as a more appropriate means of protecting Council assets from the effects of coastal erosion.

What are Council’s liabilities where Council consents to third parties building seawalls on their own land?

12. The jurisdiction to grant consent to construct a seawall within the coastal environment lies with the Northland Regional Council. Typically, a covenant would be placed on the title of the property in question recording that the full cost of maintenance, repair, and removal (if required) of the seawall is to be borne by the landowner. The Building Act 2004 also imposes certain standards through the Building Code. Sections 71 to 74 of the Building Act address building on land subject to natural hazards (including inundation). Where a building consent has been issued under section 72 and notification given under section 73, the Council will not be liable in any civil proceedings brought by the owner of the structure in relation to damage to that structure arising from inundation⁹.
13. However, this limited protection will not apply to damage to the property of any third party arising from the construction of a seawall. Although generally the Council is not liable for actions taken in the exercise of its statutory duties under the Building Act, if damage to a third party arises from the Council acting negligently in granting a building consent or code of compliance certificate, liability could arise. The best defence against this is to undertake due diligence when assessing any application for a seawall, having particular regard to the provisions of sections 71 to 74 Building Act.

What are Council’s liabilities where consent is granted to third parties to construct a seawall on Council owned land, including reserves?

14. When a seawall is constructed by a third party on Council owned land or on a reserve, the works are generally associated with a proposed subdivision or other residential development, in which case the Building Act considerations discussed above would apply. The mere presence of a seawall on Council owned land does not, in and of itself, impose

⁷ Northland Regional Council Proposed Regional Plan, see C.1.1.23.

⁸ Northland Regional Council Proposed Regional Plan, see C.1.1.24.

⁹ Section 392(2) BA.

liability on Council to maintain, repair, and / or remove the seawall. Each privately constructed seawall would need to be assessed on a case by case basis and reviewed in light of any regional consent, building consent and any conditions affecting the structure or covenants (if any) registered against the land.

15. If Council is the administering body of a reserve upon which a third party structure is built, it has an obligation under section 23(2)(a) of the Reserves Act 1977 (**RA**) to protect the features of that reserve to the extent compatible with the its principal or primary purpose. This requires identification of such features and specific actions to ensure that those features are appropriately managed and protected from damage or destruction. If the reserve is a local purpose esplanade reserve, then maintenance, repair, or removal of the seawall would have to accord with any reserve management plan and the primary purpose of the reserve. For example, if a local purpose reserve were created for the purpose set out at section 229(a)(v) of the Resource Management Act 1991 (**RMA**) (mitigating natural hazards, such as coastal erosion), and the installation, maintenance or repair of the seawall is a means of achieving that purpose, then the Council ought not to authorise the removal of the seawall if doing so would derogate from that purpose. Likewise, if maintenance or repair of the seawall would promote the primary purpose of the reserve, then the Council ought properly to ensure it is maintained.
16. The duty to maintain, repair, or remove a seawall constructed on council owned land would only fall on the third party if Council has imposed a legal obligation on that third party to do so at the time of consent. In the context of a reserve, the duty would generally fall on the administering body, although we encourage Council to review each structure on a case by case basis.

What are Council's liabilities if Council assistance is requested and granted to build a seawall on private land but with a community benefit?

17. Any common law duty on Council to protect the coastline is not an absolute duty in the sense of providing coastal protection structures at the request of the community.¹⁰ This was confirmed by the High Court in *Falkner v Gisborne District Council* [1995] 3 NZLR 622 which relates to a decision by the Gisborne District Council to discontinue coastal protection works that it had historically established and maintained for residential properties.
18. Despite this, Council must adhere to the following statutory duties and responsibilities when dealing with coastal hazards:

¹⁰ *Falkner v Gisborne District Council* [1995] 3 NZLR 622, at page 35.

- (a) To promote the environmental well-being of communities,¹¹ including by managing risks from coastal erosion and other natural hazards;¹²
 - (b) To provide and promote sustainable management of hazards, encouraging and enabling communities to achieve acceptable levels of risk by identifying, assessing, managing risks and identifying risks, monitoring, planning for emergency response and recovery;¹³ and
 - (c) To comply with a comprehensive risk management 'pathways' approach to adaptive planning for coastal hazard risks including collaborative approaches to engaging with communities.¹⁴
19. This means that Council cannot simply do nothing in response to the effect of coastal erosion on private properties generally. Council has a statutory duty to respond to the concerns of its communities about natural coastal hazards. The preferred approach to addressing these types of issues, which accords with national planning instruments, is to engage with those communities about a collaborative approach to enhance any natural defences to manage the risks of coastal hazards.
20. If there is no effective and alternative measure, then a possible approach would be for the Council to consider making an application to the Northland Regional Council for consent to construct a hard protection structure. However, this overarching responsibility to address coastal erosion issues does not imply a responsibility to respond to site specific issues to provide coastal protection in any particular case.

What are Council's liabilities if Council refuses to grant consent to a seawall being built?

21. The jurisdiction to grant resource consent to build a new seawall within the coastal environment lies with the Northland Regional Council. Thus, any challenge to a decision to grant or decline consent would be dealt with by the Northland Regional Council. An application for building consent under the Building Act must be granted or refused according to the provisions of that Act, including sections 71 to 74 where relevant.

¹¹ Local Government Act 2002, sections 10 and
¹² Resource Management Act 1991, section 6(h).
¹³ Civil Defence Emergency Act 2002
¹⁴ MfE Coastal Hazards Guidance 2017.

22. Despite this, we highlight the strong emphasis in the Ministry for the Environment's Coastal Hazards and Climate Change Guidance 2017¹⁵ on community engagement when dealing with these issues. The decision to abandon coastal protection structures or decline consent to construct new structures can be highly contentious and emotive, so early education and engagement with the local community is crucial.

Yours faithfully
BROOKFIELDS



Linda O'Reilly
Partner

Direct dial: +64 9 979 2167
email: oreilly@brookfields.co.nz



Mereaira Jones
Solicitor

Direct dial: +64 9 979 2104
email: jones@brookfields.co.nz