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Dear Frances

Councils' Ability to Limit Development in Natural Hazard Areas

Introduction

1. You have asked us to provide you with 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.

2. You want to know what the legislation provides and whether there is any useful caselaw 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)**.

4. This advice discusses the ability for councils to provide for prohibited activities in district and regional plans. It also considers sections 106 and 220 of the RMA, the New Zealand Coastal Policy Statement (**NZCPS**), changes to Regional Policy Statements (**RPS**), and encouraging the introduction of a National Policy Statement (**NPS**).

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

Executive Summary

6. The RMA provides councils with a comprehensive mandate to prevent or restrict both new development and the extension of existing development in hazardous areas. Councils can do this by providing in their plans for appropriate objectives and policies, and by providing for non-complying activity status, and 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 (discussed below). It also requires

careful wording in plans as to precisely what activities are to be made non-complying or prohibited and their respective locations.

Existing activities

7. Despite the ability to prevent new development and extensions to existing development, existing land use activities/development in hazardous areas can continue if they fall under section 10 of the RMA. But, 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.

8. 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 provides otherwise.

District and Regional Plans

9. 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, NZCPS and RPS. The RPS must specify which local authority is to have responsibility for specifying objectives, policies and methods for controlling natural hazards.

Regional Policy Statements

10. 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 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".

11. 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*".

National Policy Statement

12. The lobbying of central government for a NPS that would specifically address natural hazards, and development and other activities that can or should take place in areas subject to natural hazards, is an option for LGNZ and/or a group of councils to consider.

13. Proposals to update the way coastal hazards are addressed, are contained in the proposed NZCPS. There is also policy work being carried out on a NPS for Flood Risk Management. Some of the principles in the NZCPS may also be relevant to other hazards and development in hazard areas, and therefore it may be a good time to encourage the introduction of a natural hazards NPS.

14. However, councils can turn to the NZCPS in relation to development in coastal hazard areas.

New Zealand Coastal Policy Statement

15. The 1994 NZCPS provides a basis for councils to take an approach in their plans that encourages avoiding development in hazard prone areas as opposed to relying on mitigation measures.

16. The proposed NZCPS, which includes Objective 8 and Policies 51-54 to address the issue of coastal hazards, gives greater recognition to the likelihood of coastal hazard risks arising in New Zealand, and strengthens what is in the 1994 NZCPS. The revised NZCPS, once it comes into effect, should provide councils with an even stronger basis to prevent or restrict development in coastal hazard areas.

17. Both a NPS and the NZCPS must be given effect to in an RPS, which is a document all regional councils are required to prepare.

Non Complying Activity Status

18. 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 but does not mean that a consent will never be granted for an activity.

19. However, in some situations, after the appropriate analysis has been completed under section 32 of the RMA and all other relevant factors considered (see para 22 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.

20. 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 away 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.

Prohibited activity status

21. 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.

22. The *Coromandel Watchdog* case, discussed in detail below, is particularly important in this context. A local authority can classify an activity as a prohibited activity if it has had regard to:

    (a) an appropriate cost-benefit analysis under section 32 of the RMA, that focuses in particular on:

(i) the extent to which each objective is the most appropriate way to achieve the purpose of the RMA; and

(ii) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives; and

(iii) the benefits and costs of policies, rules or other methods; and

(iv) 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;

(b) its functions under RMA sections 30 (regional council) or 31 (territorial authority);

(c) the purpose and principles set out in Part 2 of the RMA, particularly the sustainable management purpose described in section 5;

(d) the matters which it is required to consider under RMA sections 66 (regional council) or 74 (territorial authority) - which includes the above 3 considerations and other specific matters to the extent they are relevant as well as the fact the authority is not to have regard to trade competition or the effects of trade competition; and

(e) in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (RMA sections 68(3) and 76(3)).

23. 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.

24. 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.

25. 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 give 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.

26. 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 and sections 106 and 220 of the RMA

27. 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.

28. 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.

29. Sections 106 and 200 of the RMA provide for conditions on subdivision consents relating to hazards but are not available to prevent new land use development as such.

Relevant legislation and discussion

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

30. 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 caselaw, below.

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* C024/01 ((2001) 7 ELRNZ 116). 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 RMA section 10 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 purposes 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 of which adversely affects or may adversely affect human life, property, or other aspects of the environment*".

44. Section 32 of the RMA 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 each objective is the most appropriate way to achieve the purpose of the RMA, and whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

45. The benefits and costs of policies, rules, or other methods, and 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 must also be taken into account.

46. Section 32A 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 section 32 has not been complied with may be made only in a submission under Schedule 1 or a submission under section 49.*
>
> *(2) Subsection (1) does not preclude a person who is hearing a submission or an appeal on a proposed plan, proposed policy statement, change, or variation, or a submission on a national policy statement or New Zealand coastal policy statement, from taking into account the matters stated in section 32."*

47. 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)

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

48. 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 section 77 was repealed on 1 October 2009.

49. 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 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), a plan, or a proposed 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."*

50. Section 104D provides:

> "*(1) Despite any decision made for the purpose of section 95A(2)(a) 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.)

51. 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

52. In addition to the general responsibility in respect of hazards in RMA section 31, territorial authorities also have specific powers in relation to subdivision. Section 106 of the RMA 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:

> "*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 "*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*".

53. 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 erosion, subsidence, slippage, or inundation from any source ...*".

54. It should be noted that RMA section 106 is now 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.

55. As discussed in our Coastal Hazards advice, section 106 is not necessarily dependent on the consent authority having identified any "*erosion, falling debris, subsidence, slippage, or inundation from any source*" in its district plan.

56. However, section 106 has been interpreted quite narrowly. The Court has held that for land to be "*subject to*" a natural hazard, there must be an actual occurrence, continuous or recurrent.

57. The Environment Court in *Kotuku Parks Limited* v *Kapiti Coast District Council*, A73/00, held that although a property was subject to an event which could cause extensive inundation or erosion at anytime, it was not standard practice to design a subdivision for such extreme events. By raising the building platform levels as proposed (which was to a level equivalent to the 1-in-100-year flood level), sufficient

provision would be made to avoid or mitigate likelihood of damage. The applicant was only required to design to generally accepted engineering practices in order to demonstrate that the test in section 106 of the RMA was met.

58. It is clear therefore that although these sections give territorial authorities some control over subdivision consents where land subject to some types of natural hazard are involved (note that the term "natural hazard" is not actually used in sections 106 and 220), the application of these sections may not be completely to prevent new development or the extension of existing development in hazard prone areas.

Other Planning documents - National Policy Statements (NPS)

59. 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.)

60. NPS are provided for in sections 45 to 55. Section 45(1) sates 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.

61. 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 one 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:*
>
> ..."

62. 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.

63. At present there is only one NPS – the National Policy Statement on Electricity Transmission. However, the Ministry for the Environment website indicates there is a work programme underway for several new NPS, covering renewable electricity generation, freshwater management, urban design and flood risk management.

64. In respect of the work to date on the flood risk management NPS, the website notes that comments have been sought, and a draft national policy statement has been prepared. The Ministry started the section 32 RMA process and carried out a high level cost benefit analysis and consideration of alternatives, but in doing so they identified that a NPS may not be the best tool to assist local authorities to achieve reductions in flood risk. Their reasons for this view "*are:*

- *An NPS would have greatest impact on new development and would have limited impact on reducing flood risk to existing development*
- *There are a small number of councils that would continue to struggle to meet their flood risk management responsibilities irrespective of whether a national policy statement is in place*
- *Most councils already appear to be prioritising to achieving flood risk reduction in the context of new development*

In order to determine whether or not a national policy statement should proceed, the Ministry is further investigating:

- *The amount of flood damage potentially avoided by the draft national policy statement*
- *Whether the desired objective of flood risk reduction could be achieved by most local authorities without government intervention*
- *Alternative options to address the problem – in particular targeted assistance and other tools to assist local authorities to achieve flood risk reduction*

It is expected that further analysis will be concluded late in 2010."

[See:http://www.mfe.govt.nz/issues/land/natural-hazard-mgmt/nps-flood-management.html.]

65. Section 62(3) of the RMA requires that a RPS must give effect to a NPS or NZCPS 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, and any RPS.

66. 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.

67. It is not clear, given the statements by the Ministry set out above, whether local authorities can now expect any assistance by way of a NPS in relation to managing flood risks. However, it may provide an opening for LGNZ and/or a group of councils

to lobby central government for a more general NPS on natural hazards, and development and other activities that can or should take place in areas subject to natural hazards. It would however be necessary to ensure alignment with similar proposals in relation to coastal hazards in the proposed NZCPS.

Other planning documents - New Zealand Coastal Policy Statement (NZCPS)

68. 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 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 1994, but a replacement NZCPS was notified in March 2008. The 1994 NZCPS adopted a precautionary approach to development in the coastal area, and Policy 5 of the proposed NZCPS continues this approach where effects are uncertain, unknown or little understood.

69. At present, the 1994 NZCPS provides a basis for councils to take an approach that encourages avoiding development in hazard prone areas as opposed to relying on mitigation measures.

70. The proposed NZCPS, which includes Objective 8 and Policies 51-54 to address the issue of coastal hazards, increases the recognition of the likelihood of coastal hazard risks arising in New Zealand, and strengthens what is in the 1994 NZCPS. It should provide councils with an even stronger basis to prevent development in coastal hazard areas.

71. The proposed NZCPS takes 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.

72. Proposed Policy 51 focuses on identifying and assessing hazard risks (excluding tsunami) in the context of a 100-year period and will be applied to both existing and proposed development.

73. Proposed Policy 52 addresses subdivision and development in areas of hazard risk, as follows:

> "*In areas potentially affected by coastal hazards, local authorities shall:*
>
> a. *avoid new subdivision and residential or commercial development on land at risk from coastal hazards;*
>
> b. *avoid redevelopment, or change in land use, that would increase risk from coastal hazards; and*
>
> c. *encourage redevelopment, or change in land use, that would reduce risk from coastal hazards, including:*
>
> i. *managed retreat, by relocation, removal or abandonment of existing structures;*
>
> ii. *replacement or modification of existing development to reduce risk without recourse to hard protection structures,*

including by designing for relocatability or recoverability from hazard events."

74. Proposed Policy 53 promotes natural features that provide hazard protection, while Proposed Policy 54 provides guidance on when to use hard protection structures such as seawalls.

75. Submissions have closed in relation to the proposed NZCPS. The Board of Inquiry delivered its report and recommendations to the Minister of Conservation in mid 2009 (their report has recently been made public by one of the members of the Board, but it has not yet been released officially by the Department). The Minister of Conservation has not yet determined whether she proposes to make any changes to the NZCPS recommended by the Board or Inquiry, under section 52 of the RMA, and accordingly it is not as yet approved. At this stage therefore, the proposed NZCPS has no legal effect, and the 1994 NZCPS is still the operative NZCPS.

76. Submissions on the proposed NZCPS appeared generally supportive of the coastal hazards policies but identified there is room to clarify matters.

77. In relation to Proposed Policy 52, there were some submissions stating it is not clear whether complying with the requirements of the policy means councils have to introduce rules to prohibit new subdivision and development in the 100-year coastal hazard area, and some redevelopment, or not. Other submissions stated the use of the word "avoid" in the policy went beyond the thrust of the RMA.

78. When the Proposed NZCPS comes into effect, hopefully it will be made clear what is required of councils in amending their plans, and whether "avoid" does require councils to provide for prohibited activity status in the situations specified.

79. The Board of Inquiry state in their report, in relation to policies 8-12 on subdivision, use and development, that they see a need for stronger direction to local authorities though the NZCPS.

80. However in relation to coastal hazards (now policies 27-30 in the recommended NZCPS), although the Board of Inquiry endorses a 100 year time frame for assessment and planning in relation to hazard risks, they do not go as far as to require that any particular activity status be used in district or regional plans.

81. In relation to subdivision, use, and development, in areas affected by coastal hazards policy 28 requires that "*all decision makers must:*

    (a) avoid increasing social, environmental and economic risk from coastal hazards;

    (b) avoid redevelopment, or change in land use, that would increase the risk of adverse effects from coastal hazards;

    (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 by designing for relocatability or recoverability from hazard events;

(d) *encourage infrastructure to locate away from areas of hazard risk;*

(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.*"

82. Risk is defined in the NZCPS recommended by the Board of Inquiry as the product of the likelihood of something happening and the consequences, which is taken from AS/NZS 4360:204, August 2004, third edition 2-6. The recommended NZCPS, in Policy 29, also encourages decision makers to provide for circumstances where it is appropriate to use natural defences against coastal hazards, such as beaches, vegetation, dunes and barrier islands.

83. Strategies are also required for the protection from coastal hazards of "significant existing development". 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..

84. 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 28(a) (avoid increasing the economic risk from coastal hazards). The wording is, however, not expressed as strongly as some submitters would no doubt desire.

Other Planning documents - Regional Policy Statements (RPS)

85. 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).

86. 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 states that in the absence of such a direction, the regional council retains primary responsibility.

87. 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 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).

88. The wording of a RPS was in issue in *Canterbury Regional Council v Waimakariri District Council*, 28/1/02, Env Ct Chch, Judge Smith, C009/02. 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 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)

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

Building Act 2004

90. The council powers under the BA04 relevant for the purposes of this advice are sections 71-74 and section 113 of the RMA. 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*".

91. 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.

92. 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.

93. 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. As you will be aware, 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 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 RMA 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 Brookers' 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 RMA sections 71-74 and section 113. 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] NZLR 532

101. *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2008] NZLR 532 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.

102. In this case, the Thames-Coromandel District Council's 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. 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. 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 was 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)

107. 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]

108. The Court of Appeal 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.

109. In summary, the effects 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).

Thacker v Christchurch City Council C026/09

110. In *Thacker v Christchurch City Council* C026/09, 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 costal 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.

111. 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. The Regional Council's concern was directed at lesser levels of flooding than those which trigger the material damage provisions in section 106.

112. 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 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.

113. 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 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.

114. 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

115. 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.

116. The Court discussed, in paragraphs 1124 to 1126, 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" (see paragraph 1131)). The Court found that a default prohibited activity status for subdivision of the foothills in some areas fell within four of the categories.

117. 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.

118. 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.

Otago Regional Council v Dunedin City Council & Holt [2010] NZEnvC 120

119. 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 will 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.)

120. 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.

121. 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.

122. 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...*".

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

124. 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.

125. 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.

126. 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...*").

127. 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.

128. 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.

129. 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).

130. 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)* [2005] 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.

131. 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.

132. 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.

133. 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 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

134. 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.

Conclusion

135. 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.

136. 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, but both could be effective together in lobbying central government for national controls.

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

Yours faithfully
SIMPSON GRIERSON

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