

A GUIDE TO CLIMATE CHANGE RELATED LEGAL OBLIGATIONS AND PROCESSES OF LOCAL AUTHORITIES IN AOTEAROA/NEW ZEALAND

LAWYERS FOR CLIMATE ACTION NEW ZEALAND INCORPORATED

Introduction

1. This document provided by Lawyers for Climate Action New Zealand Incorporated (LCANZI) is intended as a general guide for local communities as to climate change related legal obligations and processes of local authorities in Aotearoa/New Zealand ('Councils'). It further discusses what community action can be taken to support these obligations being complied with and constructive outcomes being achieved at local levels in reducing greenhouse gas emissions and addressing the impacts of climate change.
2. It is not the intention of this document to provide definitive legal advice on these issues. If anyone is considering taking legal action in regard to any area covered, they should seek specific legal advice.
3. The structure of this document is to discuss areas of Council climate change related obligations and processes under sections relating to the specific legislation, policies and other sources from which they originate. Most sections will include a comment on relevant community action.

Resource Management Act 1991

4. The Resource Management Act 1991 ('RMA') establishes the regime for the management of the natural environment in the district or region of a Council. The RMA has a number of provisions that relate directly and indirectly to the impact of climate change.
5. Within Part 2 of the RMA, which sets out guiding purposes and principles, there are the following provisions relating to climate change:
 - (a) Section 5 sets out the purpose of the Act to "promote the sustainable management of natural and physical resources".
 - (b) Section 6 sets out that any person exercising functions and powers under the Act in managing the use, development and protection of natural and physical resources must have regard to matters of *National Importance*, including:
 - (i) The preservation of the natural character of the coastal environment, wetlands, lakes and rivers.
 - (ii) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.
 - (iii) The relationship of Maori and their culture and traditions with their ancestral lands and water,
 - (iv) The management of significant risks from Natural Hazards.

- (c) Section 7 sets out *other matters* that a person exercising powers and functions under the act must have regard to including:
- (i) the intrinsic values of ecosystems (s 7(d)).
 - (ii) the effects of climate change (s 7(i)).
6. The RMA provides that Councils are to have *regional policy statements* and plans (for Regional Authorities)¹ and *District Plans* (for Territorial Authorities)² setting out rules for resource management in the Council's area. These rules can deal with a wide range of matters relevant to climate change, including promoting activities in particular zones, subdivision rules that govern where and how compact or spread-out urban areas will be, protection of natural features, mitigating natural hazards, and control of contaminants and hazardous substances.
 7. Section 15(1)(c) provides that no person shall discharge a 'contaminant' into the air from any industrial or trade premises unless provided for in any regional plan, resource consent or other regulations.
 8. Regional Councils are also given the responsibility of generally controlling the discharge of contaminants into the air. ³ In order to carry out this responsibility Regional Councils are able to make rules after taking into account the adverse effects on the environment of the activity.⁴
 9. A 'contaminant' is defined as including any gas when discharged into the air is 'likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged'.⁵
 10. Greenhouse Gases (GHGs) are given the same definition as in the *Climate Change Response Act*⁶ and appear to be considered as contaminants under the RMA.⁷
 11. Presently, the ability for councils to control GHG emissions in their planning documents and resource consents is limited.
 12. Under section 70A, when making regional plans, regional councils must not make rules limiting GHG emissions (but may make rules to encourage renewable energy projects).
 13. Also, under s104E when considering an application for a consent to discharge contaminants into the air⁸, the consent authority cannot presently take into account the contaminating effect of Greenhouse Gases (GHGs).

¹ Sections 59-70.

² Sections 73-77.

³ Section 30(f).

⁴ Section 68.

⁵ Section 2.

⁶ Section 2.

⁷ Given that there are exclusions for GHGs under s 70A and s 104E.

⁸ Referred to as 'discharge permits' – which is defined as a consent to discharge under s 15 - s 87(e)).

14. Section 70B does allow Councils to put in place rules to control the discharge of GHGs by implementing a National Environmental Standards (NES) to control the effects of climate change. However, to date there is no such NES in place.
15. Although s 104E and s 70A refer to restrictions on GHG emissions, the effect of the decision of the Supreme Court in *West Coast ENT Ltd v Buller Coal Ltd* is that same reasoning would apply to consents for more remote causative activities.
16. The effect of the interpretation of s 104E in *Buller Coal* effectively prevents Councils from taking into account the impact of GHG emissions/climate change in formulating plans and policies.⁹
17. S 104E and s 70A were to be repealed from 31 December 2021 or a later date no later than 30 November 2022 by order in council.¹⁰ The Government has decided to opt for the later date to provide further time on the proposed NES.¹¹ The apparent intention is to have national environment standards in place by then.
18. Once these sections are repealed and a national environmental standard is in place then the extent to which councils must take into consideration GHG emissions in making planning decisions will ultimately depend on the NES. But hopefully it will provide a broad discretion to reduce emissions, such as reducing travelling times, the energy efficiency of urban developments and the planting of trees.
19. Despite these restrictions, at present there are still possible avenues for legal action in regard to Council's planning decisions impacting on GHG emissions.
20. In planning, there may still be scope for Councils to consider indirectly, GHG emissions, when deciding on subdivision policies and rules and whether a more compact urban form is desirable. But this is subject to some debate.¹²
21. Councils are also required to take into account the effects that climate change has had on the environment in making their planning decisions.¹³ This includes catering for rising seas and increasing extreme weather events. This provides a number of challenges for councils, including the lack of any central government guidelines and funding. Many of these challenges may be addressed if the suite of RMA reforms, including the proposed Climate Change Response Act, is put into place by central government.¹⁴

Community Action in regard to the RMA

22. There are processes under the RMA 1991 which enable individuals or groups to file submissions on planning processes that also provide a right of appeal to the courts from council decisions.
23. While the scope to make submissions on climate change issues are limited by the restrictions in the RMA to addressing the effects of climate change, these will be lifted by December 2022 after

⁹ *Climate Change and the RMA – A sea change has begun* Lawtalk Issue 145 19 March 2021.

¹⁰ Resource Management Amendment Act 2020.

¹¹ New Zealand Herald 22/12/21 – *Non-Sensical Greens Smarting after Labour Delays Climate Change Fixes.*

¹² *Climate Change and the RMA – A sea change has begun* Lawtalk Issue 945 19 March 2021.

¹³ Section 7(f).

¹⁴ *The Proposed Managed Retreat and Climate Change Act & Local authorities* Lawtalk 945 22 March 2021.

which submissions can made for Councils to take steps within their planning decisions to address the reduction of GHGs within local communities.

National Policy Statement on Urban Development

24. A source of obligations of Councils to account for climate change implications of RMA decisions has recently arisen under The National Policy Statement on Urban Development 2020 ('NPSUD'). This is a national directive under the RMA which came into effect in August 2020.

25. The NPSUD applies to all 'planning decisions' by local authorities that effect an urban environment.¹⁵ A planning decision includes a regional plan or policy statement, a district plan, or a resource consent.¹⁶

26. The NPSUD contains the following objectives and policies relating to climate change:

Objective 8: *New Zealand's urban environments:*

*Support reductions in greenhouse gas emissions; and
are resilient to the current and future effects of climate change.*

Policy 1: *Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:*

(e) support reductions in greenhouse gas emissions; and

(f) are resilient to the likely current and future effects of climate change.

27. The NPSUD applies to planning decisions relating to urban environments from August 2020. This includes resource consents. As such, it would appear that the climate change policies and objectives under the NPSUD are at present inconsistent with s 104E of the RMA. It is presumed, however, that the RMA restrictions on planning decisions restricting GHG emissions will continue to apply.

28. There is a timetable for certain documents to be provided under the NPSUD. This includes a Housing and Business Capacity Assessment (HAP)¹⁷ on housing (by July 2021) and a Future Development Strategy (FDS) in time for the next Council Long Term Plans (LTPs).¹⁸

29. The objectives of FDS's are:

to promote long-term strategic planning by setting out how a local authority intends to:

(i) achieve well-functioning urban environments in its existing and future urban areas.¹⁹

30. The purpose of and HAP is to:

¹⁵ 1.3 Some of the policy does not apply to smaller LAs.

¹⁶ 1.4

¹⁷ 3.19

¹⁸ 3.12 and 4.1 which states that at the latest it must be by the 2024 LTP

¹⁹ 3.13(1)

- (a) *provide information on the demand and supply of housing and of business land in the relevant tier 1 or tier 2 urban environment, and the impact of planning and infrastructure decisions of the relevant local authorities on that demand and supply; and*
- (b) *inform RMA planning documents, FDSs, and long-term plans; and*
- (c) *quantify the development capacity that is sufficient to meet expected demand for housing and for business land in the short term, medium term, and long term.*²⁰

31. The NPSUD has started to appear in some Council planning documents. This includes HAPs and references to the policy statement in recently reviewed LTP's as relating to planned urban environments. However, in some LTPs there does not appear to be any indication that the climate change objectives of the NPSUD are being explicitly taken into account.²¹

Community Action in regard to the NPSUD

32. Community groups could make submissions and otherwise raise issues with their local Council that the climate change related policies and objectives in the NPSUD need to be taken into account in upcoming planning decisions. Approaches could be made for planning decisions made since August 2020 which are felt not to have adequately reflected the objectives to be reviewed.

Long Term Plans and Local Government Act

33. Councils are established under the Local Government Act 2002. Although the Act does not specifically refer to climate change it does contain a number of relevant obligations on Councils:

- (d) *The Act requires local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach (section 3(d)).*
- (e) *Further to the principles of the Treaty of Waitangi, local authorities must facilitate participation by Māori in local authority decision-making processes (s 4).*
- (f) *The purpose of local government is to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future (section 10(1)(b)).*
- (g) *When making a decision, a local authority should take account of the interests of future as well as current communities (section 14(1)(c)(ii) and 14(1)(h)(iii)).*

34. There is also a requirement for Councils to provide a long-term plan covering a period of not less than 10 years. This must provide for a number of matters including to "provide a long-term focus for the decisions and activities of the local authority". Community consultation must be carried out before the plan is finalised (section 93).

Community Action in regard to the LTPs

35. The LTP process is a particularly important process for members of the community to be become involved in. Submissions should be made on future climate change related policies by Councils to LTPs. In particular, the plans around investment in transport networks, public transport, cycling and walking facilities, natural hazard resilience, measures dealing with waste and public education on minimising emissions will all be relevant.

²⁰ 3.20(1).

²¹ For example, the Tauranga Long Term Plan 2021-31 page 21.

36. As noted above, the NPSUD places certain specific climate change related requirements on LTPs.

Regional Land Transport Plans

37. Section 14 of the Land Transport Management Act requires regional transport plans to be consistent with the purposes of the Act and the General Policy Statement on land transport (GPS).

38. The current GPS includes the following directive relating to climate change:

“Investment decisions will support the rapid transition to a low carbon transport system, and contribute to a resilient transport sector that reduces harmful emissions, giving effect to the emissions reduction target the Climate Change Commission recommended to Cabinet until emissions budgets are released in 2021”

Community Action regarding RLTPs

39. Submissions can be made by members of the community on proposed Regional Land Transport Plans (RLTPs) as part of the process of reviewing a Regional Council’s Long Term Plan.

40. Some existing Regional Land Transport Plans have general emission reduction targets that do not appear to have been derived from modelling in support of their transport plans. There is apparently a lack of modelling tools that would allow councils to do this.

41. If existing Regional Land Transport Plans by regional or unitary authorities are considered not to be consistent with the GPS objectives, then community members could approach their local council about the plans being improved.

42. If these approaches do not result in sufficient improvements consideration could be given to having the plan judicially reviewed by the High Court. Auckland Transport is currently being judicially reviewed for their Regional Land Transport Plan for not complying with the GPS.

Climate Change Response Act

43. The Climate Change Response Act 2002 does not refer directly to Councils, but some of its provisions arguably do apply to them.

44. Under section 5ZN a body exercising a public function may take into account the 2050 target,²² an emissions budget,²³ or an emissions reduction plan. Although the section is expressed in permissive terms it is arguable that it remains a relevant consideration for Councils in setting their own emission targets and budgets and making planning decisions. It could also be relevant to Councils working with central government in achieving these national budgets and targets.

Local Government Leaders Climate Change Declaration

²² Section 5Q: net emissions of greenhouse gases other than biogenic methane are zero by 2050 and for each subsequent year, with special targets for methane.

²³ The quantity of emissions that will be permitted in each emissions budget period as a net amount of carbon dioxide equivalent.

45. In 2017 a number of Mayors of District Councils and Chairs of Regional Authorities signed the [Local Government Leaders Climate Change Declaration](#).

46. The Declaration in its introduction section stated:

We have come together, as a group of Mayors and Chairs representing local government from across New Zealand to:

- 1. acknowledge the importance and urgent need to address climate change for the benefit of current and future generations.*
- 2. give our support to the New Zealand Government for developing and implementing, in collaboration with councils, communities and businesses, an ambitious transition plan toward a low carbon and resilient New Zealand.*
- 3. encourage Government to be more ambitious with climate change mitigation measures.*
- 4. outline key commitments our councils will take in responding to the opportunities and risks posed by climate change; and*
- 5. recommend important guiding principles for responding to climate change.*

47. The Declaration further stated in the section headed Council Commitments:

For our part we commit to:

- 1. Develop and implement ambitious action plans that reduce greenhouse gas emissions and support resilience within our own councils and for our local communities. These plans will:
 - a. promote walking, cycling, public transport and other low carbon transport options.*
 - b. work to improve the resource efficiency and health of homes, businesses and infrastructure in our district; and*
 - c. supports the use of renewable energy and uptake of electric vehicles.**
- 2. Work with our communities to understand, prepare for and respond to the physical impacts of climate change.*
- 3. Work with central government to deliver on national emission reduction targets and support resilience in our communities.*

(“The Declaration Commitments”)

48. The leaders of a number of local authorities did not sign the declaration in 2017 (Hamilton CC, Hurunui DC, Manawatu DC, Opotiki DC, Tararua DC, Taupo DC, Thames-Coromandel DC, Waimakariri DC, Waimate DC, Wairoa DC, Waitaki DC, Westland DC, and West Coast Regional Council). It is unclear whether all councils have now signed the Declaration.

49. As a consequence of not signing the declaration, judicial review proceedings were taken against the Thames Coromandel District Council. The High Court in the judgement of Palmer J in *Hauraki Climate Action v Thames Coromandel District Council*²⁴ upheld the review on the basis that the council had failed to go through the required statutory consultation process before making the decision not to sign the declaration. The Court did, however, dismiss the claim that the decision was unreasonable on the basis that signing the declaration was a significant one that may raise legitimate expectations that the council would then take action in line with the commitments, which if not fulfilled might lead to the council being judicially reviewed.

50. In regard to the legitimate expectation that may be raised by entering the declaration the High Court commented:

[32] Whether the Declaration could be the basis for enforcement at administrative law of a legitimate expectation would depend on the precise expectation claimed and the circumstances of its alleged breach. It would not necessarily be easy to enforce. It is likely to be quite difficult. But if a Council endorses their mayor signing the Declaration and the Mayor signs it, then the Mayor would have ostensibly signed it on the Council's behalf. That appears to be what was proposed here by Councillor Peters. And if, for example, the Council were then to refuse to even consider developing any action plan to reduce greenhouse gas emissions, or to decide not to work with its community at all to understand the physical impacts of climate change, then a successful action for breach of legitimate expectation could not be ruled out. Real world cases are likely to be more nuanced, less clear-cut and much less certain. And I reiterate that the chances of success would depend on the circumstances and context of the case. But a legally enforceable legitimate expectation is possible. That is relevant to the issues below.

51. With regard to the type of follow up action that may be expected of the council if it signed the declaration:

[61] As I have explained above, climate change is important both internationally and locally. The Council itself accepts its district is likely to be materially affected by anthropogenic climate change in terms of the risks of coastal inundation and/or erosion; fresh and saltwater balances in coastal margins, saline water intrusion into unconfined aquifers; impact on waste and storm water services; impacts on areas prone to landslides and flooding; increased fire and drought; negative impacts on biodiversity; and acidification in the Firth of Thames. The physical, social, economic, and cultural effects of climate change and necessary mitigation measures are likely to be highly significant for Thames-Coromandel.

[62] Given this, the Council's climate change strategy, and a proposed decision engaging with climate change issues at a strategic level, must be a significant issue in terms of the LGA and its Significance and Engagement Policy. While the question of whether to sign the Declaration might not implicate all aspects of the Council's climate change strategy, it raised salient strategic issues about it. The legal and financial implications alone needed to be considered, as the Mayor's Report itself suggested. But much wider strategic issues were engaged. Should the Council develop and implement an action plan to reduce greenhouse gas emissions and support resilience in the district and how? Should it work with its communities to understand, prepare for and respond to the physical impacts of climate change, and how? Should it work with central government to deliver on national emission reduction targets, and how? These issues are significant; more significant than whether to move a head office from one city to another.

Community action in regard to the Local Government Leaders Climate Change Declaration

52. Inquiries can be made to individual Councils as to the approach they have taken to implementation of the obligations set out in the declaration.
53. If a Council has not signed the declaration, they could be encouraged to do so given that the majority of Councils have made that commitment.
54. For those Councils who have signed the declaration, they could be asked to provide a copy of their 'ambitious action plan' that complies with the objectives of the declaration.

55. If the Council cannot provide this action plan, they should be asked to promptly develop one, together with adequate funding for its implementation.
56. If the Council has developed an 'action plan', it could be analysed to see if it complies with the objectives of the declaration, including: reducing greenhouse gas emissions and supporting resilience within local communities - including promoting walking, cycling, public transport and other low carbon transport options.
57. If a Council has signed the declaration but does not have an adequate action plan, then it could be pointed out that, following the decision in *Hauraki Climate Action v Thames Coromandel District Council*, it has left itself open to judicial review proceedings being taken against them for failing to follow through on the legitimate expectations of action they would take subsequent to committing to the declaration.

Climate Change Emergency Declarations

58. A number of Councils have also passed their own *climate change emergency* resolutions. These have contained specific commitments by the Council.
59. For example, the climate change emergency declared by the Auckland City Council contained the following commitments:

By declaring a climate emergency, the council is committing to:

- *continue to robustly and visibly incorporate climate change considerations into work programmes and decisions*
- *continue to provide strong local government leadership in the face of climate change, including working with local and central government partners to ensure a collaborative response*
- *continue to advocate strongly for greater central government leadership and action on climate change*
- *continue to increase the visibility of our climate change work*
- *continue to lead by example in monitoring and reducing the council's greenhouse gas emissions*
- *include climate change impact statements on all council committee reports.*

60. These climate change emergency resolution commitments will likely raise the same legitimate expectations of follow up action by Councils as with the climate change leaders declaration.

Factors that may be taken into account in Judicial Review of Councils

61. In a number of areas discussed above, it has been mentioned that judicial review challenges in the High Court can be brought in regard to climate change related policies and other decisions made by Councils.
62. For community groups to take judicial review proceedings against their local councils is a significant step. This should only be taken after the Council has been put on notice as to why it is considered to have acted unlawfully and the Council must be given an opportunity to respond.

Specialist legal advice should be obtained to formulate the issues to be put to the council. Legal representation for any proceedings taken will also generally be required.

63. Community groups may be able to secure free or discounted legal representation for judicial review proceedings. Inquiries can be made with Lawyers for Climate Action through its pro-bono referral service as to whether they are aware of any lawyers who can provide this type of assistance.
64. Applications can also be made to the court to waive normal court fees for commencing and having the proceedings heard.
65. It is likely, however, that there will be a certain amount of costs relating to judicial review proceedings for which funds will have to be raised.
66. If the judicial review proceedings are unsuccessful there is a possibility that the court can award costs against the community group. Fundraising for this should also be considered.

Further Inquiries

67. Any further inquiries about this document can addressed to Lawyers for Climate Action New Zealand Incorporated.

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