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Councils' Ability to Limit Development in Natural Hazard Areas

Introduction

1. You have asked us to provide you with updated advice on whether, under the Resource Management Act 1991 **(RMA)**, and/or the Building Act 2004 **(BA04)**, councils have sufficient mandate to completely prevent new development and/or the extension of existing development in hazardous areas. This advice is an update on, and is intended to replace, our advice of 9 June 2010.

2. You want to know what the relevant legislation provides and whether there is any useful case law setting out what councils can and should do, and the effectiveness of any tools.

3. This advice builds on and is related to our advice for Local Government New Zealand (**LGNZ**) on Liability for Information on Coastal Hazards (completed in April 2009, and updated in February 2010 to reflect the RMA amendments that came into force on 1 October 2009) **(Coastal Hazards advice)**.[1]

4. As part of this advice, we discuss the ability for councils to provide for prohibited activities in district and regional plans. We also consider sections 6(h), 106 and 220 of the RMA, the New Zealand Coastal Policy Statement 2010 (**NZCPS**), the potential necessity for changes to Regional Policy Statements (**RPS**), and proposals for a National Policy Statement (**NPS**) on natural hazards.

5. We will also consider relevant provisions of the BA04 which are sections 71-74, relating to building on land subject to natural hazards, and the provisions in the BA04 relating to buildings with specified intended lives.

6. This advice has been reviewed and updated in light of amendments to the RMA which came into force in April 2017 and October 2017 under the Resource Legislation Amendment Act 2017 (**RLAA**). The key changes introduced by the RLAA that impact directly or indirectly on the matters covered by this advice are summarised below:

    (a) Section 6 of the RMA has been amended to add “the management of significant risks from natural hazards” to the list of matters of national importance that decision-makers must recognise and provide for when exercising functions and powers under the RMA.[2]

1 That advice will need updating in due course to reflect legislative changes and more recent case law.
2 Section 6(h) "Natural hazard" is defined in section 2(1) of the RMA.

(b) Section 11 of the RMA has been amended so that subdivision is now permitted unless expressly restricted by rules in a district plan or a national environmental standard. Previously subdivision of land was restricted unless expressly permitted in a district plan or national environmental standard.

(c) Sections 106 and 220 of the RMA have been amended to:

(i) broaden the range of natural hazards to be considered reflecting the definition of 'natural hazards' in section 2 of the RMA; and

(ii) introduce a risk-based approach to considering subdivision consent applications. Councils can now refuse subdivision consent if there is a significant risk from natural hazards.

Executive Summary

7. The RMA provides councils with a comprehensive mandate to prevent or restrict both new development and the extension of existing development in hazardous areas. This mandate is reinforced by the new section 6(h) of the RMA. Councils can do this by providing in their plans for appropriate objectives and policies, and by providing for non-complying activity status, or where appropriate, prohibited activity status, for development activities. These measures can only be put in place if proper evaluations have been carried out, and relevant factors considered, in accordance with the requirements of the RMA.[3] It also requires careful wording in plans as to precisely what activities are to be made non-complying or prohibited as the case may be.

Existing activities

8. Whilst Councils have the ability to prevent new development and extensions to existing development in hazardous areas, existing land use activities/development in such areas can continue if they fall under section 10 of the RMA. However, if the regional plan in place for the particular area provides sufficient controls over the hazard areas and related activities, this may prevent the continuation of some existing activities.

9. In particular, a building that is destroyed, that under the district plan would be permitted to be rebuilt provided it is of the same scale character and intensity, could not be rebuilt if the regional plan relevantly and lawfully provides otherwise.

District and Regional Plans

10. It is made much easier for local authorities to provide for controls in hazardous areas and introduce non-complying or prohibited activity status for development or redevelopment in such areas, if the hierarchical planning documents require the authorities to make such provision in their plans. Both regional and district plans are required to "give effect to" a NPS, a NZCPS, and a RPS. The RPS for a region must specify which local authority is to have responsibility for specifying objectives, policies and methods for controlling natural hazards.

Regional Policy Statements

11. For an RPS to be an effective tool to prevent development in hazard areas, it needs to be clear in its directions for the content and specific requirements to be incorporated into

3 Including sections 32 to 32A.

regional and district plans. The RPS needs to contain directory language. If the aim is to prevent development, then using the term "avoid" sends a stronger message than "remedy" or "mitigate adverse effects".

12. Territorial authorities and regional councils need to work together in order to prevent development in areas subject to natural hazards. This need to collaborate is born out by the fact that the functions of both authorities, set out in sections 30 and 31 of the RMA, include duties in relation to "*the avoidance or mitigation of natural hazards*", and the new section 6(h) which requires those exercising functions under the RMA to recognise and provide for the management of significant risks from natural hazards.

National Policy Statements

13. The Ministry for the Environment (MfE) is still progressing work on a NPS on Natural Hazards. The MfE website records that the Minister has stated a preference for a NPS with an indicative date for completion of 2018.[4] As part of its work, MfE commissioned a report from Tonkin and Taylor on the use of a risk based approach to natural hazards which was published in September 2016. MfE has said that it will take into account the research and recommendations in the Tonkin Taylor report in the policy work for the proposed NPS.

New Zealand Coastal Policy Statement

14. The 2010 NZCPS relevantly includes Objectives 4 and 5 and Policies 1(2)(d), 3(2), 4(c)(iii), 10(2), 18(d), and most importantly 24 to 27. These provisions either impact on or directly relate to coastal hazards including the effects of climate change. The NZCPS must be applied as required by the RMA by persons exercising functions and powers under that Act. The NZCPS provides a strong basis to prevent development in coastal hazard areas.

Non Complying Activity Status

15. An activity that has non-complying status can only be carried out if the adverse effects of carrying out the activity are minor or it is not contrary to the objectives and policies of the particular plan. These can, depending on the circumstances, be significant hurdles to mount.

16. In some situations, after the appropriate analysis has been completed under section 32 of the RMA and all other relevant factors considered (see below), it may not be appropriate to classify an activity as prohibited. In that case, non- complying status is the "next best" option for limiting development, particularly if the objectives and policies of the plan leave little room for argument whether development in a hazard area would be contrary to the objectives and policies.

17. This requires careful wording for the objectives and policies, as they must also be consistent with and give effect to any higher regional or national planning instruments. In the *Holt* case, discussed below, the objectives and policies of the various district and regional plans and policies were not worded in such a way that the non-complying activity of a proposal was *contrary* to them, and accordingly the land use consent to build a pole house in a flood-prone area was upheld.

4 See http://www.mfe.govt.nz/more/natural-hazard-management/managing-natural-hazards.

Prohibited activity status

18. Including prohibited activity status in a plan for various activities in natural hazard areas will be able to be more readily justified if the hierarchy of documents ahead of district and regional plans provides a substantial foundation for doing so. However, local authorities must still go through the procedural steps required by the RMA in order to prevent development, including the expansion of existing development, in certain areas.

19. The *Coromandel Watchdog* case, discussed in detail below, is particularly important in this context. Although section 32 has been replaced, a new section 32AA inserted, and section 32A amended since the time of this decision, we do not consider that these legislative changes materially affect the conclusions reached in the decision.

20. The underlying principle is whether or not the allocation of prohibited activity status is the most appropriate of all the options available. In the *Thacker* case, also discussed below, prohibited activity status was not the most appropriate option because it would have unintended effects, beyond the concerns that the Regional Council was focussed on.

21. The *Coromandel Watchdog* case outlines a number of situations where prohibited activity status could be imposed. The Court of Appeal in that case held that it was not correct that prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the plan, the activity in question should in no circumstances ever be allowed in the area under consideration. While the prevention of development in clearly hazardous areas would often be likely to meet this higher test, the nature of hazards and the surrounding environment is such that it is not always "black and white", and the need to consider other factors will be desirable.

22. Categories identified in the *Coromandel Watchdog* case that may also lead to situations when prohibited activity status should be imposed, that are relevant to this advice, include:

    (a) taking a precautionary approach if there is insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan. However, the Court pointed out that relying on this ground would not be appropriate where a local authority has sufficient information, but wants to defer undertaking an evaluation until a specific application to undertake the activity is made. In relation to natural hazards, the potential to impose prohibited activity status for this reason may be particularly important;

    (b) where it is necessary to allow an expression of social or cultural outcomes or expectations. The example given in the decision was the prevention of nuclear power generation. However, it is also possible that, for example, an area where a disaster had occurred previously, as a result of a hazard, would give rise to an expectation in a community that new or further development would be prohibited there; and

    (c) where a council wishes to restrict the allocation of resources – in the *Robinson* case, discussed below, the Court identified that restricting the allocation of houses within the structure plan area was a valid reason for contemplating prohibited activity status. Restricting the allocation of buildings and other structures in a hazard area therefore may also give rise to this category being relevant and providing a reason for prohibiting that activity.

23. If the appropriate analyses and considerations, as outlined above, are given by an authority before proposing prohibited activity status, that status should generally be robust enough to avoid successful challenge (and pass any higher courts' scrutiny) in preventing further development in hazard areas or preventing new development. As noted, this is likely to require some collaboration between regional councils and territorial authorities, and ideally, with close alignment with national policy statements that provide a clear mandate to local authorities to prevent development in appropriate situations.

The Building Act 2004

24. The BA04 is not a legal mechanism that councils can generally use to "prevent" buildings being constructed, or added to, in hazardous areas, except in some specific situations. Those situations will be relatively limited.

25. If the building consent applicant can satisfy the Council that they can meet all the requirements in sections 71 and 72 of the BA04, the Council must grant the building consent, although it may result in a tag being put on the certificate of title for the property under sections 73 and 74 of the BA04**.** Controls in the BA04 concerning buildings with specified intended lives will also not allow the Council to prevent development.

Sections 106 and 220 of the RMA

26. Sections 106 and 220 of the RMA give territorial authorities a degree of control over applications for subdivision consents (and therefore the development which would follow from the grant of such consents), where land is subject to some types of natural hazard are involved. Both sections 106 and 220 were amended by the RLAA. Section 106(1A) introduces a more clearly articulated risk based approach to considering subdivision consent applications.

27. Under section 106(1)(a) a council may refuse to grant a subdivision consent if it considers that there is a significant risk from natural hazards.

28. Section 220(1)(d) has been widened and now provides that a subdivision consent may include a condition that requires provision to be made for the protection of land against natural hazards generally arising or likely to arise as a result of the subdividing of the land which is the subject of the subdivision consent.

Relevant legislation and discussion

29. There are a number of sections of the RMA that are relevant to this advice. They are referred to, and discussed by reference to relevant case law, below.

Section 6(h) of the RMA

30. Under the new section 6(h), any planning provisions will need to recognise and provide for “the management of significant risks” from natural hazards” as a matter of national importance.

Sections 10, 10B and 20A of the RMA – existing use rights

31. Section 10 of the RMA protects some existing use rights in relation to land. It provides:

"(1) *Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if—*

(a) Either—

(i) The use was lawfully established before the rule became operative or the proposed plan was notified; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified:

(b) Or—

(i) The use was lawfully established by way of a designation; and

(ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the designation was removed.

(2) Subject to sections 357 to 358, this section does not apply when a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

(a) An application has been made to the territorial authority within 2 years of the activity first being discontinued; and

(b) The territorial authority has granted an extension upon being satisfied that—

(i) The effect of the extension will not be contrary to the objectives and policies of the district plan; and

(ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.

(3) This section does not apply if reconstruction or alteration of, or extension to, any building to which this section applies increases the degree to which the building fails to comply with any rule in a district plan or proposed district plan.

(4) ***For the avoidance of doubt, this section does not apply to any use of land that is—***

(a) Controlled under section 30(1)(c) (regional control of certain land uses); *or*

(b) Restricted under section 12 (coastal marine area); or

(c) Restricted under section 13 (certain river and lake bed controls).

(5) ***Nothing in this section limits section 20A (certain existing lawful activities allowed).***" (our emphasis)

32. We note that section 10A applies (on similar terms to those in section 10) to existing activities on the *surface* of lakes and rivers, except that there is no equivalent, or reference, to sections 10(4) or 10(5). We do not consider this section to be particularly relevant for the purposes of this advice.

33. Section 10B is also relevant in relation to existing use rights and buildings:

> "*(1) Land may be used in a manner that contravenes a rule in a district plan or proposed district plan* ***if the use of land is a building work or intended use of a building (as defined in section 7 of the Building Act 2004) which is deemed to be lawfully established in accordance with subsection (2).***
>
> *(2) Subject to subsection (3), the building work or intended use of the building shall be deemed to be lawfully established if—*
>
> *(a) A building consent was issued and any amendments were incorporated in the building consent in accordance with the Building Act 2004 for the building work or intended use of the building before the rule in a district plan or proposed district plan took legal effect in accordance with section 86B or 149N(8); and*
>
> *(b) The building work or intended use of the building, as stated on the building consent, would not, at the time the building consent was issued and any amendments were incorporated, have contravened a rule in a district plan or proposed district plan or otherwise could have been carried out without a resource consent.*
>
> *(3) Subsection (2) shall not apply if—*
>
> *(a) The building consent is amended (after the rule in the district plan or proposed plan has taken legal effect in accordance with section 86B or 149N(8)) in such a way that the effects of the building work or intended use of a building will no longer be the same or similar in character, intensity, and scale as before the amendment; or*
>
> *(b) The building consent has lapsed or is cancelled, but the issuing under the Building Act 2004 of a code compliance certificate in respect of the building work shall not, for the purposes of this section, be deemed to have cancelled the building consent for that work; or*
>
> *(c) A code compliance certificate for the building work has not been issued in accordance with the Building Act 2004 within 2 years after the rule in the district plan or proposed district plan took legal effect in accordance with section 86B or 149N(8) or within such further period as the territorial authority may allow upon being satisfied that reasonable progress has been made towards completion of the building work within that 2-year period.*
>
> *(4)* ***Section 10(4) and (5) apply to this section****."* (our emphasis)

34. Section 10B addresses situations where works are commenced in reliance on a building consent but subsequently become unlawful as a result of a new provision in a proposed plan notified after the consent was issued but before the works obtain existing use rights under section 10.

35. Section 20A concerns regional plans and states that certain existing lawful activities are allowed, as follows:

> *"(1) If, as a result of a rule in a proposed regional plan taking legal effect in accordance with section 86B or 149N(8), an activity requires a resource consent**, the activity may continue until the rule becomes operative if,—***
>
> *(a) before the rule took legal effect in accordance with section86B or 149N(8), the activity—*
>
> *(i) was a permitted activity or otherwise could have been lawfully carried on without a resource consent; and*
>
> *(ii) was lawfully established; and*
>
> *(b) the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the rule took legal effect in accordance with section86B or 149N(8); and*
>
> *(c) the activity has not been discontinued for a continuous period of more than 6 months (or a longer period fixed by a rule in the proposed regional plan in any particular case or class of case by the regional council that is responsible for the proposed plan) since the rule took legal effect in accordance with section 86B or 149N(8).*
>
> *(2) If, as a result of a rule in a regional plan becoming operative, an activity requires a resource consent**, the activity may continue after the rule becomes operative if**,—***
>
> *(a) before the rule became operative, the activity—*
>
> *(i) was a permitted activity or allowed to continue under subsection (1) or otherwise could have been lawfully carried on without a resource consent; and*
>
> *(ii) was lawfully established; and*
>
> *(b) the effects of the activity are the same or similar in character, intensity, and scale to the effects that existed before the rule became operative; and*
>
> *(c) the person carrying on the activity has applied for a resource consent from the appropriate consent authority within 6 months after the date the rule became operative and the application has not been decided or any appeals have not been determined.*" (our emphasis)

36. One of the key differences between section 10 and 20A is that even though the existing activity is allowed to continue, once the regional rule is operative, the continuation of the activity is subject to a resource consent application being made within six months of the rule becoming operative and does not have on-going effect.

37. The effect of sections 10 and 20 (now 20A) of the RMA were discussed in paragraph 13 of the decision in *McKinlay v Timaru DC*.[5] The Court said:

> "…*sections 10 and 20 of the Act provide for two parallel (but different) systems of existing use rights neither of which affect the other - the first deals with existing use rights under district plans, the second under regional plans. In this instance there is no regional plan nor does the proposed regional coastal plan have rules with respect to either the coastal inundation line or the subject land. I conclude that the regional council does not in fact at present control the use of the property under section 30(1)(c). Thus the situation will be governed by the provisions of section 10*…."

38. The *McKinlay* case concerned existing use rights and how they applied to the reconstruction of a building destroyed by a natural hazard such as a flood, when reconstruction (as well as any new dwelling) was otherwise prohibited by a proposed district plan.

39. At the hearing on the preliminary issue, the parties made submissions on the effect of section 10 of the RMA on rights to rebuild if an existing house was destroyed by fire or natural hazard. However, the Court identified that section 10(4) might bar reliance on the rest of section 10 because the land use might be controlled by the Regional Council under section 30(1)(c) of the RMA.

40. However, as is clear from the passages set out above, the Court found that the Regional Council could not exercise control over the use of the property under section 30(1)(c), because there was no regional plan or relevant rules in the Proposed Coastal Plan. The Court held there was a difference between having the right to control and exercising that right.

41. The *McKinlay* case also found that, under section 10, existing use rights may extend to allow the reconstruction of an existing household unit in the event of its destruction even though new dwellings were a prohibited activity in the zone in question. The qualification on this position was that any dwelling to be rebuilt must be the same or similar in character, intensity, and scale as the previously existing dwelling. The Court noted that the position would have been different if there had been regional rules in place.

Sections 30 - 32A, 77A, 87A and 104D – Plan Preparation, and Non-complying and Prohibited Activities

42. Under section 30 of the RMA, one of a regional council's functions is "*the control of the use of land for the purpose of … the avoidance or mitigation of natural hazards.*" Under section 31 of the RMA district councils' functions include "*the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of …. the avoidance or mitigation of natural hazards.*" These provisions need to be seen in light of section 62(1)(i) which requires a RPS to state which local authority is responsible "*in the whole or any part of the region for specifying the objectives, policies and methods for the control of the use of land …to avoid or mitigate natural hazards or any group of hazards*".

43. A natural hazard is defined in section 2 of the RMA as "*any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action*

5 (2001) 7 ELRNZ 116.

of which adversely affects or may adversely affect human life, property, or other aspects of the environment".

44. Section 32(1)(a) of the RMA[6] requires local authorities, and others, when preparing plans, policy statements, changes or variations, as well as a NPS, or national environmental standard, to carry out an evaluation on the extent to which the objectives of the proposal are the most appropriate way to achieve the purpose of the RMA.

45. Section 32(1)(b) requires an evaluation report to examine whether the provisions in the proposal are the most appropriate way to achieve the objectives of the proposal by:

    (i) identifying other reasonably practical options for achieving the objectives; and

    (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

    (iii) summarising the reasons for deciding on the provisions.

46. Under section 32(1)(c), an evaluation report must include a level of detail that corresponds to the scale of the effects anticipated from the proposal.

47. By virtue of section 32(2), an assessment under section 32(1)(b)(ii) must identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, and if practicable, quantify the benefits and costs, and assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

48. Section 32AA requires a further evaluation[7] to be undertaken for any changes that have been made to or are proposed for the proposal since the initial earlier report for the proposal was completed.

49. Section 32A[8] deals with the failure to carry out such an evaluation and states:

    "*(1) A challenge to an objective, policy, rule, or other method on the ground that an evaluation report required under this Act has not been prepared or regarded, a further evaluation required under this Act has not been undertaken or regarded, or section 32 or 32AA has not been complied with may be made only in a submission under section 49, 149E, 149F, or 149O or under Schedule 1.*

    (2) Subsection (1) does not prevent a person who is hearing a submission or an appeal on a proposal from having regard to the matters stated in section 32

    (3) In this section, proposal means a proposed statement, national planning standard, plan, or change for which—

    (a) an evaluation report must be prepared under this Act; or

    (b) a further evaluation must be undertaken under this Act.

6 Section 32 as replaced by the Resource Management Amendment Act 2013.
7 To be published in an evaluation report made available for public inspection, or referred to in the decision making record (see section 32AA(1)(d) as amended by section 15(1)(a) of the Resource Legislation Amendment Act 2017).
8 As amended by the Resource Management Amendment Act 2013 and the Resource Legislation Amendment Act 2017.

50. Section 77A of the RMA outlines the powers for both regional and district councils to make rules to apply to classes of activities and to specify conditions:

"(1) A local authority may—

(a) categorise activities as belonging to one of the classes of activity described in subsection (2); and

(b) make rules in its plan or proposed plan for each class of activity that apply—

(i) to each activity within the class; and

(ii) for the purposes of that plan or proposed plan; and

(c) specify conditions in a plan or proposed plan, but only if the conditions relate to the matters described in section 108 or 220.

(2) An activity may be—

(a) a permitted activity; or

(b) a controlled activity; or

(c) a restricted discretionary activity; or

(d) a discretionary activity; or

(e) a non-complying activity; or

(f) a prohibited activity.

(3) Subsection (1)(b) is subject to section 77B." (our emphasis)[9]

51. Section 77C formerly prescribed some activities that were to be treated as prohibited activities (certain mining activities and activities prohibited by section 105(2)(b) of the Historic Places Act 1993), but it was repealed as from 1 October 2009.

52. Sections 87A(5) and (6) are also relevant in terms of non-complying and prohibited activities, as follows:

"*(5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may—*
(a) decline the consent; or

(b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the requirements, conditions, and

9 Section 77B deals with the duty to include certain rules in relation to controlled or restricted discretionary activities, and so is not relevant to this advice.

permissions, if any, specified in the Act, regulations, plan, or proposed plan."

(6) If an activity is described in this Act, regulations (including a national environmental standard), or a plan as a prohibited activity,—

(a) no application for a resource consent may be made for the activity; and

(b the consent authority must not grant a consent for it."

53. Section 104D provides:

"*(1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*

(a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity."

(Section 104(2) states that a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.)

54. We discuss the ability for a council to provide for non-complying and prohibited activities in their plans in light of the relevant case law below. It is clear, however, that if a council provides in its plan that various forms of development, including buildings and other structures, as well as other activities, have prohibited activity status in a particular area, then in the absence of challenge that provides sufficient mandate to completely prevent new development or the extension of existing development in hazardous areas, subject to the existing activity rules.

Sections 106 and 220 – Subdivision consents

In addition to the general responsibility in respect of hazards in section 31 of the RMA, territorial authorities also have specific powers in relation to subdivision.

55. Prior to the RLAA amendments, section 106(1) provided that a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions if it considered that:

> "(*a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, fallen debris, subsidence, slippage, or inundation from any source*; *or*
>
> *(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source*; or
>
> *(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision*.

56. Section 145 of the RLAA amended section 106 by amending subsection (a) and repealing subsection (b). Section 106(1) now provides that a consent authority "*may*" refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that:

> *(a) there is a significant risk from natural hazards; or*
> *…*
> *(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.*

57. Prior to the amendment to subsection (a), councils could only take into account erosion, falling debris, subsidence, slippage, or inundation when considering resource consent application. The amendment to subsection (a) has widened the range of natural hazards which councils may consider and reflects the definition of 'natural hazard' in section 2 of the RMA:

> ***"natural hazard** means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment"*

58. Section 145(2) of the RLAA inserted a new section 106(1A) which introduces a more clearly articulated risk based approach to assessing natural hazards. Section 106(1A) provides that, for the purpose of section 106(1)(a), an assessment of the risk from natural hazards requires a combined assessment of:

> *"(a) the likelihood of natural hazards occurring (whether individually or in combination); and*
>
> *(b) the material damage to land in respect of which the consent is sought, other land, or structures that would result from natural hazards; and*

(c) any likely subsequent use of the land in respect of which the consent is sought that would accelerate, worsen, or result in material damage of the kind referred to in paragraph (b)."

59. Rather than considering whether land is, or is likely to be "subject to" natural hazards, councils will now need under section 106(1A) to undertake a combined assessment as to the likelihood of natural hazards occurring, the material damage that would result from natural hazards and any likely subsequent use of the land that would accelerate, worsen, or result in material damageIt remains to be seen how the courts will interpret the term "likelihood" in the combined assessment required by subsection (1A), and the ultimate assessment of "significant risk" under section 106(1)(a)..

60. Section 220(1)(d) also provides that a council may *impose a condition* on a subdivision consent:

"…that provision be made to the satisfaction of the territorial authority for the protection of the land or any part thereof,… against natural hazards from any source..."

61. The scope of section 220(1)(d) was also widened by section 164 of the RLAA. Previously councils could only place conditions on subdivision consents to address "erosion, subsidence, slippage or inundation…". The council may now impose a condition on a subdivision consent to protect the land against "natural hazards from any source".

62. It should be noted that section 106 of the RMA is expressed in discretionary terms rather than a prohibition. Previously, under section 106 the consent authority was not entitled to grant subdivision consent unless satisfied that adequate provision had been made to avoid inundation etc. The change brings the RMA broadly into alignment with the BA04, which allows the grant of a building consent provided adequate provision is made to protect the building from inundation etc.

63. It is clear therefore that although these sections give territorial authorities some control over subdivision consents (and therefore the development which would flow from the grant of such consents) in the case of natural hazards , the application of these sections may not be able to completely prevent new development or the extension of existing development in hazard prone areas.

National Policy Statements (NPS)

64. Part 5 of the RMA sets out the hierarchy and relationship that various planning documents have to each other, and to district and regional plans (Part 5 also provides for national environmental standards but they are not relevant to this advice.)

65. NPS are provided for in sections 45 to 55. Section 45(1) provides that the purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA.

66. Section 45(2) provides that, in determining whether it is desirable to prepare a national policy statement, the Minister may have regard to a number of different matters. Several of the matters in the list may be relevant if the Government were considering a NPS on development in areas subject to natural hazards:

"(a) the actual or potential effects of the use, development, or protection of natural and physical resources:

(b) New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment:

(c) anything which affects or potentially affects any structure, feature, place, or area of national significance:

(d) anything which affects or potentially affects more than 1 region:

…

(f) anything which, because of its scale or the nature or degree of change to a community or to natural and physical resources, may have an impact on, or is of significance to, New Zealand:

(g) anything which, because of its uniqueness, or the irreversibility or potential magnitude or risk of its actual or potential effects, is of significance to the environment of New Zealand:

…"

67. Once a NPS has been through the statutory process and is in force, there are a number of important consequences:

(a) in accordance with section 55 of the RMA, a local authority must amend a planning document identified in section 55(1) to give effect to a provision in the NPS that affects that planning document; and

(b) the amendments must be made as soon as practicable; or within the time specified in the national policy statement or before the occurrence of an event specified in the national policy statement.

68. At present there are five NPS documents in force – the National Policy Statement on Urban Development Capacity, the National Policy Statement for Freshwater Management, the National Policy Statement for Renewable Electricity Generation, the National Policy Statement on Electricity Transmission, and the NZCPS (discussed below). Work is currently being done on a proposed National Policy Statement for Indigenous Biodiversity.

69. A Ministry for the Environment Flood Risk Management Review identified the need for a NPS on flood risk management in a 2008 paper entitled "Meeting the Challenges of Future Flooding in New Zealand". The Minister for the Environment and Cabinet agreed in March 2007 that a national policy statement on managing flood risk was appropriate.

70. A draft NPS was prepared and the Ministry started the section 32 RMA process and carried out a high level cost benefit analysis and consideration of alternative. However, this initial work led the Ministry for the Environment to conclude that a NPS may not be the best tool to assist local authorities to achieve reductions in flood risk. Further analysis by the Ministry for the Environment was scheduled to take place in 2010, but no further work has been undertaken.

71. MfE is still progressing work on a NPS on Natural Hazards and records an indicative date for completion of 2018 on its website. MfE will take into account the research and recommendations in the report by Tonkin Taylor mentioned in paragraph 13when preparing the proposed NPS.

72. Section 62(3) of the RMA requires that a RPS must give effect to a NPS or NZCPS or national planning standard, and sections 67(3) and 75(3) require that a regional plan and

a district plan respectively must give effect to any NPS, the NZCPS, a national planning standard, and any RPS.

73. It is therefore conceivable that local authorities would need to introduce prohibited activity status for development or redevelopment in areas that are subject to natural hazards, if there was a NPS that required them to make such provision in their plans. There would still be a need for those authorities to have sufficient information on the hazards and a RMA section 32 evaluation that justified the prohibition.

New Zealand Coastal Policy Statement (NZCPS)

74. Section 57 of the RMA requires that there be at least one NZCPS at all times. Its purpose, as set out in section 56 of the RMA, is to "*state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand*". The current NZCPS was adopted in 2010. The statutory application of the NZCPS is summarised at page 7 of the document. This summary is included as Appendix A.

75. The 2010 NZCPS maintains a similar precautionary approach that the 1994 NZCPS adopted to development in the coastal area, where effects are uncertain, unknown or little understood.

76. The 2010 NZCPS relevantly includes Objectives 4 and 5 and Policies 1(2)(d), 3(2), 4(c)(iii), 10(2), 18(d) and most importantly 24 to 27. These provisions impact on or directly address the issue of coastal hazards. They provide councils with a strong basis to identify coastal hazard risks and to prevent development in coastal hazard areas. In particular, the 2010 NZCPS continues a risk-based policy approach to promote the sustainable management of coastal hazards, locating development (including infrastructure) over time away from hazard risk areas, and moving away from the use of hard protection structures as the primary line of defence.

77. Policy 24 focuses specifically on identifying areas in the coastal environment that are potentially affected by coastal hazards (including tsunami) in the context of a 100-year period giving priority to the identification of areas at high risk of being affected.

78. Policy 25 addresses subdivision, use, and development in areas of coastal hazard risk, as follows:

> "*In areas potentially affected by coastal hazards over at least the next 100 years:*
>
> *a. avoid increasing the risk of social, environmental and economic harm from coastal hazards;*
>
> *b. avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards; and*
>
> *c. encourage redevelopment, or change in land use, where that would reduce the risk of adverse effects from coastal hazards, including managed retreat by relocation or removal of existing structures or their abandonment in extreme circumstances, and designing for relocatability or recoverability from hazard events;*
>
> *d. encourage the location of infrastructure away from areas of hazard risk where practicable;*

e. discourage hard protection structures and promote the use of alternatives to them, including natural defences; and

f. consider the potential effects of tsunami and how to avoid or mitigate them.

79. Policy 26 of the NZCPS also encourages decision makers to provide for circumstances where it is appropriate to use *natural defences* against coastal hazards, such as beaches, estuaries, wetlands, intertidal areas, coastal vegetation, dunes and barrier islands.

80. Risk is defined in the NZCPS as "*often expressed in terms of a combination of the consequences of an event (including changes in circumstances) and the associated likelihood of occurrence*" which is taken from AS/NZS ISO 31000:2009 *Risk management – Principles and guidelines*, November 2009.

81. Strategies are also required for the protection from coastal hazards of "significant existing development" under Policy 27. This may cause difficulties for local authorities in such areas where new development or the extension of existing development is sought by developers, who seek to "piggyback" on measures which local authorities intend to be used only for protecting significant existing development.

82. At the time the proposed 2010 NZCPS was drafted, there were a number of submissions that recommended amendments to provide that redevelopment which increases the value of assets which are put at risk should be discouraged. This is an issue of concern for LGNZ, and appears to be partly addressed in Policy 25(a) (avoid increasing the economic harm from coastal hazards). The wording is, however, not expressed as strongly as some submitters would no doubt have desired.

Regional Policy Statements (RPS)

83. The purpose of a RPS is to achieve the purpose of the RMA "*by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region*" (section 59).

84. As already mentioned, section 62(1)(i) provides that regional policy statements can specify which local authority has responsibility for objectives, policies, and rules relating to the avoidance or mitigation of natural hazards, and section 62(2) states that in the absence of such a direction, the regional council retains primary responsibility.

85. If a RPS does not express any preferences in relation to mitigation or avoidance of development in natural hazard locations, then a change should be sought to the RPS. A RPS cannot be inconsistent with anything that is in a NPS, national planning standard, or the NZCPS, and it needs to be clear in its wording and direction for district and regional plans. Regional councils and territorial authorities must "have regard to" any proposed RPS (RMA sections 66 and 74), and must "give effect to" an operative RPS (RMA sections 67 and 75).

86. The wording of a RPS was in issue in *Canterbury Regional Council v Waimakariri District Council*.[10] The Regional Council had used words like "consider", "promote" and "reduce" in its RPS. The Environment Court had the following to say in relation to the Regional

10 28/1/02, Env Ct Chch, Judge Smith, C009/02.

Council's position that the requirements for district plans goes beyond "having regard to" the RPS and requires implementation:

> "*[38] The CRC called in aid of their position … the decision of the Court of Appeal in Auckland Regional Council v North Shore City Council [1995] NZRMA 424 at 429. There Cooke P noted:*
>
> > *"By section 75(2)(c), a District Plan 'shall not be inconsistent with policy statement, or any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV'. If the challenged proposed provisions are intra vires and survive (amended or otherwise) the objection process and any references to the Planning Tribunal (provided for by Part I of the First Schedule to the Act), a requirement that territorial authorities give effect to those objectives and policies in district plans will equally be intra vires. So there will be an undoubtedly significant effect on territorial authorities. It will be reduced but not eliminated if the challenged provisions stand only in part."*
>
> *[39] That case concerned a R.P.S which included several provisions which were mandatory in their language. One related to the fact that urban development should be permitted only in defined urban areas:*
>
> > *(i) the metropolitan urban area, being that area inside the metropolitan urban limits (defined on metropolitan urban limits Map Series 1);*
> >
> > *(ii) any rural areas shall be managed … (ii) so that only activities which are functionally dependent on the rural resource base are permitted; (iii) so that no provision is made for urban or urban related uses except as provided for in policy 4.4.4 — 2 and those activities that service the rural community or are ancillary to permitted rural activities; and 4.4.5 methods (i) TLAs will give effect to those objectives and policies in their district plans.*
>
> *This is the clear "requirement" that territorial authorities give effect to the objectives and policies of the R.P.S in district plans spoken of in the Auckland Regional Council v North Shore decision cited earlier.*
>
> *[40] The argument in the context of this case is however otiose because it is already accepted by the Regional Council that the objectives and policies of the proposed plan are not inconsistent with the R.P.S. There is nothing in the wording of the R.P.S. which approaches the level of mandatory language used in the Auckland Regional Council v North Shore case cited. For example….*
>
> *[45] Accordingly the only methods in mandatory language that could qualify as a requirement use formulas such as avoiding, remedying or mitigating adverse effects. Such language in itself accepts that there may be various methods to achieve an outcome in terms of land use.* ***We conclude that none of the relevant provisions of the R.P.S "require" or prescribe the methods and rules to be inserted in the Waimakariri District Plan in respect of each of the identified issues*****."** (our emphasis)

87. Since the *Auckland Regional Council v North Shore City Council* (**ARC decision**) was decided, section 75 of the RMA has been amended and the words "not inconsistent"

have been replaced by the requirement for a District Plan to give effect to a RPS. The Environment Court in *Tram Lease Ltd v Auckland Council*[11] said at [23] to [26]:

> *[23] In Auckland Regional Council (ARC) v North Shore City the Court of Appeal confirmed that a Regional Policy could take effect as a rule, depending on its wording. At pp 30-31 the Court noted:*
>
> > *Regional Policy Statements may contain rules in the ordinary sense of that term; but they are not rules within the special statutory definition directly binding on individual cities. Mainly, they derive their input from the stipulation of Parliament that district plans may not be inconsistent with them.*
>
> *[24] The words not inconsistent with have now been replaced with the requirement for a District Plan to give effect to a Regional Policy Statement (s 75(3)).* ***Thus, the conclusion of the Court of Appeal can be seen as more forceful under the current Act.***
>
> *[25] Any doubt as to the certainty of this requirement is addressed in Environmental Defence Society Inc v New Zealand King Salmon Co Ltd, which confirms the hierarchy of planning documents. Policies can have the effect of what in ordinary speech would be a rule, and be binding on decisionmakers. The Supreme Court held:*[12]
>
> > *… a New Zealand Coastal Policy Statement cannot properly be viewed as simply a document which identifies a range of particularly relevant policies, to be given effect in subordinate planning documents as decisionmakers consider appropriate in particular circumstances.*
>
> *[26] We conclude this is equally true for Regional Policy Statements, depending on their wording.*

88. The *ARC* case has been followed in a number of subsequent cases, including *Man o' War Station Ltd v Auckland Council*,[13] *Carter Holt Harvey Ltd v Waikato RC*,[14] *Omaha Park Ltd v Rodney District Council*,[15] and *Christchurch Golf Resort Ltd v Christchurch CC*.[16]

89. The Supreme Court in the *EDS* case further concluded after reference to the *ARC* case that:

> *[116] In short, then, although a policy in a New Zealand coastal policy statement cannot be a "rule" within the specific definition in the RMA, it may nevertheless have the effect of what in ordinary speech would be a rule. Policy 29 in the NZCPS is an obvious example.*[17]

90. In summary, if a RPS is to be an effective tool to prevent development in hazard areas, then it needs to be clear in its directions for the content and requirements of regional and

11 [2015] NZRMA 343.
12 Arnold J at [124].
13 [2013] NZEnvC 233.
14 [2011] NZEnvC 380.
15 [2010] NZEnvC 265.
16 [2010] NZEnvC 259.
17 See also William Young J at [182] where he acknowledged that a "policy" may be narrow and inflexible, and that policies under section 58(2) may have the character of rules.

district plans, as was the situation in the *Auckland Regional Council v North Shore City Council* case.

Building Act 2004

91. The council powers under the BA04 relevant for the purposes of this advice are sections 71-74 and section 113 of the BA04. Sections 71-74 relate to the approval of building consents where the land on which a building is to be located is subject to a "*natural hazard*".

92. Section 71 provides that a building consent authority (which is usually the territorial authority) **(BCA)**, must refuse to grant a building consent for the construction of a building, or major alterations to a building, if the land on which the building work is to be carried out is likely to be subject to one or more natural hazards, or the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.

93. However, under section 71(2), the BCA can grant consent if it is satisfied adequate provision has been or will be made to protect the land, building work, or other property from the natural hazard or hazards, or will restore any damage as a result of the building work. A natural hazard for the purposes of these sections is defined as erosion, falling debris, subsidence, inundation and slippage.

94. Section 72 then specifies that an application for building consent that must be refused under section 71, must be granted under section 72 if the consent authority considers that:

> *"..(a) the building work to which an application for a building consent relates will not accelerate, worsen, or result in a natural hazard on the land on which the building work is to be carried out or any other property; and*
>
> *(b) the land is subject or is likely to be subject to 1 or more natural hazards; and*
>
> *(c) it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned."*

95. If a consent is granted under section 72, this also results in a notification being placed on the certificate of title for the land, about the fact the consent has been granted and the natural hazard concerned has been identified.

96. Ultimately, under these sections, if an applicant provides adequate protection under section 72 and/or complies with any requirements of the Council, and is happy for a "tag" to be put on the title, the applicant will usually be able to get a consent to build on land subject to a natural hazard (subject to any RMA requirements). There will of course be some situations where the hazard is such that the Council cannot grant a building consent, but generally these will be rare. This means these sections of the BA04 cannot be relied on as a tool to effectively enable the prevention of development in hazard areas.

97. However, where land is subject to a natural hazard, the Council may be able to persuade a building consent applicant that their consent application should be made for the building to have a limited life. Section 113 of the BA04. provides:

> *"(1) This section applies if a proposed building, or an existing building proposed to be altered, is intended to have a life of less than 50 years.*

> *(2) A territorial authority may grant a building consent only if the consent is subject to—*
>
> *(a) the condition that the building must be altered, removed, or demolished on or before the end of the specified intended life; and*
>
> *(b) any other conditions that the territorial authority considers necessary.*
>
> *(3) In subsection (2), specified intended life, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use."*

98. The commentary on section 113 in Westlaw Building Law text notes that:

> *"A building having a specified intended life, which may not be more than 50 years, can sometimes be designed for less demanding conditions than would otherwise be the case. That is particularly so for steel structures likely to suffer fatigue failure after a certain length of exposure to fluctuating and reversing loads such as wave and wind effects. Similarly, the design of a building need not take account of events that will not occur during its specified life, which might include coastal erosion.*
>
> *Another possibility is that if the long-term durability of a building is in doubt, that building might be acceptable for a specified life without the need to waive the other provisions of the Building Code."*

99. Although section 113 may provide another option for councils when dealing with buildings on land subject to a hazard, again it does not allow councils to use section 113 to prevent development.

100. In our Coastal Hazards advice, we discussed several determinations that considered sections 71-74 and section 113 of BA04. Although these sections cannot be used to prevent development, these and other determinations are useful for councils in applying these BA04 provisions.

Relevant case law

Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development [2008] 1 NZLR 562

101. *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] 1 NZLR 562 is the most important case to date in relation to local authorities classifying activities as "prohibited" when formulating their plans under the RMA. The case usefully outlines the relevant statutory provisions and also provides some further clarity around the scope of a prohibited activity.[18]

102. In this case, the Thames-Coromandel District Plan had classified mining as a prohibited activity in conservation and coastal zones and in recreation and open space policy areas, despite indicating that it contemplated the possibility of mining occurring in those areas.

18 The decision has been followed in a number of subsequent cases including *WMG Yovich v Whangarei DC* [2015] NZEnvC 199, *Rangitata District Race Management Ltd v Genesis Energy Ltd*, and *Queenstown Airport Corporation Ltd v Queenstown Lakes DC* [2014] NZEnvC 93.

The Environment Court decision was appealed to the High Court and then went to the Court of Appeal.

103. The High Court upheld the Environment Court decision, but the Court of Appeal allowed the appeal against the High Court decision. In summary, the Court of Appeal held that the High Court erred in holding that prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the plan, the activity in question should in no circumstances ever be allowed in the area under consideration.

104. The Court of Appeal held that prohibited activity status could be appropriate in a number of situations, including where a local authority had insufficient information about an activity at the time the plan was being formulated. However, prohibited activity status would not be appropriate where a local authority did have sufficient information, but wanted to defer undertaking an evaluation until a specific application to undertake the activity was made.

105. The Court of Appeal identified the process to be undertaken in order to determine whether or not the imposition of prohibited activity status was the most appropriate course to adopt. The following paragraphs from the case outline this process:

> *"[23] The place of rules in a district plan needs to be oriented in the statutory scheme. Under s 75(1) of the Act, a district plan must state:*
>
> *(a) The objectives for the district*
> *(b) The policies to implement the objectives; and*
> *(c) The rules (if any) to implement the policies.*
>
> *[24] Thus, the Act provides that a plan must start, at the broadest level, with objectives, then specify, in respect of each objective, more narrowly expressed policies which are designed to implement that objective. Such policies can be supplemented by rules designed to give effect to those policies.*
>
> *[25] Section 75(2) allows a district plan to state a number of other factors, but this does not affect the mandatory nature of s 75(1).*
>
> *[26] In formulating a plan, and before its public notification, a local authority is required under s 32(1) to undertake an evaluation. Under s 32(3) the evaluation must examine:*
>
> *(a) The extent to which each objective is the most appropriate way to achieve the purpose of the Act; and*
>
> *(b) Whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*
>
> *[27] The purpose of the Act is set out in s 5. It is "to promote the sustainable management of natural and physical resources". "Sustainable management" is defined extensively in s 5(2).*
>
> *[28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B* [now 77A], ***requires a council to focus on what is "the most appropriate" status for***

achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management*.*

[29] Section 32(3) is amplified by s 32(4) which requires that for the purposes of the examination referred to in s 32(3), ***an evaluation must take into account:***

(a)The benefits and costs of policies, rules or other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

[30] The precautionary approach mandated by s 32(4)(b) is an important element *in the argument before us….*

[31] In addition to the cost/benefit analysis required by s 32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B [now s 77A] *should be applied to a particular activity,* ***the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3)).*** *The Environment Court has set out a methodology for compliance with these requirements (adapting that set out in Nugent Consultants Ltd v Auckland City Council [1996] NZRMA 481 (EC) to take account of amendments made to the Act in 2004) in Eldamos Investments Ltd v Gisborne District Council EC W047/2005 22 May 2005 at [128] and [131]….*" (our emphasis)

106. Section 32 of the RMA has of course been replaced, a new section 32AA inserted, and section 32A amended, since the time of this decision, but we do not consider that these legislative changes materially affect the conclusions reached in the decision.

107. At paragraph 34 of the decision, some suggestions as to what might be appropriate situations where prohibited activity status could be used, that were made by counsel for the First and Second Interveners, are set out. Counsel's submissions were that prohibited activity status might be "*the most appropriate of the menu of options in s 77B* [now 77A] *in a number of different situations, particularly:*

(a) Where the council takes a ***precautionary approach****. If the local authority has insufficient information about an activity to determine what provision should be made for that activity in the local authority's plan, the most appropriate status for that activity may be prohibited activity. This would allow proper consideration of the likely effects of the activity at a future time during the currency of the plan when a particular proposal makes it necessary to consider the matter, but that can be done in the light of the information then available. He gave an example of a plan in which mining was a prohibited activity, but prospecting was not. The objective of this was to ensure that the decision on whether, and on what terms, mining should be permitted would be made only when the information derived from prospecting about the extent of the mineral resource could be evaluated;* [It was this category that the mining activity in this case was found to fall into]

(b) *Where the council takes a **purposively staged approach**. If the local authority wishes to prevent development in one area until another has been developed, prohibited activity status may be appropriate for the undeveloped area. It may be contemplated that development will be permitted in the undeveloped area, if the pace of development in the other area is fast;*

(c) *Where the council is **ensuring comprehensive development**. If the local authority wishes to ensure that new development should occur in a co-ordinated and interdependent manner, it may be appropriate to provide that any development which is premature or incompatible with the comprehensive development is a prohibited activity. In such a case, the particular type of development may become appropriate during the term of the plan, depending on the level and type of development in other areas;*

(d) *Where it is **necessary to allow an expression of social or cultural outcomes or expectations**. Prohibited activity status may be appropriate for an activity such as nuclear power generation which is unacceptable given current social, political and cultural attitudes, even if it were possible that those attitudes may change during the term of the plan;*

(e) *Where it is intended **to restrict the allocation of resources**, for example where a regional council wishes to restrict aquaculture to a designated area. It was suggested that, if prohibited activity status could not be used in this situation, regional councils would face pressure to allow marine farms outside the allocated area through non-complying activity consent applications. He referred to the Environment Court decision in Golden Bay Marine Farmers v Tasman District Council EC W42/2001 27 April 2001. In that case, (at [1216] – [1219]), the Court accepted that prohibited activity status for the areas adjacent to the area designated for marine farming was appropriate; and*

(f) *Where the council wishes **to establish priorities** otherwise than on a "first in first served" basis, which is the basis on which resource consent applications are considered*." (our emphasis)

108. While the Court of Appeal did not specifically decide if any of these options would appropriately give rise to prohibited activity status, the Court did note that in at least some of these examples the strict approach to determining such status, as decided in the previous Court decisions, would not be met. The Court of Appeal stated in paragraph 36 that:

> "*….it can be contemplated that a local authority, having undertaken the processes required by the Act, could rationally conclude that prohibited activity status was the most appropriate status in cases falling within the situations described in that paragraph.*" [being paragraph 34]

109. The Court of Appeal also held that the RMA defined "*prohibited activity*" in terms which need no elaboration, and resorting to a dictionary definition of the word "prohibit" was not required. A prohibited activity simply means that no application for a resource consent may be made for the activity and no consent authority can grant consent for that activity. The Court of Appeal held that the definition of "*prohibited*" outlined in the Environment Court decision and upheld in the High Court decision, had the potential to unduly limit the circumstances in which the allocation of prohibited activity status may be the most appropriate of the options available.

110. In summary, the outcome of the Court of Appeal's decision is that a local authority can classify an activity as a prohibited activity and can make rules in its plan in relation to that activity if the correct assessment has been made under section 32 of the RMA and under all of the other relevant provisions as referred to in paragraph 31 of the decision (quoted above).

111. In *Moturoa Island Ltd v Northland Regional Council* [2013] NZEnvC 227[19] the Court noted that no party disagreed that the tests for imposing prohibited activity status included:

- There is no need for a local authority to consider that an activity be forbidden outright, with no contemplation of any change or exception, before prohibited activity status is appropriate: *Coromandel Watchdog*.
- Prohibited activity status may be imposed where it is determined to be the most appropriate option under s.77A on completion of a s.32 analysis: *Coromandel Watchdog.*
- There is no bright line test that requires a local authority to determine whether or not there might be some scenarios where the activity might be considered via a plan change process: *Coromandel Watchdog*.
- The prohibition must reflect the relevant policies and objectives and be the most appropriate option in that context: *Thacker*.

Thacker v Christchurch City Council C026/09

112. In *Thacker v Christchurch City Council* C026/09,[20] a variation to the Proposed Christchurch City Plan was sought to manage the potential effects of flooding risk in the city. The variation provided a package of measures developed following detailed investigations on the major river systems and coastal areas. Following submissions and hearings on the variation, the City Council made a number of changes to the proposed controls including the removal of any prohibited activity status. The Regional Council did not agree that the new restrictions should only be non-complying and restricted discretionary.

113. Interestingly one of the points the Regional Council made was that the potential extent of property damage and loss that might occur, if certain activities were not prohibited, was not at a level that would trigger section 106 of the RMA as it then stood. The Regional Council's concern was directed at lesser levels of flooding than those which trigger the material damage provisions in section 106.

114. The Court found that the Regional Council, in advancing the case for imposition of prohibited status for subdivision, construction of dwelling units, excavation, and filling activities within three areas, had failed to give any detailed consideration to the comparative evaluation required by section 32 of the RMA and had shown a lack of appropriate analysis. The Environment Court noted the then tests in sections 32(3) and (4) in particular, and stated that as prohibited activity status is the most draconian form of control available under the RMA, it should not be taken lightly. Detailed consideration was necessary.

115. Although the Environment Court agreed with the Regional Council that the activities it sought to become prohibited were in accordance with at least some of the examples given in paragraph 34 of the *Coromandel Watchdog* decision, other parts of that decision were more relevant to this matter. The Environment Court referred to the Court of

19 At [11].
20 The decision has been referred to in a number of subsequent cases including *Federated Farmers of NZ Inc v McKenzie DC* [2015] NZRMA 52 and *Moturoa Island Ltd v Northland RC* [2013] NZEnvC 227.

Appeal's determination that the appropriate test for imposition of prohibited activity status was whether or not the allocation of that status was the most appropriate of the options available.

116. The focus of the Regional Council in this instance was to control subdivision, but the Court found that their desired variation would also have had the unintended effect of prohibiting other things such as land contouring and other activities carried out in the course of farming and market gardening. The Court therefore declined the prohibited activity status.

Robinson v Waitakere CC A003/09

117. We mention this case briefly as it follows the *Coromandel Watchdog* decision, and provides another example of where prohibited activity status was found to be appropriate. The Environment Court concluded in its decision on the proposed structure plan for the Swanson Foothills in Waitakere that, beyond a limited number of sites where subdivision would be a discretionary activity, subdivision in all other areas would have the default status of a prohibited activity.

118. The Court discussed[21] the evidence relating to the costs and benefits of the alternatives to prohibited activity status in the proposed default areas. The Court also "tested" the proposed prohibited activity status against the possible categories listed in paragraph 34 of the *Coromandel Watchdog* decision (which it considered the Court of Appeal had listed with "apparent approval".[22] The Court found that a default prohibited activity status for subdivision of the foothills in some areas fell within four of the categories.

119. The Court considered the factors against imposing this status (no remedy for submitters on the section 293 application, and that this status does not allow individual properties to be examined in depth in order to attain the most efficient use of those properties), but concluded that there were more convincing reasons in favour of prohibited activity status. These were:

(a) it avoids difficulties with assessing accumulative effects on a site by site basis compared to subdivision being discretionary or non-complying;

(b) it manages "urban creep" phenomenon of accumulative effects during the life of the District Plan;

(c) it allow the expression of the social and cultural outcome expressed by the Council's other policies in the District Plan; and

(d) it gives greater certainty in the District Plan.

120. The Court held that prohibited status for subdivision was justified in this case because of the unusual circumstances of the Swanson Foothills, which were a buffer between the Waitakere Ranges and Waitakere City. In particular, the Court noted it was bound by five core principles in the District Plan, that included this "buffer" role for the foothills, but also that the foothills were not to be consolidated or suburbanised, and that the rural amenities of the area should not be substantially altered by allowing an unreasonable amount of subdivision.

21 At [124] to [126].
22 At [131].

121. This case was decided on 21 April 2010 and concerned an unsuccessful appeal by the Otago Regional Council (**ORC**) against a land use consent granted to the Holts to build a pole house in a flood-prone area. However, the Court held that amended conditions were required, including that the Holts, (as volunteered by them), enter into deeds with ORC and the City Council regarding their knowledge of the probabilities and scale of flooding on their land, that they would not complain about the hazards, require the ORC to provide flood protection works, or bring proceedings against the City Council in negligence for issuing the consent, and that they would obtain a similar covenant from any future purchaser of the land, or indemnify the Councils. (The Court doubted that the deed requirement could be imposed as a covenant condition under section 108(2)(d), which is why it had to be a volunteered condition.)

122. In order to build a house on the land, consent was needed for a non-complying activity, because of the small size of the section, rather than its flood-prone status. The Environment Court agreed that consent could be granted because the Holts were aware of the risks and had designed their house accordingly (and would assume the risk through the condition requiring the deeds). The Court was satisfied that the risks to human safety were sufficiently low to allow for the house being built.

123. The Holts proposals also included restoration of a large part of their property as an estuarine wetland and the Court concluded that this would help achieve important national and regional priorities and policy, even if only in a small way. The Court also held that it would achieve some of the district plan policies although it might not achieve others.

124. The district plan stated as one of its objective in the rural chapter of the plan that rural residential development should be provided in a sustainable manner "*to avoid as much as practicable: Locations subject to potential natural hazards*". Under the natural hazards chapter there were also policies about "controlling" development in areas prone to the effects of flooding (among other things). Policies in the rural chapter of the plan also provided that land use activities "*should not occur where this may result in cumulative adverse effects to: (a) amenity values, (b) rural character; (c) natural hazards*…".

125. The Court found there would be no effect on the frequency of flooding as a result of building the house.

126. The Court also considered the relevant regional planning documents and found that the RPS referred to the assessment of natural hazard risk, and listed 3 possible responses to managing the risk; avoiding it, mitigating it to lessen the impact, and enduring it with clean up and restoration afterwards. The RPS then noted that the choice of individuals as to their perception of the risk and how much they were prepared to accept was very important.

127. Again there were no specific policies or objectives to prevent development, but instead the RPS provided that development should be restricted unless adequate mitigation could be provided. The other regional plans also did not expressly state that there should be no development in natural hazard areas, but required recognition, avoidance and/or mitigation of the effects of hazards.

128. In terms of national planning instruments, the Court only had difficulty with one national priority in the NZCPS. The court noted that the land had not been too badly compromised

and feared the proposal may contribute to a sense of urban sprawl contrary to Policy 1.1.1 ("*It is a national priority to preserve the natural character of the coastal environment by: (a) encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment*…").

129. The Court did not however dwell on this point and instead focussed on the fact the RPS allowed individuals to choose. The Court had earlier noted that consent authorities "should not be paternalistic" under the RMA, but should leave people to be responsible for themselves, provided they do not place the moral hazard of things going wrong on others.

130. The fact that the proposal was not contrary to any objectives and policies in the district plan, was key to the consent being allowed, as it met the "gateway" test in section 104D. (Note that the rules of the plan do not need to be considered in this test). It had policies of "control", which could be exercised by a requirement for mitigation, including appropriate covenants.

131. This test requires an overall consideration of the purpose and scheme of the plan rather than a detailed examination of the provisions. For a proposal to be contrary to a plan, it also needs to be "repugnant to" or "opposed to" a plan, not simply that there is no support for the activity in the plan (see *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC) and *Monowai Properties Ltd v Rodney DC* A215/03). Lack of support in the plan is to be expected when the activity is non-complying, but something more is required for the activity to be "contrary" to the objectives and policies in the plan (see *NZ Rail Ltd*, and *Foster v Rodney DC* A123/09).

132. The Court also noted the concerns that had been expressed about the precedent effect of granting the consent. In *Rodney DC v Gould (as trustee of the A and A Young Family Trust)* [2004] 11 ELRNZ 165, it was stated that precedent effects are a legitimate consideration. However, if a case is truly exceptional and can properly be said not to be contrary to objectives and policies of a plan then precedent concerns might be mitigated or may not even exist.[23]

133. In *Holt* the precedent effect was found to be less than first supposed. The Court noted that there were only seven undersized rural lots in the area, and only 3 of these, including the applicant's site, was entirely in the flood plain. There were also a number of other factors pertaining to the site which made it distinguishable from the others, including the wetland restoration proposal, the site had two road frontages, and the technical evidence being specific to this site.

134. This case illustrates the importance of having objectives and policies in the plan appropriately worded (and not conflicting with the higher regional and national planning documents). If the objectives and policies are worded so that new development or the extension or alteration of existing development in a natural hazard area will be unequivocally contrary to those objectives and policies, then it will be difficult to obtain consent.

135. The same requirement to apply section 32 of the RMA, and the other considerations set out in the *Coromandel Watchdog* decision at paragraph 31, will also apply when contemplating non-complying status for any activity in a district or regional plan. These

23 The approach adopted by the High Court in *Rodney DC v Gould* was approved by the High Court in Auckland RC v Living Earth Ltd [2009] NZRMA 22. See also *Man O' War Station Ltd v Auckland RC* [2001] NZRMA 235 (HC).

matters need to be considered to determine which of the classes of activity referred to in section 77A (out of 6 possibilities) should be applied to a particular activity.

Other cases

136. We note that prior to the *Coromandel Watchdog* decision there were other cases concerning activity status in plans for hazard areas. Many of these concerned coastal hazards, and some are discussed in our Coastal Hazards advice. Some of these cases approved (or did not overrule) prohibited activity status for various types of development in the hazard areas. However, the *Coromandel Watchdog* case is the most relevant case in relation to its guidance on the steps to follow to ensure an activity is appropriately classified as prohibited.

Conclusions

137. The best mechanisms that councils can use to prevent development in hazard areas is to classify development activities as prohibited activities in regional and district plans. Such classifications will be effective if councils follow the necessary steps outlined in the *Coromandel Watchdog* case, and set out in the RMA.

138. The ease with which the prohibitions can be put in place will be assisted by national and regional planning instruments that also support the prevention of development in hazard areas. Territorial authorities will need to collaborate with regional councils on local plans.

139. We are happy to discuss this advice with you further.

Yours faithfully
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Duncan Laing
Partner

Appendix A
(Application of the 2010 NZCPS)

Application of this policy statement

This NZCPS is to be applied as required by the Act by persons exercising functions and powers under the Act. The Act itself should be consulted, but at the time of gazettal of this statement, its requirements in relation to this NZCPS are, in summary, that:

- regional policy statements, regional plans and district plans must give effect to this NZCPS (sections 62(3), 67(3)(b), 75(3)(b) refer);
- local authorities must amend regional policy statements, proposed regional policy statements, plans, proposed plans, and variations to give effect to NZCPS provisions that affect these documents as soon as practicable, using the process set out in Schedule 1 of the Act except where this NZCPS directs otherwise (section 55 refers);
- a consent authority, when considering an application for a resource consent and any submissions received, must, subject to Part 2 of the Act, have regard to, amongst other things, any relevant provisions of this NZCPS (section 104(1)(b)(iv) refers);
- when considering a requirement for a designation and any submissions received, a territorial authority must, subject to Part 2 of the Act, consider the effects on the environment of allowing the requirement, having particular regard to, amongst other things, any relevant provisions of this NZCPS (sections 168A(3)(a)(ii) and 171(1)(a)(ii) refer);
- when considering a requirement for a heritage order, a territorial authority must, subject to Part 2 of the Act, in addition to having regard to certain matters, have particular regard to, amongst other things, all relevant provisions of this NZCPS (section 191(1)(d) refers);
- in considering an application for a water conservation order, a special tribunal, in addition to having particular regard to certain matters, must have regard to, amongst other things, the relevant provisions of this NZCPS (section 207(c) refers);
- in conducting an inquiry in respect of the report of a special tribunal on an application for a water conservation order, the Environment Court, in addition to having particular regard to certain matters, must have regard to, amongst other things, the relevant provisions of this NZCPS (section 212(b) refers).