

**IN THE HIGH COURT OF NEW ZEALAND  
NAPIER REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
AHURIRI ROHE**

**CIV-2024-441-74  
[2025] NZHC 3817**

BETWEEN TANGOIO DEVELOPMENTS LIMITED  
Plaintiff

AND HASTINGS DISTRICT COUNCIL  
First Defendant

HAWKE'S BAY REGIONAL COUNCIL  
Second Defendant

Hearing: 15 September 2025

Appearances: A Boadita-Cormican for Plaintiff  
M Casey KC, K D Perry and J Tian for First Defendant  
C Harpur and S Farnell for Second Defendant

Judgment: 8 December 2025

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**JUDGMENT OF ASSOCIATE JUDGE LESTER**

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This judgment was delivered by me on 8 December 2025 at 4.30 pm  
pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

## **Introduction**

[1] This proceeding concerns land at Tangoio Beach, north of Napier, owned by the plaintiff, Tangoio Developments Limited (**TDL**) (the land). TDL acquired the land on 30 June 2022 from Tawanui Developments Limited (**Tawanui**), which had in turn acquired the land in January 2019. Tawanui and TDL both have as their sole director and ultimate shareholder, Mr Colville.

[2] In April 2019, Tawanui obtained subdivision consent for the land and TDL undertook the subdivision in accordance with that consent, creating 36 residential lots.

[3] By the time Cyclone Gabrielle arrived on 13 February 2023, TDL retained 12 of those lots. The practical impact of Cyclone Gabrielle is that it is no longer possible to build on TDL's remaining lots. TDL claims those lots are a complete loss and seeks damages against the Hastings District Council (**Hastings**) and the Hawke's Bay Regional Council (**Hawke's Bay**) in negligence and for breach of statutory duty for the way in which the zoning and subdivision consent were dealt with.

[4] Hastings and Hawke's Bay apply to strike out the proceeding, or for summary judgment, in respect of all causes of action against them.

### **TDL's claims against Hastings**

[5] TDL asserts Hastings was negligent in respect of three events that make up TDL's three causes of action.

[6] The first cause of action concerns Hastings' actions (or inaction) in respect of the private plan change that resulted in the land being rezoned Coastal Settlement Residential, known as Plan Change 31 (**PC31**). That process was commenced in 2004 by the then owners of the property with PC31 declared operative on 6 October 2008. Tawanui purchased the land in January 2019 from the landowners who obtained PC31.

[7] The second cause of action focuses on Hastings' 10 yearly District Plan review which saw the Coastal Settlement Residential zoning carried through into the reviewed District Plan, unchanged.

[8] The third cause of action alleges Hastings was negligent in granting Tawanui's subdivision resource consent in respect of the land—either in granting it at all or in respect of the conditions imposed.

### **TDL's claims against Hawke's Bay**

[9] The claim against Hawke's Bay also concerns PC31. Hawke's Bay opposed PC31 and TDL pleads Hawke's Bay should have appealed the adoption of the private plan change. Hawke's Bay is also criticised for not submitting an opposition to the 2012-2013 District Plan review in respect of the Coastal Settlement Residential zoning.

[10] A distinct cause of action against Hawke's Bay concerns it adopting Plan Change 4 (PC4) to its Regional Resource Management Plan as that Plan identified the area surrounding the Tangoio land as inappropriate for green field residential development, yet included TDL's land as appropriate for residential development.

[11] The causes of action against Hawke's Bay are also in negligence and breach of statutory duty.

[12] The focus of each of Hastings and Hawke's Bay's applications is that as a matter of law, the duties relied on in relation to all of the causes of action do not exist or, they should be struck out on limitation grounds.

[13] Before addressing those causes of action, I comment briefly on the position TDL has found itself in.

[14] Ms Boadita-Cormican, counsel for TDL, submitted TDL has lost the value of its development through no fault of its own and with no means of obtaining compensation. As the land has not been rezoned, s 86 of the Resource Management Act 1991 (**the RMA**) does not apply. Rezoning of the land as other than residential would provide a potential avenue for TDL to recover compensation. At its most basic, it was submitted it would be unjust if the law did not provide a means of relief to TDL.

[15] The other side of the coin is that Hastings and Hawke's Bay say they do not owe TDL a duty to see that its development was economically successful.

**The land is zoned "Coastal Settlement Residential"**

[16] At the heart of TDL's proceeding is that the land in question was known to be subject to the risk of flooding. TDL pleads that Hawke's Bay, in its April 2005 submission in opposition to PC31, concluded:

- [20] In stating its opposition to the private plan change the second defendant presented a technical engineering report and hydraulic analysis of the Te Ngaru catchment (in which the plaintiff's land was located) which concluded (inter alia):
- (a) The Plaintiff's land was within the floodplan area of the Te Ngaru Stream.
  - (b) The plaintiffs land was subject to inundation from flash flooding.
  - (c) That flash flooding is an extremely volatile natural hazard.
  - (d) That there is a risk to public safety in the area due to flash flooding.
  - (e) That there is generally very little warning time for flooding in the area including the plaintiffs land.
  - (f) That residential of land within the floodplain (which included the plaintiffs land) was likely to end in disaster.
  - (g) The land within the floodplan is an area that is constantly undergoing natural changes due to erosion and siltation.
  - (h) Any permanent structures on the plaintiffs land will be at risk.

[17] TDL pleads Hawke's Bay's conclusions were supported by the expert planning evidence, a technical engineering report and hydraulic analysis.

[18] Hastings established a Hearings Committee to consider PC31. Hearings were conducted in May and June 2008. Hastings is criticised for approving the Plan Change in the face of Hawke's Bay's opposition.

[19] Mr Casey KC, counsel for Hastings, in effect submitted TDL's focus on Hawke's Bay's opposition was to cherry pick the material presented to Hastings and ignores that Hastings undertook a detailed assessment of all the evidence and ultimately imposed conditions in respect of the Plan Change designed to cope with

a one in 100-year flood event. Substantial filling of the site was required to raise the ground levels and minimum floor levels were also specified.

[20] The Committee appointed by Hastings to examine the application had the benefit of a report from an Environmental Policy Planner which addressed the submissions of objectors that there was a high flooding risk and went on to address the flood hazard risk in detail. The report recorded the divergence of opinion between Hastings and Hawke's Bay about flood mitigation options and recorded that as being the outstanding issue. As the report writer put it, the issue came down to two alternative approaches; avoidance versus mitigation.

[21] The Report of the Committee concluded the Plan Change request should be declined, as the application had not specifically shown that the adverse effects of the flooding could be successfully avoided, remedied or mitigated. However, in the following paragraph the report writer noted:

If the Committee can be satisfied that the flood hazard can be adequately mitigated after considering all the evidence at the hearing, it is considered that all other issues and effects identified above can be adequately addressed by the Plan Change request and recommend modifications to that request. The Plan Change could then be approved with modifications.

[22] The minutes of the Committee's meetings are in evidence. The evidence in respect of flood risk and possible means of mitigating that risk are referred to throughout the minutes. The Committee ultimately approved the Plan Change with a number of modifications. The decision included the following:

In reaching this decision Council gave specific consideration to the evidence presented by the Regional Council who in their submission identified that a precautionary approach be taken using the 100 year flood discharge as a minimum for design purposes. The requestors will provide protection against a 100 year flood level of RL 15.2 metres in terms of ground level of the outer perimeter, with an extra 0.5m freeboard providing added protection along the inner perimeter by the crown of the road at RL 15.7 metres, and therefore the future Tangoio community will be protected from the flooding and coastal inundation hazards that have been identified in relation to the Proposed Development Area.

[23] Mr Casey submitted that the Plan Change process was quasi-judicial and therefore no duty of care in tort arose.

[24] TDL pleads Hastings owed it a duty of care and any subsequent owner within the Coastal Settlement Residential zone of Tangoio's land to "control the actual or potential effects of the use, development or protection of land for the purposes of avoiding or mitigating natural hazards" and "within its District Plan, provide for residential zoning that avoided or mitigated natural hazards".

[25] The breach of this duty pleaded is:

42. In adopting the private plan change the first defendant breached the duty pleaded at paragraph 36 in one or more of the following ways by:
  - (a) acting contrary to the expert advice provided by the second defendant.
  - (b) acting contrary to the expert advice provided by the first defendant's own expert.

[26] The above is not a reasonably arguable breach as if it were correct, it would elevate the expert advisors to the role of decision-maker. It also assumes that all the advice received by Hastings was consistent (that is, it does not take into account what Hastings would do if there was a conflict in the expert advice), and finally would render the hearing process redundant.

[27] While I will go on to address Mr Casey's submissions regarding duty of care in respect of quasi-judicial functions, I am satisfied that the causes of action relating to PC31 are statute barred.

### **Limitation**

[28] Mr Perry, counsel for Hastings, presented the submissions on limitation. All relevant events in respect of PC31 occurred prior to 1 January 2011, when the Limitation Act 2010 came into effect. This proceeding was filed after 1 January 2011, and it relies on acts or alleged omissions before 1 January 2011.

[29] I accept Mr Perry's submissions that this means the 15 year longstop provision in s 23B of the Limitation Act 1950 applies. That section provides:

**23B Longstop period of limitation**

- (1) No action to which this section applies may be brought after the last to end of the following periods:
  - (a) 5 years ending on the close of 31 December 2015:
  - (b) 15 years after the date of the act or omission on which the action is based.
- (2) That period of limitation applies to the action in addition to every other period of limitation that applies to the action.
- (3) This section is, in accordance with section 3, subject to Part 2, which provides for the extension of that period of limitation in the case of disability, acknowledgment, part payment, fraud, and mistake.

[30] As Mr Perry submitted, the focus of s 23B(1)(b) of the Limitation Act is on the act or omission upon which an action is based, not on when a cause of action accrued or when it could have reasonably been discovered.

[31] PC31 was approved on 25 September 2008. The 15-year limitation period therefore expired in September 2023. This proceeding was filed one year later in September 2024.

[32] As Mr Perry submits, the 15-year longstop is an absolute cut-off—it is not necessary to consider when a cause of action may have arisen or late knowledge.

[33] I find that the 15 year cut-off applies to the claim in respect of PC31 and thus the first cause of action against Hastings (noted at [6] above) is ***struck out***.

[34] To the extent the first cause of action against Hawke's Bay also relies on Hawke's Bay not appealing PC31, those paragraphs of the statement of claim are also ***struck out***.<sup>1</sup>

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<sup>1</sup> The first cause of action against Hawke's Bay at [73], [74], [77] and [78] refer to PC31. The pleading that Hawke's Bay breached the alleged duty of care by not appealing PC31 is out of time.

[35] I will address below whether the longstop extends to the subsequent events, if I consider the alleged duties of care are arguable. Mr Perry submits TDL cannot avoid the longstop by attempting to reframe its case around later events that trace back to PC31.

### **Hastings District Council 10 yearly District Plan review**

[36] TDL pleads that when Hastings reviewed its District Plan in 2012, the Coastal Settlement Residential zoning was carried over into the new proposed 2013 Hastings District Plan which was declared operative on 4 July 2014.

[37] Paragraph 37 of the amended statement of claim pleads:

37. In exercising its functions under the RMA to review its District Plan in 2013, the defendant owed a duty of care to the plaintiff and to any subsequent landowner within the coastal residential development of Tangoio to ensure that the District Plan provisions were appropriate:
  - (a) for the control the actual or potential effects of the use, development or protection of land for the purposes of avoiding or mitigating natural hazards;
  - (b) To provide for residential zoning that avoided or mitigated natural hazards.

[38] It will be noted that the reference to *ensuring* that the District Plan provisions were appropriate is a pleading of strict liability rather than a pleading of a duty to take reasonable care. However, if the only issue was with the pleading, it could have been amended.

[39] The breach of duty is pleaded as follows:

43. In reviewing its District Plan the first defendant breached the duty pleaded at paragraph 37 in one or more of the following ways by:
  - (a) Failing to consider whether the District plan provisions were appropriate for the purposes of assisting it to carry out its functions under the Resource Management [A]ct 1991 in order to achieve the purposes of that Act.
  - (b) Failing to consider whether the District plan provisions were appropriate.

[40] The review is undertaken pursuant to s 79 of the RMA. Section 79(1) says:

**79 Review of policy statements and plans**

- (1) A local authority must commence a review of a provision of any of the following documents it has, if the provision has not been a subject of a proposed policy statement or plan, a review, or a change by the local authority during the previous 10 years:
  - (a) a regional policy statement:
  - (b) a regional plan:
  - (c) a district plan.
- (2) If, after reviewing the provision, the local authority considers that it requires alteration, the local authority must, in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part, propose to alter the provision.
- (3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision—
  - (a) as if it were a change; and
  - (b) in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part.
- (4) Without limiting subsection (1), a local authority may, at any time, commence a full review of any of the following documents it has:
  - (a) a regional policy statement:
  - (b) a regional plan:
  - (c) a district plan.
- (5) In carrying out a review under subsection (4), the local authority must review all the sections of, and all the changes to, the policy statement or plan regardless of when the sections or changes became operative.
- (6) If, after reviewing the statement or plan under subsection (4), the local authority considers that it requires alteration, the local authority must alter the statement or plan in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part.
- (7) If, after reviewing the statement or plan under subsection (4), the local authority considers that it does not require alteration, the local authority must still publicly notify the statement or plan—
  - (a) as if it were a proposed policy statement or plan; and
  - (b) in the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part.

- (8) A provision of a policy statement or plan, or the policy statement or plan, as the case may be, does not cease to be operative because the provision, statement, or plan is due for review or is being reviewed under this section.
- (9) The obligations on a local authority under this section are in addition to its duty to monitor under section 35.
- (10) (omitted as inserted after the date the claim was filed)

[41] Under s 79(4) of the RMA, a local authority may at any time commence a full review of the documents specified in s 79(1).

[42] Ms Boadita-Cormican emphasised that when the review was undertaken in 2012–2013, Hastings knew of Hawke’s Bay’s objection to the re-zoning along with the expert reports that highlighted the flooding risks at Tangoio. The submission was that with the ongoing awareness of the effects of climate change, Hastings had an obligation to revisit PC31 and Hastings breached that duty by not doing so.

[43] Mr Casey submitted that with PC31 having been approved within 10 years of 2012, it was excluded from the compulsory review under s 79(1). In short, if there was no statutory obligation to undertake a review of PC31, then such an obligation cannot be imposed through a cause of action in negligence.

[44] That leaves the discretionary ability to commence a review pursuant to s 79(4) of the RMA.

[45] Ms Boadita-Cormican submitted that as PC31 was not reviewed in 2013, that reinforced the signal from the Plan Change that the land was appropriate for residential development. It also signalled that the mitigation proposed in PC31 was appropriate.

[46] The submission was that the volte-face represented by residential development now being practically prohibited, following Cyclone Gabrielle, must sound in a remedy.

[47] Ms Boadita-Cormican’s submission was developed with reference to what at the hearing was called the “institutional knowledge” of Hastings it held from the

adverse reports to PC31. It was submitted that this knowledge along with increased awareness of climate change, meant Hastings had an obligation to revisit PC31.

*Was Hastings under a duty of care to review PC31?*

[48] I find no such duty existed.

[49] First, as I have said, the statutory context is, there was no obligation to carry out a review of PC31 as plan changes within 10 years of the review are exempted for review. What then is the factor that would create a duty of care owed to subsequent owners of the land? Here, it is said to be the “institutional knowledge” of Hastings. However, alongside the adverse reports is the other material held by Hastings considered in the Plan Change itself, and which resulted in conditions intended to address the risk of flooding. In other words, the “institutional knowledge” was of risks met with mitigation measures.

[50] It is then said the significance of the adverse reports in respect of PC31 was reinforced by climate change. However, this would mean that ongoing risks created or exacerbated by climate change would impose on every council a duty to review zoning where flooding or inundation was a recognised hazard, even when met with mitigation conditions.

[51] Such a duty would be owed to a potentially open-ended class. On TDL’s case, the duty is owed not only to current, but subsequent landowners. It would also be a constant, that is, an ongoing duty as councils would be in a never-ending cycle of reviews, contrary to the 10-year scheme under s 79 of the RMA.

[52] A council’s continuing duty to review plan changes would not only require councils to re-assess evidence it did not accept when it made the plan change, but to do so against “institutional knowledge” and against an open-ended range of factors that might impact on the “wisdom” of the plan change. Not only would parties who allege they suffered economic loss because a plan change was not reviewed have a cause of action but potentially so would parties say they suffered loss because a plan had not been changed in the past.

[53] As Mr Casey submitted, whether a review is undertaken, involves legislative and policy decisions within the council.

[54] In addressing whether there was sufficient proximity between Hastings and TDL, Mr Casey submitted:

36. The courts have repeatedly confirmed that in the RMA decision-making context, there is insufficient proximity between councils and individual landowners. The leading authority is the Court of Appeal decision in *Bella Vista*, which held that the decision making of the Council in relation to its statutory functions under the RMA is a quasi-judicial role and not one that imposes a duty of care.<sup>2</sup> The Court specifically found that:<sup>3</sup>

*“[...] The underlying purpose of the consent process is to provide a system whereby proposed activities can be assessed in terms of their impact on the environment and their sustainability. It does not require an assessment of the economic wellbeing of individual applications, or subsequent purchasers.”*

37. The High Court in *Monticello Holdings Ltd v Selwyn District Council* followed *Bella Vista*. In *Monticello*, it was alleged the Council failed to disclose the existence of a former town dump on land the plaintiff purchased to develop by way of a residential subdivision. The Court found that:<sup>4</sup>

*“The SDC owed no duty of care, in issuing the resource consent, to consider the economic interest of Monticello, nor the viability of the project (to the extent that project information was before the SDC). When considering resource consents, local authorities are obliged to give effect to the purposes of the Resource Management Act. Their role is quasi-judicial and, in this respect, their allegiance lies with no one.”*

38. *Bella Vista* was again followed in *Mao v Quotable Value Ltd*. The High Court struck out a claim against Auckland Council alleging that it owed the plaintiffs a duty of care in relation to the implementation of zoning changes and a subdivision consenting process. It reemphasised the principle that the role of the consent authority under the RMA is not to protect individual landowners against economic loss.<sup>5</sup>

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<sup>2</sup> *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33, [2007] 3 NZLR 429 at [15].

<sup>3</sup> *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, above n 2 at [25].

<sup>4</sup> *Monticello Holdings Ltd v Selwyn District Council* [2015] NZHC 1674, [2016] 2 NZLR 148 at [87].

<sup>5</sup> *Mao v Quotable Value Ltd* [2022] NZHC 1680.

[55] Mr Casey submitted that in relation to the District Plan review, the lack of proximity was even more pronounced.

[56] Ms Boadita-Cormican sought to distinguish these authorities on the basis that *Bella Vista Resort Ltd v Western Bay of Plenty District Council* involved a matter where the Court of Appeal considered the scope of a local authority's liability in negligence when *issuing a resource consent*.

[57] I do not accept the authorities relied on by Mr Casey can be distinguished on their facts. If anything, the facts here are against TDL in respect of the District Plan review as it relies on an omission by Hastings rather than a direct interaction between TDL and Hastings. For example, *Monticello Holdings Ltd v Selwyn District Council* involved an application by the plaintiff to the Selwyn District Council for a subdivision consent, and *Bella Vista* involved incorrect advice from a council officer that a resource consent change did not need to be notified. TDL's claim in respect of the plan review relies on a failure to act by Hastings.

[58] TDL's pleading in respect of the District Plan review amounts, at its highest level, to saying Hastings owed TDL a duty to protect it against economic loss.

[59] At the hearing, an admittedly late affidavit was filed on behalf of Hastings, which confirmed that no Land Information Memorandum (**LIM**) was requested by Tawanui, TDL or Mr Colville. Ms Boadita-Cormican noted its late filing and said she would want to file a reply in relation to what a LIM might have disclosed.

[60] The point of Hastings formally confirming that no LIM was sought by TDL, is to address that if a LIM *is* sought, local authorities are under a duty of care in respect of a LIM or a Project Information Memorandum.<sup>6</sup> The issue is not what a LIM might have said if requested. Leave to respond to the late affidavit is *declined*.

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<sup>6</sup> *Monticello Holdings Ltd v Selwyn District Council*, above n 4 at [96]; and *Marlborough District Council v Altmarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [98].

[61] Ms Boadita-Cormican relies on *Oteha Investments Ltd v Simon Yates Planning Ltd*, as an example of where the Court of Appeal distinguished *Bella Vista* on its facts.<sup>7</sup> However, the issue is not whether *Bella Vista* is capable of being distinguished on its facts, but whether the factual differences, such as they are here, warrant treating *Bella Vista* as not being applicable to TDL's claim.

[62] In *Oteha Investments Ltd*, the council in question had charged for expert advice for what was called a pre-lodgement meeting intended to facilitate the subsequent lodging of a resource consent application. Such a semi-commercial process by a council is far removed from "quasi-judicial" statutory functions such as a s 79 review. The Court said of the council role in issue in *Oteha Investments Ltd* "The giving of such advice does not necessitate the making of a decision or the reconciliation and weighing of potentially competing objectives".<sup>8</sup> However, that is what the decision to undertake an optional plan review involves. The criteria that guide such decisions are varied and the weight to be given to considerations, such as what aspects of a plan warrant an optional review, and the direct costs of a review are matters of judgment. The then owner of TDL's land would have been entitled to be heard on the challenge to the plan change they had obtained only five years earlier.

[63] TDL also relies on *Swordfish Co Ltd v Buller District Council*.<sup>9</sup> Swordfish alleged that the Buller District Council owed it a duty to take reasonable care in issuing a certificate under s 224 of the RMA and was under a duty of care to take reasonable care in issuing and ensuring registration of a consent notice.

[64] The consent notice for the subdivision in question related to the site being subject to unconsolidated fill. The Court declined to strike out this claim albeit expressed a cautionary note about "a duty to take reasonable duty to warn".<sup>10</sup> The alleged failing by Buller District Council in that case was administrative or procedural in nature being a failure to register a consent notice on the title to record non-compliance with subdivision conditions. It is where the conduct complained of

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<sup>7</sup> *Oteha Investments Ltd v Simon Yates Planning Ltd* [2011] NZRMA 69 (HC) at [30].

<sup>8</sup> *Oteha Investments Ltd v Simon Yates Planning*, above 7 at [32].

<sup>9</sup> *Swordfish Co Ltd v Buller District Council* [2012] NZHC 2339, [2013] NZRMA 21.

<sup>10</sup> At [63].

is administrative in nature or involving a matter of process that the Courts have found a duty can arise.

[65] Finally, TDL relies on *Smaill v Buller District Council*.<sup>11</sup> That case did not concern the RMA. The subdivision approval process in that case was controlled by the Counties Amendment Act 1953. The Court held the subdivision process involved an administrative function, contrasting it with changes to land use controls under the Town and Country Planning Act 1953 (the predecessor to the RMA) which were accepted by Panckhurst J as a quasi-judicial function and therefore not giving rise to a negligence cause of action.

[66] Panckhurst J characterised the subdivision approval process under the Counties Amendment Act 1953 as essentially administrative involving technical checks. This is similar to *Swordfish* where it appears the Council issued a s 224 certificate without recognising that a report identified issues of non-compliance with fill conditions.

[67] The present case is far removed from those relied on by TDL which all involved direct interactions between the claimant and the Council in respect of matters that had a process or administrative character.

[68] In this case, the claim in relation to the District Plan review does not involve a failure by Hastings to take a prescribed step, rather it alleges a duty to take an optional step, that is, the decision whether to commence which is a process involving a policy judgment.

[69] Ms Boadita-Cormican submits:

The redress sought against the defendants is the only avenue of redress available. In contrast, the councils here had information, which their own experts generated, but maintained the coastal residential zoning of the Land and, despite having power to do so, took no steps to change this. It is the councils, being in possession of knowledge of risk and having power to mitigate it, who are trying to avoid responsibility for the losses incurred by the plaintiff.

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<sup>11</sup> *Smaill v Buller District Council* [1998] 1 NZLR 190.

[70] The fact loss has occurred does not give rise to a duty. Not every loss must have a remedy. As I concluded at [48], I do not accept Hastings was owed a duty of care to commence an optional plan review of PC31. In any event, what such a review would have concluded only five years after PC31 was granted, is a matter of speculation. It follows that the second cause of action against Hastings is *struck out*.

### **Subdivision consent**

[71] On 29 June 2018, Tawanui applied for a subdivision resource consent for the land pursuant to s 88 and Sch 4 of the RMA. Tawanui, in its application, identified the flood hazard in the area and referred to the mitigation measures contained in PC31, including importing fill to meet the minimum site and floor level requirements in the District Plan.

[72] Hastings assessed the application, prepared reports which addressed the flood hazard and concluded that the mitigation measures (which were required by the District Plan and as proposed by Tawanui) were adequate.

[73] Hastings granted the subdivision resource consent (**the Consent**) on 2 April 2019. The conditions in the Consent reflected the flood hazard mitigation measures in PC31 and were consistent with the conditions that Tawanui proposed in its application. It will be recalled that TDL acquired the land on 30 June 2022 from Tawanui and that Mr Colville is the sole director and ultimate shareholder of both companies.

[74] In *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, the Court of Appeal considered whether a local authority owes a duty of care to an applicant for a resource consent.<sup>12</sup> The Hofmanns, who were the shareholders of Bella Vista, had been granted a resource consent on a non-notified basis to construct and operate a lodge and restaurant. They then changed their plans to include in the development a separate conference facility. On the advice of a council officer, the Hofmanns were granted a variation to the existing non-notified consent without being required to

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<sup>12</sup> *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, above n 2.

obtain further consent from neighbours. Shortly after this occurred, Bella Vista purchased the property and business from the Hofmanns.

[75] The Hofmanns' neighbours successfully applied for judicial review of the council's decision to grant on a non-notified basis the variation of the resource consent to develop the separate conference facility. The council then required all activity on the development to cease. There was no challenge to the outcome of the judicial review decision, nor was a further resource consent application sought.

[76] Bella Vista commenced proceedings in negligence against the council in relation to the variation of the resource consent on the basis the advice by the council officer that the conference facility could be added to the existing non-notified consent was negligent. The proceeding was struck out in the High Court and Bella Vista appealed.

[77] In *Bella Vista*, the Court said:<sup>13</sup>

As pleaded, the claim addresses only the decision making of the Council in relation to its statutory functions associated with the issuing of the consent and variation. This is a quasi-judicial role and not one which is an obvious candidate for the imposition of a duty of care.

[78] The above comment is directly applicable to TDL's claim directed at the granting of the subdivision consent. The breaches of the duty of care are pleaded as follows:

- (a) Failing to consider whether approving subdivision consent was consistent with the first defendant's function of controlling the actual or potential effects of the use, development or protection of land for the purposes of avoiding or mitigating natural hazards.
- (b) Failing to consider whether there was a significant risk from natural hazards and/or the likelihood of the natural hazard occurring.

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<sup>13</sup> At [15].

[79] As they are pleaded, it is hard to see how the above breaches could be made out. Tawanui was aware of the flood risks and applied for resource consent on the basis the mitigation measures it proposed would adequately mitigate those risks. The council, based on a notification report pursuant to ss 95A and 95B of the RMA and an assessment report pursuant to s 104, granted the Consent with the conditions already noted.

[80] Accordingly, the council did consider the actual or potential effects of the use of the land and the risk of natural hazards. Again, the conditions it imposed were largely those proposed by Tawanui. TDL essentially seeks to be protected from its decision to proceed with the subdivision granted on conditions sought by its predecessor in title. The Court of Appeal in *Bella Vista* adopted a comment made by Simon France J who struck out *Bella Vista's* claim in the High Court that:<sup>14</sup>

The focus of the Act in the area of resource consent is on the assessment of the impact of the activity on the environment. It is quite some distance from a consideration of the economic interests of persons who have a connection to the activity.

[81] Counsel for Bella Vista in the Court of Appeal argued that:<sup>15</sup>

... the consent authority must not do anything which unjustifiably imperils the economic interests of an applicant (or subsequent purchaser) in making a decision to grant a resource consent.

This is essentially what TDL asserts in this case.

[82] The Court of Appeal concluded that the RMA "... does not require an assessment of the economic wellbeing of individual applicants, or subsequent purchasers."<sup>16</sup>

[83] TDL pleads it was reasonably foreseeable that if Hastings breached its duty of care, TDL would suffer loss. The loss here is plainly economic loss. *Bella Vista* is clear authority that no duty of care is owed by a local authority to protect an applicant for a resource consent or subsequent owners against economic loss.

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<sup>14</sup> At [21], citing *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2006] NZRMA 29 at [33].

<sup>15</sup> At [22].

<sup>16</sup> At [20].

[84] I do not repeat all of the reasoning from *Bella Vista*, but I do not see any basis for it not to be applied here.

[85] Ms Boadita-Cormican submitted the proposition from *Bella Vista* that a council exercising a quasi-judicial role is not an obvious candidate for the imposition of a duty of care, was limited to cases analogous to the facts of *Bella Vista*. The submission was that I should be extremely cautious about expanding the notion of quasi-judicial immunity to apply to the unique facts of this case when being asked to pre-emptively strike it out.

[86] Ms Boadita-Cormican submitted that:

Knowingly taking a risk that the councils themselves acknowledged would result in signalling to the public, i.e. future landowners, that the Land was suitable for development is not a quasi-judicial function.

[87] This is a counsel of perfection. Nearly every resource consent has conditions designed to mitigate risk. Hastings was not “knowingly taking a risk” in granting the Consent. Hastings had, through the plan change process, investigated the risks and designed mitigation measures to address those risks. Tawanui, and subsequently TDL, through their common directorship and shareholding, were aware of the risks.

[88] Tawanui engaged independent consultants to prepare a report on the environmental effects of the resource consent application. That report referred to the flood risk and recorded:

The exposure of the site to a risk of flooding from the Te Ngarue Stream during significant weather events was a core consideration of the plan change that formed the Coastal Settlement Zone of the site. Mitigation of this risk was obviously necessary to enable site development through the plan change. The Proposed Hastings District Plan requirements for the site specify a minimum site level of RL 15.2m and a minimum habitable floor level of RL 15.7m to mitigate the flood risk.

[89] The report then goes on to refer to the importation of fill as required by the Coastal Settlement Residential zone requirements and for the fill to have battered edges so that it would be resilient to the threat of scouring from potential flood waters. The report states:

This approach addresses the flood risk as required by the Coastal Settlement Zone provisions.

[90] The plaintiff in *Bella Vista*, if anything, was in a stronger position on the facts than TDL. Bella Vista's shareholders received incorrect advice on whether the addition of the conference facility would have to be notified. Here, Tawanui was fully aware of the flood risk—its consultants had the relevant material from PC31 and engaged with Hastings on risk mitigation.

[91] The risk mitigation in PC31 was aimed at a one in 100-year event—Cyclone Gabrielle was a one in 1000-year event. The Consent was granted on the basis of risk mitigation, not on the basis of risk elimination.

[92] As I have said, I can see no basis for distinguishing *Bella Vista* on the facts. It follows that I must find there is no duty of care as alleged in respect of the third cause of action relating to the issue of the Consent, and accordingly, the third cause of action is *struck out*.

#### **A comment on limitation in respect of plan change review and the Consent**

[93] Hastings submitted that the cause of action in relation to the Plan Change review and the Consent were also statute-barred by virtue of the fact that those causes of action in fact depend on PC31 and were therefore out of time.

[94] Had there been arguable duties of care owed by Hastings in respect of the Plan Change review and/or the Consent, then they would have been independent causes of action arising from Hastings' actions at the time of those events (rather than being dependent on PC31) and I would not have struck out such causes of action on limitation grounds.

#### **TDL's causes of action against Hastings for breach of statutory duty**

[95] The duty of care alleged in relation to Hastings' consideration and approving of TDL's application for a subdivision consent reflects the duties summarised at [24] above.

[96] TDL's second and alternative cause of action for breach of statutory duty really contains three causes of action. TDL alleges a breach of statutory duty in respect of PC31, the District Plan review and the issue of the Consent. The three alleged duties and associated breaches should have been pleaded as individual causes of action but for the purposes of this application, nothing turns on that.

[97] I do not address the breach of statutory duty pleaded in respect of the private plan change PC31. That claim is statute barred for the reasons I have already given.

[98] That leaves the causes of action relating to the review of the District Plan and the granting of the Consent.

#### *2013 District Plan review*

[99] TDL pleads that Hastings, in exercising its functions under the RMA to review its District Plan, owed a statutory duty to TDL and to any subsequent land owner in the Coastal Settlement Residential zone of Tangoio to *ensure* that the District Plan provisions were appropriate:

- (a) For the control [of] the actual or potential effects of the use, development or protection of land for the purposes of avoiding or mitigating natural hazards.
- (b) To provide for residential zoning that avoided or mitigated natural hazards.

[100] It is pleaded that in reviewing the District Plan, Hastings breached the above duties by failing to consider whether the District Plan provisions were appropriate for the purposes of assisting it to carry out its functions under the RMA in order to achieve the purposes of the RMA, and failed to consider whether the District Plan provisions were appropriate for the purposes of providing for residential zoning that avoided or mitigated natural hazards.

[101] TDL pleads that the duty exists either expressly or by implication under the statutory scheme of the RMA which placed on Hastings the responsibility for making

provision in its District Plan to provide for residential zoning that avoided or mitigated natural hazards.

[102] TDL pleads that the RMA, in imposing this and the other duties pleaded, intended to protect land owners of land zoned as residential land.

### **Relevant legal principles**

[103] The following comes from the discussion in *The Laws of New Zealand*, of whether a statutory duty is owed.<sup>17</sup>

[104] Whether an individual may bring a common law action in respect of a breach of statutory duty depends on whether the intention of the statute considered as a whole, and on the circumstances in which it was made and to which it relate, was to impose a duty enforceable by an agreed individual. The wording of the statute, its general purview and intention, and the context in which it was passed, are relevant. It is relevant whether the statute was intended to protect a limited class of persons or the public as a whole, including along with whether the damage suffered by the person seeking to sue was of the kind which the statute was intended to prevent.

[105] An individual may sue in tort for breach of statutory duty only if the statute imposes a duty enforceable by a party aggrieved. If the statute is intended to protect the public as a whole, it will not usually be construed as giving a right of action to individual members of a particular class. Furthermore, in order for the plaintiff to succeed, it must be shown that the injury or damage suffered was of the kind which the statute was intended to prevent.

[106] It will be seen, in particular from the final passage above, that the damage for which TDL sues (economic loss) is not the type of damage the RMA was intended to prevent. While a cause of action in negligence is distinct from a cause of action for breach of statutory duty, the High Court's discussion of the statutory scheme of the

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<sup>17</sup> Stephen Todd *The Laws of New Zealand* Specific Torts: Breach of Statutory Duty (online ed) at [91]-[92].

RMA in *Bella Vista* endorsed by the Court of Appeal, already reproduced above at [80] is apposite.<sup>18</sup>

[107] In *Bella Vista*, the Court of Appeal identified that the council in respect of the resource consent in issue in that case, was required to determine the impact of the business activity on the environment, not to assess the economic well-being of the proposed activity.<sup>19</sup>

[108] Ms Boadita-Cormican refers to s 5 of the RMA which sets out the purpose of the Act. Section 5 provides:

**5 Purpose**

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) 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.

[109] I note here that the reference to economic well-being in s 5(2) of the RMA, was rejected in *Bella Vista* as pointing to a duty of care in negligence on behalf of a local authority not to imperil the economic interests of an application for a consent or a subsequent purchaser.<sup>20</sup>

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<sup>18</sup> *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, above n 2, at [21].

<sup>19</sup> At [52].

<sup>20</sup> See [22] and [25].

[110] Ms Boadita-Cormican then refers to s 85 of the RMA. Section 85(1) and subs (2) provide:

**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.

[111] Ms Boadita-Cormican submits that s 85 of the RMA is not expressed to be the sole and exclusive pathway by which persons whose interest in land are affected may pursue remedies in respect of their affected interest. She submits that s 85 of the RMA also does not address the position where a failure to act to give effect to the purpose of the RMA is alleged to have impacted on a person's interest in land.

[112] I view s 85(1) of the RMA as incompatible with the existence with the pleaded statutory duty. TDL complains that PC31 was not reviewed in the 2013 Plan review. That means the harm TDL complains of arises from the fact that the status of the land as a Coastal Settlement Residential zone remained unchanged. TDL submits Tangoio's land zoning, or classification, was inappropriate and therefore its economic value was over-stated. The proposed cause of action based on the statutory duty alleged by TDL would effectively make s 85 of the RMA redundant.

[113] Mr Casey referred to the Privy Council decision in *McGuire v Hastings District Council*, where the Panel held that the purpose of sustainable management cannot be disaggregated into economic, social and environmental limbs.<sup>21</sup> While the

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<sup>21</sup> *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

RMA requires councils to consider the needs of communities and their economic well-being, this does not translate into liability to compensate individual applicants for economic loss—that being the impact of *Bella Vista*. I accept Mr Casey’s submission that the detailed processes in the RMA, including submissions, hearings, rights of objection and appeals to the Environment Court, are inconsistent with the outcome of those decisions sounding in a cause of action based on breach of statutory duty. The decision of territorial authorities involve making evaluative, often contested decisions about the use or protection of resources in the interests of the community as a whole. To impose a right for parties whose interests are at that time or subsequently suffer economic loss to claim damages would be not only to impose a significant financial burden on councils, but would mean that in making their decisions, councils always had a weather eye on the risk of being sued as a result of economic loss arising from their decisions.

[114] In opposing the strike-out application, TDL claims to be part of “the class of people who developed land to meet the needs of people and communities for housing and provide for their economic well-being”. Mr Casey submits that this passage from the notice of opposition suggests that TDL is in a standalone class of persons that the sustainable management purpose of the RMA is intended to benefit, but he submits that is not an appropriate or correct description.

[115] The breadth of matters a local authority must address in its plan and consenting process under the RMA would mean that virtually any person adversely affected by an act or omission of a local authority could define themselves into a class of people affected by a decision. Effectively, there would be a statutory duty owed to the world. In a sense, this point only mirrors the point in *Bella Vista* that the scheme of the RMA is not to protect economic interests, individuals or groups, but to address the impact of activities on the environment.

[116] I am satisfied that the duties on Hastings created by the RMA do not give rise to the common law action asserted by TDL. I am satisfied it is the case both in respect of the cause of action concerning the 2013 Plan review and the application for the Consent.

[117] The duty said to have been owed by Hastings in respect of the Consent is the same as that owed for the review of the District Plan referred to at [24].

[118] The pleading of breach is that Hastings failed to consider whether approving the Consent was consistent with Hastings' functions of controlling the actual or potential affects of the use of the land, and of mitigating natural hazards. Also, that Hastings failed to consider whether there was a significant risk from natural hazards and the likelihood of a natural hazard occurring.

[119] That pleading of breach cannot be sustained in terms of the detailed process undertaken at the time the Consent was sought and granted. As already noted, an independent consultant prepared a report for TDL as to the flood risks and Hastings considered the mitigation requirements in PC31 and the conditions that were attached to the Consent.

[120] On the evidence, keeping in mind that Hastings also brought a summary judgment application, the pleading of breach cannot succeed.

#### **Application to strike-out and/or for summary judgment by Hawke's Bay**

[121] I have already ordered that TDL's claims against Hawke's Bay to the extent they rely on Hawke's Bay not appealing PC31 are *struck out*. The appeal period in respect of PC31 (30 working days) expired on 6 November 2008. As TDL's claim was filed on 3 September 2024, it was approximately 10 months outside the 15-year longstop. No issue as to when loss occurred or was otherwise discoverable arises and thus those claims must be *struck out*.

[122] TDL pleads the following duties of care are owed by Hawke's Bay:

69. In exercising its functions under the Resource Management Act the second defendant owed a duty of care to the plaintiff and to any subsequent landowner within the coastal residential development of Tangoio to control of the use of land for the purpose of the avoidance or mitigation of natural hazards.

70. In exercising its functions under the Soil Conservation and Rivers Control Act 1941 the second defendant owed a duty of care to the plaintiff and to any subsequent landowner within the coastal residential development of Tangoio to prevent damage caused by flooding and erosion.

[123] Each duty is said to arise either expressly or by implication under the statutory scheme of the respective legislation.

[124] A distinct area of breach alleged to involve Hawke's Bay is its adoption of PC4 to the regional resource management plan. PC4 identified the land at Tangoio surrounding TDL's land as an inappropriate area for greenfield residential development but included TDL's land as an area that was appropriate for residential development. PC4 was made operative on 1 January 2014.

[125] Paragraph 79 of the statement of claim pleads:

The second defendant did not submit in opposition to the 2013 District Plan review zoning of the Land as Coastal Residential Zone.

[126] In respect of this allegation, the District Plan review did not address PC31 which zoned the land as Coastal Residential. The point of TDL's cause of action against Hastings is that it failed to revisit PC31 in the 2013 Plan review. I have already held that Hastings did not owe a duty of care to include PC31 in the 2013 Plan review. Hawke's Bay is one step removed from that exercise which had to be initiated by Hastings.

[127] Paragraph 81 of the statement of claim pleads two ways in which the duties of care, set out at [122] above, are said to have been breached. The first is not appealing PC31, which I have already dealt with, and the second is not submitting an opposition to the 10 yearly District Plan review. PC31, as I have said, was not expressly part of the 2013 review.

[128] It appears it is alleged that Hawke's Bay in adopting PC4, also breached the alleged duty of care.

[129] Ms Harpur, counsel for Hawke’s Bay, submits that the functions and responsibilities of a Regional Council under the RMA are broad in nature and are focused on the development of policy statements and regional plans. She submits:

6.6 The function recorded at s 30(1)(b)(iv) to “*control of use of land for the purpose of the avoidance or mitigation of natural hazards*” must be viewed in the context of a Regional Council’s policy and planning role. Imposing a duty on [Hawke’s Bay] to prevent residential zoning or development of all land subject to natural hazards (to the extent it can), is plainly not intended by the legislation and would be unworkable.

[130] Ms Harpur submits that Hawke’s Bay was at no time a decision-maker in relation to the zoning or any other consenting of TDL’s land. There was no assumption of responsibility or a direct relationship between Hawke’s Bay, the zoning of TDL’s land, and TDL. In practical terms, Ms Harpur submits that Hawke’s Bay was further removed from the events TDL complains of, than Hastings.

[131] Ms Harpur submits that while the particular fact situation in this case may appear to be novel, the functions undertaken by local authorities on which TDL’s claim is based are not. Ms Harpur also relies on *Bella Vista* as authority for the proposition that a local authority does not owe a duty of care to prevent economic loss.

[132] Ms Harpur notes that the cases referred to in *Bella Vista* where a duty of care was found to be owed by council in carrying out RMA functions, concerned situations where the acts or omissions were “administrative or operational” or the result of a deliberate wrongdoing or a failure to follow a statutory procedure.<sup>22</sup>

[133] The control of land to avoid or mitigate natural hazards involves statutory discretions. PC4 was a result of a long term consultation process where Hawke’s Bay worked with Hastings and the Napier City Council to develop the Heretonga Plains Urban Development strategy, which was a 30-year strategy for urban development in the Heretonga Plains, which includes TDL’s land at Tangoio.

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<sup>22</sup> *Oteha Investments Ltd v Simon Yates Planning Ltd*, above n 7; *Swordfish Co Ltd v Buller District Council*, above n 9; and *Athendale Property Ltd v Western Bay of Plenty District Council* [2014] NZHC 635.

[134] In 2012, Hastings commenced a review of its District Plan and in 2013, Hastings publicly notified its District Plan for public submission. As I have said, on 1 January 2014, Hawke's Bay's "Regional Policy Statement Change 4 – managing the built environment" became operative.

[135] TDL alleges that at the time of PC4, Hawke's Bay should have excluded TDL's land from greenfield residential development, or at least included it in areas marked as inappropriate.

[136] The status of TDL's land was determined under PC31 and was not created by the plan review or PC4.

[137] PC4 was not concerned with land already zoned for some form of development. PC4 was publicly notified on 7 December 2011. Submissions were invited and the process as per Sch 1 of the RMA then followed and a decision issued by Hawke's Bay came into effect on 1 July 2014.

[138] This process meant that Hawke's Bay's decision of PC4 was quasi-judicial. I accept Ms Harpur's submission that *Bella Vista* is authority that a local authority does not owe a duty of care in exercising its judicial functions.

[139] The background to PC4 is, as I have said, years of joint decision-making by respective councils involving public consultation. The Heretonga Plains Urban Development Strategy in referring to the land at Tangoio said "Tangoio – no growth beyond the existing coastal residential zone in order to retain natural character".

[140] That Hawke's Bay in PC4 decided not to revisit land zoned residential or for development was itself a policy decision.

[141] For TDL to succeed in this cause of action, it must establish that Hawke's Bay owed a duty of care to the then landowner of TDL's land and subsequent landowners to exclude the TDL land from the greenfield residential development.

[142] Ms Boadita-Cormican's written submissions do not expressly refer to the cause of action based on PC4.

[143] When PC4 referred to inappropriate residential greenfield growth areas, it listed 11 sites with the footnote advising that “future” greenfield growth refers to areas not already zoned for some form of residential development in existing District Plans. PC4 was only recording what was already in existing District Plan.

[144] Accordingly, TDL’s claim in respect of PC4 is similar to its claim against Hastings for not including PC31 in the 2013 Plan review. Essentially, TDL is alleging these were lost opportunities to review PC31. However, it is one thing to say an opportunity existed to carry out a review and another to say there was an actionable duty to do so. Essentially, the same considerations that apply as to why Hastings did not owe a duty of care to review PC31 in 2013 apply to why Hawke’s Bay did not have a duty to take steps to challenge or review PC31 at the time Hawke’s Bay referred to what PC31 provided when it finalised PC4.

[145] I find Hawke’s Bay did not owe a duty of care to TDL to review the suitability of TDL’s land for residential development. Such amounts to saying Hawke’s Bay had a duty to challenge PC31. It would be incongruous having struck out the duty of care said to be owed by Hastings to review PC31 during the 2013 Plan Review, not to strike out what amounts to a pleading that Hawke’s Bay had a duty to review the residential zoning of TDL’s land as part of PC4. I am satisfied it is appropriate that TDL’s cause of action in respect of PC4 against Hawke’s Bay is *struck out* and *I order* accordingly.

#### **Soil Conservation and Rivers Control Act 1941**

[146] The duty of care in tort alleged to arise under the Soil Conservation and Rivers Control Act 1941 (SCRCA) is referred to at [122] above.

[147] Ms Boadita-Cormican notes that s 10 of the SCRCA provides that the objectives of the Act include the prevention of damage by floods and the utilisation of lands in such a manner that will tend towards the attainment of the objects of the SCRCA. She notes that s 126 of SCRCA provides that every Catchment Board has general powers to minimise and prevent damage by floods and erosion within its district and has all such powers, rights and privileges as may reasonably be necessary or expedient to enable it to carry out its functions.

[148] Hawke's Bay refers to s 148(1) of SCRCA and to *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, as authority for the proposition that s 148 displaced other forms of liability other than negligence.<sup>23</sup>

[149] Section 148(1) of SCRCA provides:

**148 Liability for damages arising from neglect**

(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.

[150] The main questions in *Easton* were whether the council was negligent in its monitoring and maintenance of a stopbank and whether any such negligence caused the plaintiff's loss.<sup>24</sup> The plaintiff's case was based on deficiencies in the council's maintenance and monitoring of a stopbank which broke, causing the plaintiff's land to be flooded.

[151] *Easton's* counsel submitted there were no political or policy issues involved and that the proposed liability of the council related to purely operational matters.<sup>25</sup> Mr Upton submitted the council had assumed responsibility for maintenance and monitoring in circumstances where ratepayers were entitled to assume the council had the skills and resources to do so properly.

[152] Submissions on behalf of the council focused on policy matters. The council raised the question of whether it was correct to view the issue of maintenance as an operational matter when management of the stopbank was dictated by the funding available, which was something voted upon by the community.

[153] The Court concluded that a duty of care did exist in respect of monitoring and maintenance of the floodways' stopbanks. Kós J concluded the fact that s 148 of the SCRCA provided that a council could only be liable in negligence would be meaningless if negligence could not in fact arise on policy grounds. Kós J also noted

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<sup>23</sup> *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC).

<sup>24</sup> At [3].

<sup>25</sup> At [127].

that the council explicitly undertook monitoring and maintenance of the stopbank and budgeted for that activity. It was common ground amongst expert witnesses that stopbank security is dependent on good maintenance practices.<sup>26</sup>

[154] The present case is very different. There is no allegation against Hawke's Bay that anything it did or did not do in respect of physical flood mitigation measures had any bearing on TDL's loss. The duty of care said to arise under the SCRCA is expressed in the broadest of terms, that is, a duty owed to TDL to prevent damage caused by flooding and erosion.

[155] While it is not clear from the pleading exactly what breaches are said to be a breach of the duty of care alleged to arise under the SCRCA, it seems from paragraphs 82 and 83 of the amended statement of claim that the breach asserted is adopting PC4 without excluding TDL's land as being inappropriate for residential development.

[156] At its most basic, Catchment Boards under the SCRCA are now Regional Councils and are responsible for physical works to minimise and prevent damage by floods and erosion. Section 126(2) of the SCRCA is focused on powers to carry out physical works. Policy and planning has been subsumed into the RMA.

[157] TDL's counsel did not submit that Hawke's Bay had the power under the SCRCA to amend PC4.

[158] Accordingly, while I accept that *Easton* is authority that councils can owe a duty of care in negligence in respect of their duties under the SCRCA, such does not extend to a duty to take care that PC4 to the Regional Resource Management Plan did not contain the provisions complained of. Hawke's Bay had no power under the SCRCA to change PC4. There can be no duty of care in negligence under the SCRCA in relation to PC4 owed by Hawke's Bay when it had no power under that Act to alter PC4. This cause of action is also struck out.

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<sup>26</sup> See [131]-[134].

## Breach of statutory duty

[159] Paragraph 91 of the amended statement of claim pleads:

In exercising its functions under the [SCRCA ], the second defendant owed a statutory duty to the plaintiff and to any subsequent landowner within the coastal residential development of Tangoio to avoid damage by flooding and erosion.

[160] Kós in *Easton* said of s 148:<sup>27</sup>

[106] Secondly, s 148 means what it says. The Council’s liability for damage to property resulting from “the sudden breaking of any bank” (which is what happened here) is dependent on proof of negligence. In my view this has the statutory consequence of effectively displacing other forms of liability, apart from negligence. *The provision operates not so much as a defence to the common law forms of action other than negligence, as an ouster of them.* It follows that my conclusion in relation to s 148 disposes, also, of any claims in nuisance and breach of statutory duty. (emphasis added)

[161] The passage in italics in the quote above means no common law cause for breach of statutory duty exists—all other common law forms of action, other than negligence, were ousted by s 148.

[162] It follows the cause of action for breach of statutory duty said to arise under the SCRCA as pleaded in the second cause of action against Hawke’s Bay is ***struck out***.

[163] That leaves TDL’s second cause of action in breach of statutory duty under the RMA against Hawke’s Bay.

[164] TDL’s amended statement of claim at 90 pleads:

In exercising its functions under the RMA the second defendant owed a statutory duty to the plaintiff and to any subsequent landowner within the coastal residential development of Tangoio to control the use, development or protection of land for the purposes of avoiding or mitigating natural hazards.

[165] Then paragraph 93 of the amended statement of claim provides:

The duty referred to in paragraph 90 placed on the second defendant the responsibility of avoiding or mitigating natural hazards.

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<sup>27</sup> *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council*, above n 23..

[166] Paragraph 98 of the amended statement of claim provides:

As the Regional Council responsible for managing land for the purpose of avoiding or mitigating natural hazards, the second defendant had the ability in law to exert control over the activity from or in respect of which loss would occur as a result of natural hazards.

[167] It appears the same alleged breaches as asserted in the negligence claim against Hawke's Bay are relied on as paragraph 100 of the amended statement of claim which simply pleads that Hawke's Bay breached the duty pleaded at paragraph 90 of the amended statement of claim.

[168] As with the negligence cause of action against Hawke's Bay, this cause of action amounts to saying Hawke's Bay had a duty to challenge PC31 or in some way have used PC4 as a means to revisit the residential zoning of TDL's land. Ms Harpur submitted that the claim amounts to an allegation that Hawke's Bay should have used its powers under the RMA to ensure that Hastings' District Plan was consistent with Hawke's Bay's Regional Policy Statement and/or Regional Management Plan in relation to the zoning of TDL's land.

[169] Ms Harpur, however, notes that the District Plan was not inconsistent with Hawke's Bay's Regional Policy Statement and/or Regional Management Plan and therefore the allegation must be that Hawke's Bay should have sought to create such inconsistencies to its Regional Policy Statement and/or Regional Management Plan.

[170] Ms Harpur submits, and I accept, the fact that Hawke's Bay submitted against PC31 in 2008 cannot give rise to an obligation on Hawke's Bay to seek to overturn the zoning of TDL's land that had been approved by Hastings through its statutory processes.

[171] At its most basic, TDL is alleging that Hawke's Bay had a statutory duty to take steps to challenge PC31 in some way whether through the process of finalising PC4 or otherwise. Whether Hawke's Bay would take such a step involves a decision of a quasi-judicial nature as it requires an assessment of matters of policy. There is no material difference between the duty of care alleged by TDL against Hawke's Bay and the statutory duty that is alleged.

[172] Accordingly, and essentially for the same reasons that I held no duty of care in negligence exists, I find Hawke's Bay did not owe the pleaded statutory duty to TDL and this cause of action is also *struck out*.

### **Costs**

[173] Both defendants being successful in their application, there is no reason why costs should not follow the event. My preliminary view is that Tangoio should pay to the first and second defendant's costs on a 2B basis plus disbursements as fixed by the Registrar. That will be the order of the Court if costs memoranda are not filed *within 10 working days* of the date of this judgment (not more than five pages). If either defendant files such a memorandum, then TDL may apply *within a further 10 working days*.

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**Associate Judge Lester**

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