Our advice

Prepared for Local Government New Zealand

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PRIVILEGED AND CONFIDENTIAL

Ability to limit or stop the provision of services infrastructure and potential liability consequences

Background

You have asked us to review and update our 13 February 2018 advice regarding the ability of local authorities to limit or stop the provision of services and related infrastructure in areas that may be affected by climate change natural hazards and risks.[1] Our advice also comments on the potential legal challenges and liabilities that might flow from decisions to stop or limit these services.

As with our previous advice, our analysis focuses on three key areas of local authority service provision: flood and erosion protection works, roads and bridges,[2] and three waters services (collectively referred to as "**services**").

This advice reflects the current legal position as at the time of drafting. The Government's current reform programme will alter local authorities' responsibilities moving forward, particularly the reform concerning delivery of three waters functions, resource management planning responsibilities, and more generally, the nature and purpose of local government under the Local Government Act 2002 (**LGA 02**). Specific advice may be needed which considers how those reforms impact on this advice, once they have been concluded.

Structure

Given its breadth, we have split this advice into six parts:

Part One provides a detailed background on the scope of the advice.

Part Two summarises the general statutory framework applying to local authority decision-making.

Part Three assesses local authorities' ability to cease or limit the provision of flood and erosion protection works.

Part Four assesses territorial authorities' ability to decide not to repair or maintain roads and bridges.

Part Five assesses local authorities' ability to cease or limit the

1 These impacts include sea level rise (and consequential inundation, erosion and rising ground water levels), and extreme weather events causing slips and flooding.
2 We will discuss roads and bridges together as bridges are normally on legal roads.

provision of three waters services.

Part Six considers the potential for liability to arise, if a local authority was to stop or limit the provision of services in circumstances where they were adapting to potential future risks.

Executive summary

There is general scientific consensus that climate change is likely to continue to exacerbate natural hazard risks.

Sea level rise will cause impacts such as coastal inundation, erosion and rising ground water levels. Extreme weather events will become more frequent and stronger in intensity, causing erosion, slips and flooding. It may be uneconomic and/or impracticable for a local authority to reinstate services in areas within their district/region damaged by natural hazards, or upgrade services to make them more resilient to climate related hazard risks.

The existence and extent of local authorities' powers to limit or stop the provision of services (and any associated potential liability) is a fact specific inquiry that is highly dependent upon the relevant statutory framework that empowers and/or directs the provision of that service.

Provision of flood and erosion protection works

Decision-making about the construction of coastal protection works, and the potential to cease to support such works is essentially discretionary in nature. However, there may be a duty on a local authority to at least properly consider whether the power should be exercised or cease to be exercised.

Local authorities should seek to show that they have turned their mind to climate change issues. This will assist in defending a decision either not to continue supporting coastal protection works in any particular case, or to maintain an existing level of service in the knowledge that the works will ultimately become inadequate for their purpose.

Most of the decision-making factors outlined above will also apply to flood and erosion protection works under the Soil Conservation and Rivers Control Act 1941 (**SCRCA**). However, section 148(2) of the SCRCA imposes a specific form of statutory liability that may influence a regional council's decision-making in terms of stopping or limiting the provision of such works.

Other types of flood and erosion control works may be undertaken by local authorities under the general power of competence under the LGA 02 (as opposed to the SCRCA).[3] Again, most of the decision-making factors discussed in relation to coastal protection works will apply in this instance.

Provision of roading services or infrastructure

In conferring a power to repair roads, section 319(a) of the Local Government Act 1974 (**LGA 74**) contemplates that a local authority may decide whether to continue to repair specific roads (ie. it may decide not to repair). However, the local authority must fulfil its public law responsibilities

3 Local Government Act 2002, section 12.

in making any decision of this nature, which may include "stopping" the road to comply with its statutory duty to take all sufficient precautions for the general safety of the public.[4]

There may be instances where a decision not to repair a road could be characterised by a Court as so unreasonable that no responsible local authority could reasonably decide not to repair the road. In such circumstances, there would effectively be a public law duty to act, notwithstanding that section 319(a) is expressed in empowering terms.

However, in the absence of any procedural impropriety, or a clear breach of established administrative law principles, and so long as there is robust evidence that considers alternatives and can support the prudence of the recommended option, a decision of a local authority to not undertake repair or remedial works on a public road or bridge would likely survive challenge.

Provision of three waters services and infrastructure

Territorial authorities are specifically charged with providing three water services, particularly by section 130(2) LGA 02. Section 130(2) requires that territorial authorities provide adequate or reasonably fit for purpose water services across their district. This responsibility should extend to making any relevant upgrades to the relevant infrastructure to deal with natural hazard risks, or providing alternatives in circumstances where repair of upgrading work is not possible.

Section 131 provides a limited exception to the obligation in section 130(2), allowing local government organisations to close down or transfer a water service in certain circumstances. Apart from procedural requirements (consultation, publicly available information and a referendum), the key requirement is that there must be 200 or fewer persons to which the water service is delivered and who are ordinary resident in the district, region or other subdivision.

The Three Waters reforms propose to transfer responsibility for three waters services from territorial authorities to four statutory, and public, "water service entities".[5] Assuming that Three Waters reform proceeds in its current form, up until 1 July 2024 territorial authorities will be required to continue fulfilling their three waters (and other) responsibilities under the LGA, subject to only a few exceptions - which generally relate to facilitating the Three Water reforms. These exceptions are discussed further in a separate piece of advice prepared for Local Government New Zealand.[6]

Potential legal challenges and liabilities involved if stopping or limiting the provision of services in

A local authority's public and private law responsibilities are distinct. A person affected by the breach of a public law duty, or the exercise of a relevant statutory power, can bring judicial review proceedings seeking to have a decision quashed or revisited.

It is possible that decisions to stop or limit the provision of infrastructure services because of climate change (or other impacts) could be challenged

4 Local Government Act 1974, section 353.
5 At the time of this advice, the Water Services Entities Bill, which establishes the water services entities, has received its third reading and is now waiting for Royal assent to become law.
6 See our advice entitled: Provision of water services by local authorities until 1 July 2024, dated 14 December 2022.

adapting to future natural hazard risks

in the future in reliance on established administrative law grounds because of the financial and other implications for people and communities. A decision to stop or limit a service in breach of a statutory provision such as sections 130 or 131 of the LGA 02 would also be amenable to judicial review.

However, if a decision is made in a robust manner in compliance with a local authority's statutory decision-making responsibilities and other relevant factors, this will assist in successfully resisting such proceedings.

In order to claim monetary compensation, a plaintiff must bring a private law action for damages in tort. Such an action would usually be founded in the common law tort of negligence, but other causes of action such as nuisance, breach of statutory duty and misfeasance may also apply.

While we provide some general comment about claims for damages, it is beyond the scope of this advice to cover in any detail the precise nature of common law liability that could arise from climate change related decisions about such services.

Part One: Detailed background

Overview

1. We have proceeded on the basis that "limiting" or "stopping" services could involve deciding to cease to maintain services, physically removing them, or in the case of destruction or significant damage, deciding not to reinstate them.

2. While the focus of this advice is on climate change related hazards and risks, much of the analysis in this advice is likely to be of relevance to community assets vulnerable to natural hazards more generally.[7] In most instances, climate change is an additional matter to factor into local authorities' policy and planning for service delivery, and other policy and operational decisions.

3. The issues raised in our advice are also broadly relevant to decisions to fund and construct new infrastructure, or purchase land and assets, as well as to improve existing infrastructure. This advice provides a high-level overview of the relevant issues, especially in relation to potential liability arising from decisions to limit or stop the provision of services.

4. This advice does not:

   4.1 cover the separate potential liabilities of a local authority as the owner of the land subject to natural hazards;[8]

   4.2 directly deal with potential regulatory and informational responses (such as the LIMs) to climate change impacts; and

   4.3 consider how the impacts of climate change should be assessed when making decisions about present or future services (that being a policy matter for councils to determine).

5. It is axiomatic that local authorities need to plan for climate change both at a regulatory and policy level, as well as in terms of actual provision of climate change resilient infrastructure. This is particularly important in terms of infrastructure that is intended to be either permanent or long-lived.

6. We have focussed on three key local authority services in this advice: flood and erosion protection works, roads and bridges, and three waters services. We briefly describe the specific issues associated with these three areas below.

Flood and erosion protection works

7. Flood and erosion protection works include stop banks, groynes, coastal revetments or seawalls, and other flood protection works such

7 The ability for a council to be able to limit or stop the provision of new works in the future because of climate change (or other factors) may influence a local authority's decision to carry out such works in the first instance.

8 This is particularly relevant to coastal protection works. A territorial authority will often have esplanade reserves or other land vested in it along the coastline. It can also involve roads and reserves more generally.

as detention dams, swales and ponds.

8. The works will often involve considerable capital expenditure, and may ultimately require upgrading over time when they are located in areas that are (or could become) vulnerable to flooding and erosion.

9. These works are likely to be long-term or permanent in nature and landowners may well have made land acquisition and development decisions, and obtained consents, based on the existence of such (permanent) infrastructure.[9] To cease or limit such works in the future could have significant consequences for landowners and other members of the public.

10. Local authorities are likely to come under increased pressure to provide flood and erosion protection works to maintain the existing environment. This may include pressure to upgrade existing works to respond to climate change effects, or constructing new works to deal with increased flooding and erosion impacts.

11. Some members of the community will strongly support local authorities undertaking such works, as opposed to adopting policies and regulatory measures that implement some form of managed retreat. Such policies and measures may include managed retreat, maintaining an existing level of service that does not cater for climate change, or placing planning restrictions on new subdivision and development, and/or exercising relevant Building Act provisions.

12. Conversely, members of the community may oppose undertaking such works, on the basis that it is involves the use of council funds to benefit particular communities or persons only, and is therefore not a prudent use of ratepayer funds. The development or adoption of policies or other regulatory methods / measures that assist with the implementation of some form of managed retreat may be considered preferable.

Roads and bridges

13. It is becoming increasingly common for slips and washouts to render roads and bridges unusable (at least temporarily, and more so in certain parts of New Zealand). These events are likely to continue, and may well be exacerbated by climate change.

14. It may be uneconomic for a local authority to reinstate such services, particularly where they only serve a relatively small number of properties. A road or bridge may also be virtually impossible to reinstate on an existing alignment because of cost or geotechnical considerations.

15. The considerations for coastal protection works and three waters services may also apply. Roads are often constructed along the margin of water bodies or the coast, and can act as a risk-protection tool. Roads also often contain three waters services.

9 An example is a stop bank catering for a 100-year flood event that has enabled development beside it.

Three waters services

16. These services are integral, in particular for urban and semi-urban communities. This importance is recognised by the provisions in the LGA 02 that restrict the closure or limitation of such services.

17. Climate change could influence the delivery of three waters services in a number of ways; by necessitating upgrade works to ensure that there is capacity to deal with, for example, extreme rainfall events, increased temperatures, and sea level rise. This may impact on the ongoing viability of these services in certain areas of a district or region.

Part Two: Statutory overview

Statutory Background

18. Before assessing the specific legal principles relating to each of the categories outlined above, we outline below several statutory provisions in the LGA 02 that are likely to be common to any decision making relative to the stopping or limiting of relevant services.

19. Our previous advice considered the LGA 02 as at February 2018. Part 2 of the LGA 02 has since been amended, and this advice comments on the significance of those changes.

Purpose, role and power provisions (Part 2, LGA 02)

20. The Part 2 provisions of the LGA 02 are fundamental to local authorities' decision-making. As noted by the Supreme Court, the wide discretionary powers conferred by the LGA 02 are constrained by its statutory purpose.[10]

21. The "Better Local Government Reforms"[11] were still in force at the time of our previous advice. These reforms had the effect of shifting local authorities focus to core infrastructure activities and services, as a means of increasing fiscal responsibility. The legislative purpose as at the time of our 2018 advice, under section 10(b), was:

> to meet the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

22. The Government reinstated the well-beings in 2019, replacing section 10(b) with the following:[12]

> to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

23. Following the first reading of the Well-Being Amendment Bill, the Minister for Local Government stated:[13]

> We face serious challenges such as the impact of population growth, climate change and ageing infrastructure. A broader focus in the way councils meet the challenge of setting priorities and planning for the future is required. Reintroducing an emphasis on the four well-beings will engage councils and citizens on an intergenerational approach to improving quality of life outcomes in our towns and cities.

24. Section 10 works in tandem with sections 11 and 12. Section 11 sets out the role of a local authority, to:

    (a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and

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10 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59 at [327].
11 Local Government Act 2002 Amendment Act 2012; Local Government Act 2002 Amendment Act 2014.
12 Local Government (Community Well-being) Amendment Act 2019
13 Hon Nanaia Mahuta, "Four well-beings core to local government's role", 11 April 2018, Beehive press release. Available here.

(b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment

25. At the time of our 2018 advice, section 11A directed local authorities to have particular regard to "core services" when performing their role.[14] Section 11A was repealed in the 2019 well-being reforms, reinforcing the broader community focus envisaged for local government by the 2019 reforms.

26. Section 12 provides local authorities' with a "power of general competence", that is subject to compliance with the LGA 02 and general law. Subsections (1) – (3) read:

> (1) A local authority is a body corporate with perpetual succession.
> (2) For the purposes of performing its role, a local authority has—
> (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
> (b) for the purposes of paragraph (a), full rights, powers, and privileges.
> (3) Subsection (2) is subject to this Act, any other enactment, and the general law.

27. The introduction of a wide power of general competence within the LGA 02 (which departed from the more prescriptive approach of the former LGA 74) gave local authorities full capacity and powers for the purposes of performing their role and purpose. The decision-making and accountability provisions contained in the LGA temper the breadth of local authorities' competence.

28. Finally, section 14(1) provides that local authorities must act in accordance with a number of principles. Relevantly, these principles include that:

- a local authority should make itself aware of, and should have regard to, the views of all of its communities (section 14(1)(a)(b));
- when making a decision, a local authority should take account of
  - the diversity of the community, and the community's interests, within its district or region (section 14(1)(a)(c)(i));
  - the interests of future as well as current communities (section 14(1)(a)(c)(ii)); and
  - the likely impact of any decision on each aspect of well-being referred to in section 10 (section 14(1)(a)(c)(iii)):
- a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets (section 14(1)(a)(g));
- in taking a sustainable development approach, a local authority should

14 These core services comprised network infrastructure, public transport services, solid waste collection and disposal, the avoidance or mitigation of natural hazards, libraries, museums, reserves, and other recreational facilities and community amenities.

take into account—

- the social, economic, and cultural well-being of people and communities (section 14(1)(a)(h)(i));
- the need to maintain and enhance the quality of the environment (section 14(1)(a)(h)(ii)); and
- the reasonably foreseeable needs of future generations (section 14(1)(a)(h)(iii)).

29. In the event of conflict between any principles (or any aspects of well-being referred to in section 10), local authorities are required to resolve the conflict in accordance with the principle in section 14(1)(a), which is to conduct business in an open, transparent, and democratically accountable manner.[15]

30. We note that the reference to future communities, and to planning effectively for the future management of assets, will be important for decision-making involving climate change related risks and issues.

Decision-making (Part 6, LGA 02)

31. All Council decisions, whether made by the Council itself or under delegated authority, are subject to the decision-making requirements in Part 6 of the LGA 02. This includes decisions not to take any action.[16]

32. There are two key requirements:

    32.1 Section 77 requires the Council to identify all reasonably practicable options for achieving its objective or addressing the matter under consideration, and to then assess each of these options in terms of its advantages and disadvantages. This requirement is intended to ensure that the Council has fully canvased all the ways in which it could proceed, and that its decision is well informed and reasoned.[17]

    32.2 Section 78 requires that the Council consider the views and preferences of interested or affected persons in the course of its decision-making. This requires the Council to identify those persons who are interested or affected, and then take their views into account. One way of identifying views and preferences is through consultation or engagement, but section 78 does not require consultation in all cases.

33. Section 79 provides an important proviso to the requirements in sections 77 and 78. It confers discretion about how to comply with these requirements in any particular case, but requires that

15 Local Government Act 2002, s 14(2).
16 For example, see *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2021] 3 NZLR 280 (HC).
17 Rigorous compliance with these requirements will be of considerable importance if a local authority is contemplating closing down or even limiting a particular service.

compliance is largely in proportion to the level of significance of the matter concerned.[18] In effect, the more significant a matter is, the more rigorous the Council's assessment under section 77 should be, and the more likely it is that the Council will carry out some form of engagement or consultation under section 78. If the Council does decide to undertake consultation, it must comply with the consultation principles set out in section 82.

34. A local authority's decision-making requirements must be seen in the context of the other provisions in subpart 1 of Part 6 relating to the Long-term Plan (**LTP**), the Annual Plan, and in subpart 3 relating to financial management. It is beyond the scope of this advice to deal comprehensively with these provisions, but we note the following:

    34.1 Section 97(1)(a) concerns decisions to alter significantly the intended level of service provision for any *significant activity* (including a decision to commence or cease such activity). If this section is triggered, consultation is mandatory. If a proposal to limit or cease the provision of services is being considered, which would have the consequence of triggering section 97(1)(a), then that proposal and decision must be included in a consultation document for a LTP and then the LTP itself.

    34.2 A financial strategy under section 101A must include a statement of factors relating to the expected capital expenditure on network infrastructure, flood protection, and flood control works, that is required to *maintain existing levels of service*. Climate change impacts may result in a reduced level of service without additional expenditure being incurred.

    34.3 Under section 101B, an infrastructure strategy must outline how the local authority intends to manage its infrastructure assets taking into account the need to provide for the resilience of infrastructure assets. It should do this by identifying and managing risks associated with natural hazards and by making appropriate financial provision for those risks. The risks associated with natural hazards would include established climate change impacts.

*Resource Management Act 1991 (**RMA**)*

35. The RMA is not directly relevant to local authorities' powers to undertake, cease and stop the provision of services. The RMA does not place a statutory duty on local authorities to protect properties from natural hazards. However, local authorities are responsible for controlling land use for the avoidance and mitigation of the effects of natural hazards.[19] Decisions related to the ceasing or stopping of services (such as coastal protection works) will be relevant to councils' resource management functions.

18 Significance is determined on a case-by-case basis, in accordance with the Council's Significance and Engagement Policy.

19 Resource Management Act 1991, sections 30 and 31; see also *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 (CA).

36. There is no legislation in New Zealand that is equivalent to the United Kingdom's Coast Protection Act 1949, which provides for compensation for damage to interests in land resulting from provision of, or failure to provide, coastal protection works.[20] However, the Government's resource management reform programme will include a proposed "Climate Adaptation Act", which is proposed to:[21]

36.1 provide for managed retreat, powers to change established land uses and to address liability and options for potential compensation; and

36.2 establish an adaptation fund to enable central and local government to support necessary steps to address climate change adaptation and reduction of risks from natural hazards.

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20 See section 4 of the Coastal Protection Act 1949 and the discussion in *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

21 See Resource Management Review Panel "New Directions for Resource Management in New Zealand" June 2020. However, the Climate Adaptation Bill will likely not be introduced to Parliament until 2023.

Part Three: What ability does a local authority have to cease or limit the provision of flood and erosion protection works?

Overview

37. Our discussion of this question has been separated into the following topics:

    37.1 coastal protection works undertaken pursuant to local authorities' powers of general competence;

    37.2 flood and erosion protection works subject to the SCRCA; and

    37.3 other forms of protection not subject to specific statutory provision.

Coastal protection works in reliance on the LGA 02

38. Local authorities are under no express statutory duty under the LGA 02 to protect properties from the encroachment of the sea. Such a statutory duty is also absent from the RMA. As discussed above, although local authorities have a policy and regulatory role in controlling the use of land for the avoidance or mitigation of natural hazards, this does not translate into a duty to actively protect land from such hazards.[22]

39. Under the now repealed section 469 of the LGA 74, local authorities had a specific power (as opposed to an express duty) to undertake coastal works. Local authorities now undertake this work pursuant to their general power of competence.

40. As to whether local authorities have any legal responsibility founded in a duty of care to protect its ratepayers from coastal erosion, this was considered in 1983 in *Bosworth v Rodney County Council*, where Chilwell J commented:[23]

    > It must today be a moot point, depending on the statutory setting, whether a local authority in New Zealand could be under a duty of care to its ratepayers to protect them from being inundated by the sea. The decision will ultimately hinge on the correct interpretation of the Local Government Act, any other legislation having a bearing on coastal protection, and the parallel implications of the common law.

41. The High Court then referred to section 469 of the LGA 74, which at the time read:[24]

    > The Council **may** construct and maintain within or outside the district any

22 We note that a duty of care also generally does not attach to planning decisions. See *Baker v New Plymouth District Council* [1996] DCR 709: "Firstly, there is in my view an insufficient relationship of proximity between a local authority and an individual resident of its district so as to give rise to a prima facie duty of care in the preparation and promulgation of a district plan. Secondly, even if a prima facie duty of care was to arise in such circumstances, there are in my view compelling considerations of a public policy nature which should negative the existence of a duty which the law would recognise. Were the position to be otherwise, any misconceived provision in a district plan could result in the local authority in question being held liable for any resulting loss to any owner of property within its district". Also see *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA).

23 *Bosworth v Rodney County Council* A350/81, Chilwell J, 24 February 1983, at p 63.

24 At p 64.

> works or do anything necessary to prevent damage to any property inside the district or to the property inside the district or to the property of the Council outside the district from floods of rivers or stream, **or from encroachment of the sea.**
>
> [Emphasis added]

42. Although this provision did not contain an express duty, it did raise the question as to whether a local authority could either be under an implied duty to construct coastal protection works, or alternatively, an implied obligation to consider whether to exercise its discretion to continue to maintain such works.

43. In *Bosworth*, there was a road vested in the local authority that was at risk from coastal erosion. The Court referred to a series of factors which might influence whether a duty of care might exist.[25] Notably, the Court considered that the decision to deliver the infrastructure service was a policy matter that did not lend itself toward attracting a duty of care. The Court said:[26]

> The policy matters which must be considered by a local authority before committing itself to large expenditure could militate against the existence of a common law duty of care parallel with the statutory powers in the Local Government Act.

44. The Court went on, relative to the discretion conferred on Councils:[27]

> A council is answerable to its ratepayers in resolving the question. A Council may have to decide which of several competing projects is to get priority for funding. On the evidence before me, but not before the Tribunal, it is open to infer that the Council has in this case already exercised its discretion under the Local Government Act in considering whether to exercise the power to construct coastal protection works. It has investigated the feasibility of protection works and reached the conclusion not to proceed – in the short term at least. If it has responsibly exercised the power vested in it, albeit indirectly adversely affecting the sea frontagers, it does not follow that it has breached any duty of care to them or, for that matter, whether a duty was owed in the first place. The Council is under no absolute duty under the statute, especially in the light of the necessity for Ministerial approval.

45. The Court's observations in *Bosworth* remain relevant to the lawful exercise of the power of general competence to construct or continue to maintain coastal protection works now. If anything, the repeal of section 469 tends to lessen the potential scope for the assertion that councils are under any implied public law or common law duty to undertake or continue maintaining coastal protection work.

46. As is evident from the *Bosworth* case, it is important that local authorities address issues through a robust decision-making process.

25 Quite separate liability issues may arise out of the Council's ownership of land adjoining the coast whether road, reserve or fee simple land vested in the Council. These issues are not discussed in this advice.

26 Some of the matters referred to at page 62 of the decision appear to be more relevant to the question of breach of duty of care.

27 At page 65.

This is especially where the issue is "live", whether it has been raised by landowners or otherwise.

47. This reflects the general principle adopted by the courts that, even if there is only a permissive statutory power, there may be a duty to at least properly consider whether the power should be exercised in appropriate circumstances. The failure to exercise such discretionary power could in turn be susceptible to challenge by judicial review.[28]

48. We therefore tend to the view that decision-making about coastal protection works (including construction, or ceasing to support such works) should be considered as essentially discretionary in nature. However, a number of matters will be relevant to a Council's decision-making, including:

    48.1 The statutory context of the LGA 02, and in particular, the purpose and role of local government, the existence of express statutory powers (if any) relating to the particular works, and the principles relating to local authorities under section 14.

    48.2 Compliance with the Part 2 decision-making requirements, including ensuring adequate appraisal and consideration of community views, and robust long-term and annual planning, and consultation and engagement processes.

    48.3 The need for robust, and evidence supported, analysis (including as to costs and benefits) that identifies the potential (reasonably practicable) options available, and the associated risks (both to council and the community) of not undertaking the works.

    48.4 Whether undertaking any such works would be a responsible, and prudent, use of council funds, and assessment of any practical constraints (such as obtaining resource consents).

    48.5 Councils should also have a strategy for managing the consequences of ceasing to maintain or support existing coastal works, if a decision to do so was made. There will be a need to ensure alignment between council's policy and its resource management planning and consenting functions, noting again their function of controlling the use of land for the avoidance or mitigation of natural hazards.

49. In summary, if a local authority can show that it has turned its mind to these issues as outlined, we consider it is likely to be able to more readily defend a decision either not to continue supporting coastal protection works in any particular case, or to simply maintain an existing level of service in the knowledge that the works will become

28 See Joseph, *Constitutional and Administrative Law in New Zealand,* 4th ed at 22.7 (pages 894 to 896), and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. We note that this approach has been overturned in Western Australia, where there is no duty to consider the exercise of a power that is expressed in wholly permissive language. See *Angas Securities Ltd v Chief Executive Officer, Department of Water and Environmental Regulation* [2022] WASC 134.

inadequate for their purpose in due course. As already mentioned, there are quite separate common law liability issues arising out of this situation.

Flood and Erosion Protection Works subject to the SCRCA

50. Regional Councils are the successors of Catchment Boards and Drainage Boards,[29] and as such, have inherited the powers under sections 126 and section 133 of the SCRCA. These include general powers for undertaking works in relation to the minimisation and prevention of damage by flooding and erosion of watercourses.

51. The SCRCA provisions are generally empowering (rather than directive). Therefore, it is unlikely that local authorities are under specific duties to undertake these works. The same general considerations discussed in *Bosworth* apply to these works: the application of council funding is a policy matter, which may militate against the existence of a common law duty of care parallel with the decision-making processes in the LGA 02. We note, for completeness, that a regional council could not rely on the power of general competence in section 12(2) of the LGA 02 when to do so would be contrary to the provisions of SCRCA.

52. Section 148 has some relevance to the ability of a *regional council* to decide not to continue to maintain existing flood protection works. It provides as follows:

> (1) No Board shall be liable for injury to any land or other property caused **without negligence** of the Board by the accidental overflowing of any watercourse, or by the sudden breaking of any bank, dam, sluice, or reservoir made or maintained by the Board.
>
> (2) If the owner or occupier of any land or other property gives notice in writing to any Board warning it that any dam, sluice, or reservoir made or maintained by the Board is weak, and requiring it to strengthen or repair the same, and the Board within a reasonable time after the delivery of the notice fails to take proper and reasonable precautions efficiently to strengthen or repair the dam, sluice, or reservoir, then the amount of any damages sustained through that failure shall be made good by the Board.

53. Section 148(2) creates an express form of statutory liability. It does not appear to require regional councils to continue to upgrade works to a standard necessary to meet climate change impacts, instead referring to works “made or maintained”.

54. A conscious policy decision not to continue to upgrade such works does not fall neatly within the negligent liability captured by section 148, which refers to “accidental” flooding and “proper and reasonable” precautions.[30] This potential for liability may well influence a regional council’s decision-making in terms of stopping or limiting the provision of flood protection works.

29 See *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 at [105], [106] and [224].

30 We note section 148 refers to works “made or maintained” by a Board. It is arguable that flood protection works no longer maintained by a regional council are still capable of falling within section 148 on the basis that they are made by that council.

55. The general LGA 02 and public law decision-making factors outlined in relation to coastal protection works (paragraph [46] above) will also apply to flood and erosion protection works under the SCRCA.

Other flood control and erosion protection works

56. Such works may be undertaken by local authorities under the general power of competence as opposed to the SCRCA. Again, most of the decision-making factors discussed in relation to coastal protection works will equally apply in this situation.

Part Four: Can a territorial authority cease maintaining or repairing roads because of climate change impacts?

Ceasing to maintain or repair roads because of climate change impacts

57. The statutory position in relation to local authority ownership and control of roads is set out in Part 21 of the LGA 74. This part of the LGA 74 is still in force, being specifically excluded from the repeals provided for in the LGA 02.

58. "Road" is defined in section 315. Sections 316, 317, and 319 confer a number of powers on a local authority over roads vested in the local authority.[31] Section 319 gives a local authority power to do certain things in respect of roads, including to:

    58.1 construct, upgrade and repair all roads with such materials and in such manner as the council thinks fit (section 319(1)(a)); and

    58.2 stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and Schedule 10 (section 319(1)(h)).

59. Other statutory duties also apply. This includes section 353 of the LGA 74, which provides that a local authority *"shall take all sufficient precautions for the general safety of the public and traffic and workmen employed on or near any road*". While section 353 corresponds more or less with the common law of misfeasance, where, in the course of carrying out repairs a local authority may be liable for negligence (see discussion further below), there is *no* statutory obligation under section 353 upon a local authority to repair the road.

60. As already indicated in relation to flood and erosion protection works, while the power to repair roads is discretionary, a local authority may be under an obligation to *consider* whether or not to exercise such a power.

61. In deciding whether or not to exercise its power to repair or maintain, a local authority must make its decision in accordance with established administrative law principles. Accordingly, a local authority must take into account relevant considerations and not take into account irrelevant considerations, and its decision should be substantively reasonable.

62. One of the relevant considerations in making its decision will be the council's duty to take all sufficient precautions for the general safety of the public under section 353. For example, if a road that has suffered coastal erosion damage is deemed insufficiently safe for public use, the council may necessarily need to decide whether the road must be either stopped or repaired.

63. In *Stowell v Geraldine County Council*, a ratepayer sought to compel

31 "Road" is defined in section 315(1) of the LGA 74 as including bridges.

Geraldine County Council to rebuild a bridge that had fallen into disrepair.[32] The Court held that, notwithstanding that the county only had a power (and not an express duty) to maintain roads, a local authority could in certain circumstances be compelled to keep a road in good repair so that it is reasonably safe for the traffic for which it is intended.

64. The subsequent decision of *Tuapeka County Council v Johns* departed from *Stowell*,[33] as the then Supreme Court followed a decision of the Privy Council in *Municipal Council of Sydney v Bourke.*[34] Williams J concluded that the *Bourke* case was authority for the proposition that a local authority could not be compelled to maintain a road where the relevant statutory provision is empowering only.

65. Moreover, although the Court in the *Stowell* case had held that there may be a duty to repair, the Court was also of the view that a local authority still had a discretion as to how to satisfy that duty. Denniston J said:[35]

> I have already held that it is a legal right of the public to have, from any public body entrusted with and undertaking the control and management of a road, such road kept in such a state as to insure that it shall be reasonably safe for the traffic it is intended for. I do not find any authority to say that, subject to that limitation, such public body deprived of a discretion as to how far and when the facilities for traffic on any road are to be adapted to the existing conditions on that road of population and traffic, even if such adaptation involves a reduction and diminution in the previously-existing convenience and efficiency of the road.

66. All of the decisions above predate the LGA 74. In our view, in conferring a power to repair roads, section 319(a) of the LGA 74 contemplates that a local authority may decide not to repair a specific road. In making such a decision, a Council must satisfy its public law requirements, which could realistically include an option to stop the road in accordance with section 342 and Schedule 10 so as to preserve public safety.

67. We consider that there may be instances where a decision not to repair a road might also be characterised by a court as so unreasonable that no local authority could reasonably have made that decision. In such circumstances, there would effectively be a public law duty to act, notwithstanding that section 319(a) is expressed in empowering terms only.

68. In summary, in the absence of any procedural impropriety, or a clear breach of established administrative law principles, local authorities may make decisions not to undertake repairs, not to carry out remedial works on a particular public road or bridge, and to stop any road or part thereof in accordance with section 342 and Schedule 10.

32 *Stowell v Geraldine County Council* (1890) 8 NZLR 720.
33 *Tuapeka County Council v Johns* (1913) 32 NZLR 618.
34 *Municipal Council of Sydney v Bourke* [1895] AC 433 (PC).
35 At pages 737-738.

Part Five: Does a territorial authority have power to limit or stop providing three waters services?

Overview

69. The Government's current reform programme proposes to transfer responsibility for delivery three waters services to four statutory "water service entities".[36] If this reform is implemented, the question of council powers to limit or stop these services will become moot (following the relevant transition period).

70. We set out our advice in relation to the current legal position below, which has altered slightly given the amendments made to the LGA 02 by the Water Services Act 2021.

Territorial responsibility for the provision of water services

71. Distinct from coastal protection and roading works, territorial authorities are specifically obliged to provide three water services. The relevant provisions are those in subpart 2 of Part 7 of the LGA 02, which establishes the duty to maintain water services.[37] Section 130(2) provides the primary obligation:[38]

> A local government organisation to which this section applies must continue to provide water services and maintain its capacity to meet its obligations under this subpart.

72. We note that:[39]

    (a) "Local government organisation" means a local authority, council-controlled organisation, or subsidiary of a council-controlled organisation, that provides water services.

    (b) "Water services" means water supply and wastewater services. "Wastewater services" in turn means "sewerage, treatment and disposal of sewerage, and stormwater drainage".

73. Section 130(2) is open to a degree of interpretation. In particular:

    73.1 The section establishes that there is a duty to "continue to provide water services", but does not specify or indicate at what standard that duty must be satisfied, or address the extent to which these services must be provided;

    73.2 The section refers to a local government organisation's duty to "maintain its capacity to meet its obligations under [subpart 2]", but subpart 2 does not specify any substantive obligations

36 At the time of this advice, the Water Services Entities Bill, which establishes the water services entities, passed its third reading on 7 December 2022 and is now awaiting royal assent.

37 Under section 124, "local government organisation" means a local authority, council-controlled organisation, or subsidiary of a council-controlled organisation, that provides water services

38 Section 124 defines "water services" as meaning water supply and wastewater services. "Wastewater services" in turn means "sewerage, treatment and disposal of sewerage, and stormwater drainage". We note that there is a lack of clarity around what may amount to "stormwater drainage".

39 Local Government Act 2002, section 124.

regarding delivery of these services; and

73.3 More generally, it is not clear whether the capacity that a local government organisation must "maintain" is that which existed at the time section 130 first applied, or any expanded capacity required to meet any increase in need for water services by communities within the district or region, or where additional development occurs and the relevant infrastructure has vested in local government.

74. In our view, the intention of section 130(2) is that local government organisations must provide (and continue to provide) adequate (in terms of safe and sufficient) water services for their district. In our view, this extends to making any relevant upgrades to this infrastructure to deal with natural hazard risks (subject to a water service being closed in accordance with section 131, as discussed below).

75. This approach is supported by subpart 1 of Part 7, and in particular:

75.1 The requirement for territorial authorities to assess drinking water services under section 125, which includes consideration of:

(i) the community's existing access to drinking water services;

(ii) any reasonably foreseeable risks to the community's access to drinking water services in the future; and

(iii) the current and estimated future demands for drinking water services within the community;

75.2 Territorial authorities' duty under section 127 to ensure communities have access to drinking water in circumstances where existing suppliers are facing significant problems;

75.3 The requirement for territorial authorities to assess, from a public health perspective, wastewater and other sanitary services under section 128, in light of:

(i) the health risks to communities arising from any absence of, or deficiency in, the services;

(ii) the quality of the services currently available to communities within the district;

(iii) the current and estimated future demands for any of those services; and

(iv) the actual or potential consequences of stormwater and sewage discharges within the district.

76. In our view, the assessments provided for under sections 125 and 128 are intended to inform local government organisations' consideration as to what water services are required across their district.[40]

77. The Water Services Act 2021 also places a number of duties on drinking water suppliers that would inhibit the ability to make material changes to the delivery of drinking water services. This includes duties to supply safe drinking water, comply with drinking water standards, and supply sufficient drinking water.[41]

Closure of water services

78. An important issue that may arise for local government organisations in the future relates to their obligations if an existing service becomes physically or financially impossible to maintain on an ongoing basis, due to climate change.

79. Section 131 provides a limited exception to the obligation in section 130(2), as it allows the closure or transfer of a water service in certain circumstances. Apart from certain procedural requirements (consultation, publicly available information and a referendum), the key requirement under section 131 is that there must be 200 or fewer persons to which the water service is delivered, and who are ordinary resident in the district, region or other subdivision.

80. Section 134 provides the criteria for closure of a water service. A local government organisation may only close down a water service if it has first reviewed the likely effect of the closure on the public health of the community, and the environment. There is also a requirement to:

80.1 assess, in relation to each property that receives the water service, the likely capital cost and annual operating costs of providing an appropriate alternative service if the water service is closed down; and

80.2 compare the quality and adequacy of the existing water service with the likely quality and adequacy of the alternative service.

81. A local government organisation can only close down an individual water service if the substantive and procedural requirements in sections 131 are met, and the matters under section 134 have been considered.

Responsibilities in

82. It is beyond the scope of this advice to assess whether territorial

40 There is clearly a heightened responsibility in respect of drinking water under the LGA 02, which includes reporting and notification requirements (section 126) and ensuring alternate supply arrangements in certain circumstances (section 127).

41 Water Services Act 2021, sections 21, 22 and 25. "Sufficient quantity" is defined under section 25 as meaning: (a) the quantity of drinking water that is sufficient to support the ordinary drinking water needs of consumers at the point of supply; or (b) if compliance rules have been made prescribing the quantity of drinking water or a formula for determining the quantity of drinking water that is sufficient to support the ordinary drinking water needs of consumers at a point of supply, the amount specified in, or calculated according to the formula set out in, those rules.

the event of closure of water services

authorities or other local government organisations have a general statutory duty to provide alternative water services in the event that a service is closed under section 131. The answer to this question involves a number of complex interpretation and fact specific issues, but it does raise an important issue for the future planning of new water services and the maintenance of existing services, especially given the potential financial environment and social consequences of ceasing to provide such services

83. We note that:

83.1 Section 134 requires consideration of the costs of an "alternative service", if closure is considered. It is unclear on the face of section 134 whether the expectation is that the alternative service is provided *by* the relevant local government organisation. In reading the relevant provisions, it is reasonable to interpret sections 131 and 134 as not creating any such expectation, particularly given that section 131 provides for complete "closure", and is limited to situations where the users of the service are limited to 200 persons.

83.2 Section 127(3)(b) provides for territorial authorities to ensure that drinking water continues to be provided through alternative supply arrangements, "*if a territorial authority is obliged to ensure access to drinking water*". It is unclear whether a closure under section 131 acts to remove any obligation.

83.3 Given that the United Nations has accepted an international human right to water and sanitation, we expect the courts would stringently interpret local governments' duties and responsibilities for the provision of water services.[42]

84. Finally, we also note that section 193 of the LGA 02 allows a local government organisation to restrict a water supply under certain specific circumstances. However, this provision is unlikely to be useful to the challenges from climate change.

Decisions to cease or limit provision of three waters services during Three Waters reform transition period

85. In a separate piece of advice for Local Government New Zealand dated 14 December 2022, we have discussed the provision of water services by local authorities in the Three Waters reform "transition period", up until 1 July 2024.[43]

86. As discussed in that advice, the responsibility to provide water services under section 130(2) of the LGA will remain with territorial authorities during the transition period, rather than transferring to the new Water Service Entities. However, the ability of local authorities to make changes to their water services provision and infrastructure will be subject to certain restrictions by the Water Services Entities Bill,[44] which could constrain or limit the exercise of those powers. For

42 United Nations General Assembly, Resolution 64/292.

43 See our advice entitled, "Provision of water services by local authorities until 1 July 2024", dated 14 December 2022.

44 Water Services Entities Bill (136-4).

example:

86.1 The Department of Internal Affairs (**DIA**) will have oversight of certain local authority decisions (as discussed above). While it would be a question in each case as to whether the "significant" threshold is met, it is likely that a section 131 closure decision by a council (to cease provision) would fall within this requirement.

86.2 In addition, and before a local authority was to confirm a proposal for substantial repair of damaged water services or upgrades to water services, to deal with natural hazard type risks, this would likely require DIA approval. We note that this places local authorities in a position of requiring DIA approval before being able to discharge their section 130(2) statutory obligations.

86.3 Local authorities must also exclude from their long-term planning any content (including proposals) relating to water services during the transition period.[45] This could act to limit local authorities' ability to make material changes (or improvements) to their three waters service infrastructure, where such a proposal would need to be consulted on as part of a long-term plan process.

86.4 This limitation could prevent local authorities from proceeding with proposals that will alter significantly its intended level of water services provision, including a decision to commence or cease such services.[46] Again, this sits somewhat uncomfortably with the enduring section 130(2) obligations on local authorities.

87. When considered in light of the intention of the Water Services Entities Bill, territorial authorities' should be expected to continue with their existing water service provision and infrastructure programmes. While there may be a legislative oversight mechanism in play, we do not consider that DIA or the new entities will be discouraging any improvement or maintenance works, or responsive actions relative to natural hazard risks.

45 Clause 27(2) of Schedule 5 of the Water Services Entities Bill.

46 See section 97(1) of the Local Government Act 2002. Presumably, if capital expenditure works have already been proposed in the council's long-term plan, there will be an expectation for these to continue.

Part Six: What liabilities may be involved if a local authority was to stop or limit the provision of services in circumstances where they were adapting to potential futuristic risks (as opposed to dealing with a risk or hazard event that has already risen or occurred)?

Overview

88. There is a distinction between a local authorities' public and private law responsibilities.

89. A person who is affected by the breach of a public law obligation can bring judicial review proceedings seeking to have a decision quashed or reconsidered. It is likely that decisions to stop or limit the provision of infrastructure services because of natural hazard risk could be challenged in the future by judicial review.

90. The grounds for judicial review include where a local authority has: acted in breach of its statutory responsibilities / powers, made a decision that has regard to irrelevant considerations or failed to have regard to relevant considerations, or made a decision that is substantively unreasonable. If a decision has been made in a robust manner and consistently with the local authority's statutory decision-making responsibilities, this will assist in successfully resisting judicial review proceedings.

91. Damages are not recoverable in conventional judicial review proceedings. However, private law claims for damages in tort are frequently brought against public bodies. Negligence is the most common cause of action, but breach of statutory duty and nuisance may also apply. The boundaries of these different causes of action have become blurred in their application by the courts.[47]

92. It is beyond the scope of this advice to address all of the potential bases for common liability that could arise from decisions to stop or limit services, or to fail to address the impact of climate change on the effectiveness of infrastructure assets and services. However, we make some general comments below in relation to the more common causes of action, and the three specific topics subject to this advice.

Negligence

93. Negligence is the most common form of tortious liability. The basis of responsibility is the public interest in requiring persons to take reasonable care in circumstances where a lack of care could foreseeably cause injury to another.

94. Kenneth Palmer's text on Local Government Law in Aotearoa New Zealand notes that:[48]

> The balance maintained by the courts between imposing liability upon the discrete grounds of legal principle or social policy goals, and protecting freedom of action, is still evolving and may be applied incrementally to

47 S Todd *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2012) at 10.2.07.

48 Kenneth Palmer *Local Authorities Law in Aoteraoa New Zealand* (2nd ed, 2022, Thomson Reuters, Wellington) at 179 - 180.

> new situations. Although the categories of negligence are not closed, liability will not be expanded to cover all claims….
>
> Concerning negligence categories in relation to novel claims, the New Zealand courts may ask whether, in the light of all he circumstances of the case, it is just and reasonable that such a duty be imposed… [I]n deciding this question the court may adopt a two-stage approach. First, the degree of proximity between the parties may be assessed and the merits whether a duty should be owed and the level of that duty. Secondly, the question may be determined whether there are wider policy considerations that may negate, restrict or strengthen the existence of a duty in the particular class of case, and whether causation has been established between the duty and the damage.

95. The relevant factual context is of central importance in terms of determining whether a duty of care exists. A critical feature in any inquiry into a duty of care owed by a public body is the relevant statutory context. Consideration must be given to whether, as a matter of policy, finding that a duty exists would undermine the public bodies' exercise of its statutory functions. Such considerations have been relied on to find against local authorities' owing a duty of care in exercising consenting functions under the RMA.[49]

Breach of statutory duty

96. In some limited circumstances it is possible that a breach of a statutory duty may result in private law liability. Just because a public body has a statutory duty to perform a particular function does not mean that it is liable for losses arising from any failure to perform that function. In a 2017 paper, Professor Todd noted in respect of actions for breach of statutory duty:[50]

> The court must look at the provisions and structure of the statute and ask whether an intention can be gathered to create a private law remedy. However, inferring the requisite parliamentary intent from a statute which says nothing about civil liability tends to be an uncertain and unpredictable exercise, and it has been commented that the construction explanation has contributed to the degeneration of this branch of the law into one of the least principled in the books. The possibility exists, but no more will be said about it here.

97. The courts are generally reluctant to find that public bodies are liable in private law for breaches of statutory duties where the statute does not expressly provide for liability. The recent District Court decision of *Tombleson v Far North District Council* is illustrative of this.[51]

98. Mr Tombleson alleged that the Council had allowed the gravel road leading to his house to fall into disrepair causing damage to his motor vehicle. Among the causes of action pleaded, Mr Tombleson alleged that the council was liable because:

    98.1 it breached section 23(b) and (c) of the Health Act 1956, which places a duty on local authorities to identify and remove

49 For example, see *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA); *Monticello Holdings Ltd v Selwyn District Council* [2016] 148.

50 *A framework for Public Body Liability in Negligence,* NZLS Intensive, Liability of Local Authorities May 2017, at page 23.

51 *Tombleson v Far North District Council* [2020] NZDC 12171.

nuisances that may exist in the district; and

98.2 it breached its statutory duty under section 353 of the LGA 4 to take sufficient precautions for the general safety of the public in respect of roads.

99. The District Court granted summary judgment in favour of the council, concluding that:

> [43] Section 23 of the Health Act 1956 creates duties and rights on a local authority but does not provide for enforcement. In the absence of an enforcement provision for individuals, and without express words to limit or prevent application of the non-feasance rule,[52] the common law exception to liability for non-repair of roads applies.
>
> [44] Section 353 of the Local Government Act 1974 is a general statutory duty and the common law non-feasance rule prevents it from creating liability for damage caused by non-feasance, as opposed to misfeasance, unless the section expressly states otherwise. This is mere non-feasance and the Plaintiff cannot claim for damage caused by it.

100. What this decision highlights is that statutory duties will generally not, in the absence of express reference otherwise, create liability for damage caused by a failure where the relevant duty is purely passive (non-feasance). This is in contrast to misfeasance, where a positive act by the public body (such as repairs or upgrades) causes the relevant damage. This is discussed in further detail below in relation to liability for roads and bridges.

Nuisance

101. Local authorities are not entitled to create private or public nuisance in the exercise of their functions. This is explicitly confirmed by section 191 of the LGA 02. Local authorities may be liable for public (infringement of a public right) and private nuisance (unreasonable interference with a private right).

102. Any nuisance claim must first establish that the defendant caused interference with the rights of the plaintiff. Nuisance claims will be therefore be uncommon where it is natural forces that cause the relevant damage. We note Kenneth Palmer's analysis that:[53]

> A nuisance may occur from natural causes, such as blockage of a road drain. Liability may apply if the council "continues" the nuisance by ignoring it after notice of the hazard and fails to abate it within a reasonable time, or where it "adopts" the nuisance in making use of it in a positive manner." A starting point in these cases is that the local authority will not generally be liable for an existing nuisance if it does no positive act to increase the nuisance.

Flood and erosion protection works

103. We have referred to section 148 of the SCRCA, which provides a specific form of statutory liability for works done under that Act. This could provide for statutory claims against a regional council if it were

52 For a summary of the nonfeasance and misfeasance rules, see paragraphs 108 and 109 below.
53 Kenneth Palmer *Local Authorities Law in Aoteraoa New Zealand* (2nd ed, 2022, Thomson Reuters, Wellington) at 179 - 180.

to decide to stop or limit maintenance of a flood or erosion protection, work such as a stop bank.

104. In *Altas Properties Ltd v Kapiti Coast District Council*, several property owners sought damages from the council for flood damage to their properties resulting from a major storm.[54] The property owners alleged that the issue was caused by the inadequate capacity of a road culvert, which had caused secondary flows onto their properties.

105. The council had appreciated that in flood conditions the culvert would not be able to cope with expected floodwater. The High Court considered that the main question was whether the council had breached a duty of care in failing to improve a culvert that it knew or ought to have known that was likely to cause flooding on the plaintiffs' properties.

106. The High Court considered that the defendant was not acting as a Catchment Board under the SCRCA, because the essential work was directed at the formation of a road rather than the free flow of water.[55] The Court also found that the council owed the plaintiffs a particular duty of care arising out of its approval of relevant subdivision plans and issuing of building permits. Informing this duty of care was the council's statutory responsibilities to consider the prospect of flooding of the relevant land.[56]

107. The High Court ultimately concluded that the council had not breached its duty of care, stating:[57]

> Standing back from the matter and seeking a broad overview I have come to the conclusion that the Council's actions in planning for a bridge to replace the culvert in the not too distant future, was reasonable having regard to the presumed competing demands on the Council and its assessment of those demands against the risk inherent in the existing floodwater scheme. The Council had to balance a number of competing interests and there is no evidence that in seeking a balance the Council was acting irresponsibly. The evidence is rather that the Council was concerned to take a responsible approach. I find therefore that the Council was not in breach of its duty and that the action must fail.

108. The High Court's decision was upheld in the Court of Appeal, which held that flooding of the properties was inevitable regardless of the deficiencies in the culvert.[58]

109. In summary, it is not entirely clear whether a decision to cease maintenance of existing works in response to climate change (risk or impact) would protect a local authority from a negligence claim for failing to maintain an existing asset. This positon is likely similar in relation to coastal protection works.

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54 *Altas Properties Ltd v Kapiti Coast District Council* CP172/00, 19 December 2001, Durie J (HC); *Altas Properties Ltd v Kapiti Coast District Council* CA30/02, 20 June 2002, Blanchard J (CA).
55 High Court decision above, at [23].
56 At [57].
57 At [93].
58 Court of Appeal decision above, at [21].

110. A number of considerations will feed into the existence and extent of any duty of care, including: the factual context and the proximity between the parties; the consistency of a duty of care with the statute; and whether, as a matter of policy, a finding of a duty of care is in the public interest.

Roads and bridges

111. The two main areas of potential claims are physical loss or damage caused by the disrepair of a road, and claims for economic loss, if for instance, property owners and others are deprived of access to particular properties because roads and bridges have become impassable, and the local authority has decided not to or is unable to reinstate them.

112. These categories of claim involve complex and specific considerations as to whether a duty of care could be owed in the circumstances, and whether such a duty of care is breached. However, the nonfeasance rule may still be the law in New Zealand, which would provide a potential defence to claims of the kind outlined above. The rule is described in more detail below.

113. The courts in New Zealand have held that proceedings cannot be brought against a local authority (as the roading authority) for failure to maintain and repair a road even though a statute gives the council the power to repair it. This is known as the "nonfeasance" rule.

114. The opposite of nonfeasance is misfeasance. A roading authority could be liable for misfeasance if it decides to reconstruct or repair a road, but does so inadequately (for example, digging holes in a road, inadequately repairing roads, etc). However, it is immune so long as it adopts a merely passive role.

115. In *Tuapeka County Council v Johns* (1912) 32 NZLR 618, the then Supreme Court concluded that a local authority could not be compelled to maintain a road where the relevant statutory provision is empowering only. It relied on the Privy Council decision in the Australian case of *Municipal Council of Sydney v Bourke*.[59] In *Bourke*, the claim was based on an allegation that the Council's negligence in allowing a road to fall into disrepair had resulted in the driver of a cart being killed. The case was decided in favour of the council because of the nonfeasance rule.

116. *Hocking v Attorney-General* remains the leading case on the nonfeasance and misfeasance rules in New Zealand.[60] Turner J restated the nonfeasance rule:[61]

> … while a road authority is immune from liability to users of the highway who are injured as a result of the unsafe or dangerous state of the highway so long as it adopts a merely passive role, once it decides to reconstruct or repair a road, then it is obliged, like anyone else, to exercise reasonable

59 [1895] AC 433.
60 *Hocking v Attorney-General* [1963] 513 at 532.
61 At 532.

care in the performance of its self-imposed task

117. The rule of nonfeasance is subject to two main exceptions:

117.1 a roading authority will still be liable for breaching any other duty imposed by statute (for which a breach gives rise to a private right of action); and

117.2 it is also a requirement that the disrepair causing the injury be of the road itself, and not of some artificial structure placed on or in the road for some other purpose.

118. The nonfeasance rule has been abolished in Australia. There has been criticism of the nonfeasance rule in New Zealand, but no decision has specifically overturned the rule. The Court of Appeal in *Hocking*, while stating that it was the law, also stated that the rule is "*somewhat anomalous and certainly archaic*", and seemed to view its continued existence with some doubt. . The rule has been applied as recently as 2020 by the District Court in the *Tombleson* case (referenced above).

119. In summary, and while the rule has been subject to criticism, there is currently nothing to suggest that the New Zealand legal position has altered and that roading authorities in New Zealand are liable in damages to road users for failure to form or repair roads.

Three Waters Services

120. We have already noted the statutory limits imposed on local authorities in terms of closing water services. A breach of these statutory provisions may provide a basis for a successful judicial review challenge, and could potentially found a private claim for damages.