

**Legal considerations for Resiliency
Project for Anzac Parade, Whanganui**

Our Advice

Prepared for	Horizons Regional Council
Prepared by	Fitzherbert Rowe Lawyers
Author	Liam Hehir, Partner
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Background

1. Fitzherbert Rowe has been asked by Horizons Regional Council (**Horizons**) to provide advice about the legality of solutions aiming to protect the houses neighbouring the Whanganui River from flooding, assisting Massey University researchers as the primary points of contact.
2. For various reasons, including the threat of climate change, flooding of the Whanganui River is likely to become increasingly frequent. Horizons has acknowledged that this risk cannot be addressed through traditional modes such as major flood works.
3. There are forty properties located along Anzac Parade in Whanganui that are particularly vulnerable to serious damage or destruction following a flood. Horizons has formed a strategy to address the high-risk section of houses and are interested in engaging the homeowners to support its implementation.
4. Horizons' strategy contains short, medium and long-term actions, which span up to one hundred years into the future. Of particular importance are the action steps relating to a house-raising scheme in the short term and a buy-out scheme in the medium to long-term for the Anzac Parade houses.
5. There are seven questions this report will address:
 - (a) What lawful means can Horizons use to bind key participants to a range of short to long-term options to support the strategy?
 - (b) What legal mechanisms are open to Horizons to prevent future purchasers from perpetuating flood risk through the opportunistic purchase of properties following a major flood?
 - (c) What options does Horizons have under compulsory acquisition legislation to reduce flood risk on currently private property and when can these be exercised?
 - (d) The solution is likely to involve joint action between local, regional and central governments. What are the legal issues that arise from that and how should these be resolved?
 - (e) How can Horizons ensure that the solutions it puts in place are stable for the long term, for example, by binding future councils?
 - (f) What obligations exist under Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and similar matters?

- (g) What other legal questions arise that should be considered?

What lawful means can Horizons use to bind key participants to a range of short and long-term options to support the strategy?

Key takeaways

6. The best means of binding key participants to a range of options within the proposed scheme would be by agreement. This should be reflected in a binding contract that is secured against future owners of the property by way of a covenant in gross in favour of Horizons (and other entities) or an encumbrance registered under the Land Transfer Act 2017 (**LTA**).
7. It may also be possible for either Horizons or Whanganui District Council (**WDC**) to use powers of designation under the Resource Management Act 1991 (**RMA**) to designate the land in a way that prohibits further development. However, this measure could lapse or be removed from the district plan.

Registering a covenant against the property

8. It is possible to place restrictions or limitations on the title of a property that bind all present and future owners. Examples include encumbrances, easements and covenants. The most useful of these for present purposes is a covenant in gross.
9. A covenant is defined in s 307A of the LTA and requires the landowner to do or refrain from doing something to their land. Traditionally, a land covenant was made between two owners of the property where one property was “burdened” and one was “benefited” by the obligation imposed. A land covenant can now be granted “in gross”. This is where the benefit attaches to a person, not a piece of land.
10. Horizons (and other interested parties) could be granted the benefit of a covenant in gross giving them a perpetual right to enforce the terms of any agreement.
11. The terms and conditions of any covenant must be agreed upon between the parties. We will need to carefully consider the long term goals of the project when drafting any covenant instrument for registration.
12. The property owners will need to agree and authorise the registration of the covenant. Horizons cannot unilaterally impose this. This should not create an issue, given that any contract could be made conditional on the successful registration of a covenant in gross in favour of Horizons if necessary.
13. Once registered, a covenant in gross is binding on every person who becomes the owner or occupier of the burdened land as per s 307C. Covenants may only be removed or amended by agreement of the affected parties. This is explained further below.

Powers of Designation

14. Under Part 8 of the RMA, authorities may designate areas of land for public works or projects. A designation is made in a district plan to give effect to this requirement for such works.

15. Horizons could seek a designation over the Anzac Parade area. Under s 176, this would restrict anyone other than Horizons (and other entities) from carrying out work on the designated land that would prevent or hinder the project or work to which the designation relates, without obtaining Horizons permission. It will be essential to carefully consider the long-term goals of the project to best draft the terms of the designation.
16. Any property owner affected by the designation may apply to the Environmental Court obliging Horizons to acquire the property. Additionally, if parties failed to cooperate by agreement and if Horizons wanted to, it could compulsorily acquire the land affected by the designation under s 186 of the RMA. The procedure for doing so is outlined in the Public Works Act 1981 (PWA) and explained further below. These outcomes are unlikely to be an issue given that Horizons intend to offer to purchase the properties as part of the scheme anyway. However, it is important to note that Horizons can bind participation in this way.
17. A designation, once confirmed, is included in a district plan and any proposed district plan as if it were a rule. The downside of this approach is that the designation will lapse on the expiry of five years after inclusion in the district plan unless the incoming council gives effect to it. Therefore, this may be a less permanent solution.
18. Additionally, while a designation can imposed on property owners (unlike a covenant) parties are entitled to submit against the designation and challenge the project as a whole. Therefore, if there is any opposition to the scheme, and Horizons goes for a designation or acquisition route, it will be important to consider how any political opposition could hinder the project.
19. In any event, Horizons has made clear it wishes to rely on voluntary measures only and so any opposition to designation would, presumably, be fatal to Horizons' goals.

What legal mechanisms are open to Horizons to prevent future purchasers from perpetuating flood risk through the opportunistic purchase of properties following a major flood?

Key takeaways

20. A foreseeable consequence of flooding is the value of these properties will decrease either following a major flood or over time given the inability to obtain insurance and/or restrictions on the property such as a caveat or designation.
21. These properties could become subject to opportunistic purchasing which could disproportionately affect vulnerable community members desperate for inexpensive housing and/or create ongoing obligations to clearing the Anzac Parade area.
22. Again, our view is that a binding covenant registered against the property would be the best mechanism for securing an in-perpetuity mechanism to secure this objective.

Mechanisms

23. If flood protection work is considered work or a project which can be designated, then it is likely that the council can designate the land with flood protection/prevention status and restrict any future works on the property. This will not require existing buildings to be removed. However, as noted above, this only operates for so long as Councils give effect to it.

24. We would suggest that a registered covenant is equally if not more binding. In the experience of our property conveyancing team, it is much more likely that a future owner will have its attention drawn to any scheme or restriction by a covenant than something noted on the district plan.
25. Alternatively, Horizons could acquire the properties either by agreement or acquisition as set out below. The land could then be converted to public use other than for residential purposes.

What options does Horizons have under compulsory acquisition legislation to reduce flood risk on currently private property and when can these be exercised?

Key takeaways

26. We think that land can probably be acquired under the PWA because the definition of public works appears to be flexible enough to allow either the local or regional council to use powers of acquisition in this area even if the scheme is technically not essential or does not involve the construction of flood banks.
27. However, our understanding is that any plans are to proceed on a strictly voluntary basis and so it would seem unnecessary to utilise these powers.

Public Works Act 1981

28. Given that Horizons was authorised under the Local Government Act 1974 (**LGA**) to undertake flood protection works, it is likely it will be permitted to acquire the land under s 189 of the LGA by agreement or compulsorily acquire.
29. The definition of public work and work as set out in s 2 of the PWA is incredibly flexible. This sets out that:

“every... local work that ...any local authority is authorised to construct, undertake, establish, manage, operate, or maintain, and every use of land for any ... local work which ... any local authority is authorised to construct, undertake, establish, manage, operate, or maintain by or under this or any other Act; and include anything required directly or indirectly for any such ... local work or use.”
30. The term local authority is also defined broadly in s 2 to include traditional city, district, regional and unitary authorities and under s 16, local authorities are empowered to acquire any land required for a local work for which it has financial responsibility.
31. Under s 189(1) of the LGA Horizons could compulsorily acquire any land necessary or convenient for the purposes of or in connection with the public works provided it is empowered to undertake that work.
32. A principle under the PWA stipulates that before any notice of compulsory acquisition is issued, the responsible body should consult with the property owner to sell the land by Agreement. This is, of course, already part of the ideal scheme proposed.
33. However, it is useful to note that if negotiations fail and Horizons still intends to acquire the land there is a formal process to force cooperation. After issuing a formal notice the owner is invited to sell following a valuation and estimation of compensation. Horizons will be obligated to negotiate in good faith. If there has been no response, negotiation

or settlement after three months Horizons may, within one year after the initial formal notice, proceed to take the land compulsorily.

34. If any problems were to arise with the use of the PWA Horizons can look outwards for support. Under s 224 the Government and any local authority can combine roles for works of national and local importance. If in the opinion of the Minister of Finance and any other Minister the project is of national and local importance, they may agree to the acquisition, execution, control, and management of land as required even if otherwise it would fail to come within necessary PWA requirements.

The solution is likely to involve joint action between local, regional and central government. What are the legal issues that arise from that and how should these be resolved?

Key takeaways

35. We believe that local authorities have legal competency to enter into the types of agreements contemplated in this scheme under the LGA (subject to any internal approvals needed).
36. If other state or Crown agencies or bodies are to participate that will come down to their governing legislation. We see few issues here given that there is support at a ministerial level and the actions to be undertaken are within the contemplation of that agency's functions. For example, Waka Kotahi can enter into arrangements with other government departments and local authorities provided this does not compromise its purpose.
37. Therefore, we do not believe that any kind of special empowering legislation will be required for joint action.

Local Government Act 2002

38. The purpose of the LGA is to provide for local authorities to play a broad role in promoting the social, economic, environmental and cultural wellbeing of their communities and to take a sustainable development approach. This establishes the framework for local and regional government in New Zealand and sets out the:
- (a) purpose, powers and responsibilities of councils generally;
 - (b) structure of local government;
 - (c) planning, decision-making, consultation and accountability of councils generally;
 - (d) governance and management of local authorities;
 - (e) council-controlled organisations and council organisations and the obligations and restrictions on local authorities.
39. Most notably, s 12(2) gives local authorities full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction and full rights, powers, and privileges.

How can Horizons ensure that the solutions it puts in place are stable for the long term, for example, by binding future councils?

Key takeaways

40. The best way to guarantee any desired long term outcome is for an agreement based on contract between multiple parties that are motivated to enforce the contract. If the contract is secured by a covenant or encumbrance registered against the property then it can exist in perpetuity.
41. Alternatively, specific legislation for this issue. That could take the form of a local act of Parliament. However, that is likely to involve some delay due to the legislative process.

The relative security of registered covenants

42. It is difficult to remove covenants from a record of title. Absent agreement by all existing parties, it can only be done by a court order and typically, courts are reluctant to intervene in what contracting parties have agreed.
43. However, s 317 of the Property Law Act (PLA) does provide a discretionary power to modify or extinguish covenants. This requires consideration on the:
 - (a) nature and extent of the use of the land;
 - (b) character of the neighbourhood; and
 - (c) any other relevant circumstances.
44. Additionally, under s 381D(1)(g) the court may remove covenants in gross and restrictive and positive covenants where the covenant is contrary to public policy. However, the primary focus is on private property rights, not the general public interest.
45. We are sceptical of the idea that a court would intervene to remove a covenant of the nature proposed while the risk of flooding remained a possibility.

The option of seeking legislation

46. While we do not believe Horizons require specific legislation to establish the responsibility and accountability between local, regional and central governments, it should be mentioned as an option that would have the supreme force of law.
47. This could be subject to a long legislative process. Before analysing this option further we will need to evaluate whether there is strong ministerial, departmental and budget support and a likelihood of gaining priority on the legislation programme.

What obligations exist under Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and similar matters?

Key takeaways

48. We do not think that Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (**TAT**) imposes any particular or specific obligation on Horizons in this matter as the land is private property.
49. Arguably, however, this project falls within the scope of freshwater management. It is therefore prudent that Horizons have regard to Te Kōpuka, a permanent joint committee for the Manawatu-Wanganui Regional Council, Ruapehu, Stratford and Whanganui District Councils.

50. Horizons has indicated that it intends to have extensive consultation with local iwi throughout differing stages of the project. The LGA and RMA require Horizons to consider te Tiriti o Waitangi (**the Treaty**) in consultation and decision-making processes. We recognise that active partnership and opportunities for participation are essential components to fulfilling these obligations.

Te Awa Tupua

51. TAT gives effect to the deed of settlement that establishes Te Pā Auroa Nā Te Awa Tupua and settles all claims concerning the Whanganui River.
52. Under s 12, the Whanganui River has been given a living person status. Te Pou Tupua (TPT) is the human representative for the river and exists to hear applications made under the RMA for resource consent relating to activities affecting the Whanganui River catchment. Under s 46(3), TPT consent is only required when consent is requested for the use of the water in the river and not the bed itself.
53. Nothing in TAT limits existing private property rights. TPT will not be required to affirm any RMA consent for projects on private property on Anzac Parade. Notwithstanding this, Horizons should consult with Te Kōpuka as explained further below.

Te Kōpuka

54. Section 35 of TAT requires that if Horizons adopts any legislation, process or plan relating to freshwater management in the Whanganui River catchment, Te Kōpuka must be appointed for the process.
55. If freshwater management includes how floods from rivers are managed and the project is a policy statement or plan Te Kōpuka's seventeen members must be appointed to the project. It is unclear what level of control they would have.
56. If freshwater management is confined to the management of the river within its traditional boundaries, relating to concerns such as water quality, run-off and biodiversity in the river this project would not be within Te Kōpuka's scope.
57. The nature of the projects being on privately-owned homes tips the balance towards taking a narrow view of Te Kōpuka's authority. This resiliency project is an engagement project with external stakeholders (private homeowners). However, as a stakeholder in the river, Te Kōpuka should be advised of the project.

Local Government Act

58. Section 4 of the LGA requires that local authorities recognise and respect the Crown's responsibility to the treaty and improve opportunities for Māori to contribute to local government decision-making processes. Parts 2 and 6 of the LGA set out principles and requirements to facilitate this participation.
59. Additionally, s 81 requires that all local authorities establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority and consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority. For these purposes Horizons must also provide relevant information to Māori.
60. Horizons must follow the processes it already has in place under the LGA.

Resource Management Act

61. Section 8 of the RMA states that In achieving the purpose of the RMA all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, must consider the principles of the Treaty.
62. Consultation processes are set out in schedule 1. This explains how consultation with local Iwi should progress when the local authority is preparing or changing policy statements and plans.

Schedule 1 of the RMA

63. Section 3B of schedule 1 outlines that a local authority must respond to an invitation to consult with local Iwi or invite the local Iwi to consult on the strategy. A process must be established and maintained to provide the opportunity to consult on the strategy. The process will ultimately enable Iwi authorities to identify resource management issues of concern to them and address those issues throughout the strategy.
64. Section 4A of schedule 1 of the RMA sets out the further pre-notification requirements concerning Iwi authorities. A local authority must before notifying a proposed policy statement or plan;
 - (a) provide a copy of the relevant draft proposed policy statement or plan to the Iwi authorities;
 - (b) have particular regard to any advice received on a draft proposed policy statement or plan from those Iwi authorities; and
 - (c) allow sufficient time for the Iwi authority to consider the draft and provide advice on it.

Mana Whakahono a Rohe

65. Mana Whakahono a Rohe is an agreement mechanism for Iwi participation outlined in section 58M and 58N of the RMA. This is for Iwi and local authorities to discuss, agree and record ways in which tangata whenua may participate in resource management and decision-making process under the act.
66. Due to the large numbers of potential parties, it may be wise for Horizons to initiate their own Mana Whakahono a Rohe so all parties can be involved from the beginning of the implementation of the strategy. This must meet the requirements set out in s 58R and record how Horizons will:
 - (a) include Iwi in planning processes;
 - (b) undertake consultation with Iwi;
 - (c) work with Iwi to develop monitoring systems;
 - (d) give effect to the requirements of any relevant Iwi participation legislation; and
 - (e) manage conflicts and resolve disputes.

Climate Change Commission

67. Additionally, the CCC as referred to below notes in their National Climate Change Risk Assessment 2020 that mātauranga Māori can identify ways to adapt and prepare for change. It may also be important to actively consider how Mātauranga Māori plays a role in informing risk assessments, adaptation and adaptive capacity for relevant climate-sensitive Māori communities.
68. The discussions and considerations of which may be led by Māori in any of the above required consultations.

What other legal issues arise that should be considered?

69. This section will deal with the following further issues:
 - (a) What obligations does Horizons have for houses on Anzac Parade subject to residential tenancies?
 - (b) What are Horizons' more general obligations to consult with the Client Change Commission?

What obligations does Horizons have for houses on Anzac Parade subject to residential tenancies?

Key takeaways

70. It is possible that some of the houses on Anzac Parade are or will be rented out before Horizons may obtain, relocate or raise the properties. This creates several issues for how to manage the property owners' obligations to their tenants while also making the most of the opt in scheme.
71. It is possible that owners of the Anzac Parade houses may not wish to wait for tenancies to end before selling, raising their houses or relocating. Where this is the case, Horizons may need to manage its obligations as an incoming Landlord, including compliance under the Residential Tenancies Act 1986 (**RTA**).
72. If the tenancies are of a periodic nature, Horizons can require that the tenancy be ended by the existing landlord (after the expiration of notice). If the tenancies are for a fixed term, then the tenancies would have to continue to the end of the term or the landlord or the owner would have to apply to the court to end them early.
73. We do not think it would be easy for the tenancies to be terminated early (other than by agreement) for the purposes of lifting or moving the houses. It is possible that a court or tribunal could authorise an early termination but we think that this would involve payment of compensation to tenants (for example, relocation costs).
74. If an overarching agreement is entered into with landowners, this should include a covenant that only periodic tenancies be entered into.

Purchasing Rental Properties

75. Horizons can purchase property on Anzac Parade that are subject to tenancies. The landlord will need to communicate the purchase with the tenant and Horizons will need

to be considerate of their rights. For example, if Horizons want any photographs of the house or to visit the property, the landlord must give notice. While the tenant cannot unreasonably refuse access, they are entitled to set reasonable conditions. On settlement, the old landlord's interest in the bond will pass to Horizons. Horizons will have to continue to rent the property out to the existing tenants and comply with the RTA until the tenancy ends.

Terminating Tenancy Agreements

76. Fixed-term tenancies can only be changed if the landlord and tenant agree. If the tenant will not agree the only alternative is to apply to the Tenancy Tribunal to be released based on an unexpected change in circumstances. Horizons will have to prove it will suffer severe hardship if the tenancy continues. This is unlikely. Even if the Tribunal were to release the parties from the tenancy, it can order compensation to be paid to the tenants being removed. This would be an expensive avenue to pursue.
77. To end a fixed term tenancy, a landlord must give notice to the tenant of their intention for the tenancy to end on the expiry date. Notice requirements change based on when the tenancy signed:
 - (a) If the tenancy was signed before 1 February 2021, notice must be given between 90 and 21 days before the expiry date.
 - (b) If the tenancy was signed after that date notice must be 28 days' notice before the expiry date and set out reasons for ending the tenancy including, with the relevant notice requirements. These are the same as set out for periodic tenancies below.
78. Any periodic tenancy can be cancelled with notice in writing. The notice period changes depending on who is giving notice:
 - (a) tenants must give at least 28 days' notice unless the landlord agrees to less.
 - (b) landlords must give at least 90 days' notice with one of the following reasons:
 - (i) the property is going on the market for sale within 90 days of the set end date; or
 - (ii) the property has been sold and the agreement is conditional on vacant possession; or
 - (iii) it would be impractical for the tenant to stay in the property because the landlord wants to do major alterations, refurbishment or repairs within 90 days of the set end date; or
 - (iv) the property is becoming a commercial premise for at least 90 days; or
 - (v) the property needs to be vacated for a business activity and the tenant was told they may use the property for that purpose; or
 - (vi) the property is going to be demolished within 90 days after the set end date.
 - (c) The landlord only has to give at least 63 days' notice if:
 - (i) they or one of their family members wants to live there as their main home for at least 90 days; or

- (ii) one of their employees is going to live there, and the tenant knew before the tenancy started that the property was used for housing employees.

Works on rental properties

- 79. If property owners elect to have their house raised or relocated, these works cannot be done while there are tenants in the property.
- 80. Landlords must provide and maintain rental properties in a reasonable state of repair. This means making sure they're safe and healthy to live in. Landlords must meet all legal building, health, and safety requirements. This means keeping the plumbing, electrical wiring and structure of the house safe and in working order. It would be impossible for any landlord to maintain these standards while completing substantive works on the property.

What are Horizons obligations to consult with the Climate Change Commission?

Key takeaways

- 81. Finally, it may be prudent for Horizons to consult with the Climate Change Commission (CCC) to verify whether any scheme aligns with the national adaptation plan for climate change based on commission experts.

The role of the Climate Change Commission

- 82. The first National Climate Change Risk Assessment was produced by the Ministry for the Environment and released in August 2020. There are currently no dedicated funds for adaptation to reduce exposure to climate change related risks. However, there is funding for recovery from hazard events, including the Natural Disaster Fund and the Adverse Events Fund for the primary production sector.
- 83. This report acknowledges that where managed retreat is the only option, significant investment will be required to support these communities. The next report is due to come out in 2024. It may be worth consulting with the CCC with regard to what their advice is for managed retreat and allocation of likely future funding for similar measures.