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12 October 2018

By Email: Brent.Pizzey@ccc.govt.nz

Christchurch City Council
P O Box 73049, Orchard Road
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ATTENTION: Brent Pizzey

AMENDMENT TO CHRISTCHURCH DISTRICT PLAN POLICY 5.2.2.2.1

We refer to your email of 3 October 2018 and our telephone discussion on 4 October 2018 regarding advice sought on a proposed amendment to Policy 5.2.2.2.1 in the Christchurch District Plan.

INTRODUCTION

1. Broadly speaking, Policy 5.2.2.2.1 addresses development in High Flood Hazard Management Areas (**HFHMA**). Council is currently considering options to amend the policy to better articulate the outcomes sought for the Residential Unit Overlay (**RUO**) within the HFHMA. By way of background you have advised that the Council has modelling demonstrating that the risk in the RUO is likely to become unacceptable within the lifetime of a building.

2. Council has considered whether the policy should be amended as per the suggestion of Council witness Ruth Evans during the plan review process. Ms Evans' alternative version of the policy provided (with amendments to the operative policy wording shown in underline and strikethrough):

    b. In High Flood Hazard Management areas:

        i. Provide for development for a residential unit on residentially zoned land where appropriate mitigation can be provided that protects people's safety, well-being and property; and

        ii. In all other cases, ~~A~~avoid subdivision, use or development in areas where there is a high flood hazard where it will increase the potential risk to people's safety, well-being and property.

3. Council has sought advice from consultant planner Sarah Dawson regarding the proposed amended wording to the policy. Ms Dawson has suggested some amendments to the

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version of the policy above to ensure that the amended policy aligns with Rule 5.4.6.2 RD2 while also remaining consistent with the approach provided for in other relevant objectives and policies in the District Plan,[1] and the RPS.[2] Ms Dawson has suggested the following further amendments to the proposed policy (with amendments to the version above shown in underline and strikethrough):

> b. In the High Flood Hazard Management ~~A~~areas:
>
> i. provide for development ~~for~~of a residential unit on residentially zoned land where the flooding risk is predominantly influenced by sea-level rise and where appropriate mitigation can be provided that protects people's safety, well-being and property from unacceptable risk; and
>
> ii. in all other cases, avoid subdivision, use or development where it will increase the potential risk to people's safety, well-being and property.

YOUR QUESTION

4. Against that background, you have asked us to advise whether Ms Dawson's suggested wording of policy 5.2.2.2.1(b) would enable resource consents for permanent dwellings in the RUO.

EXECUTIVE SUMMARY

5. Our view is that the proposed amendment to the policy set out at paragraph 2 of this letter would potentially allow for resource consents for permanent dwellings within the RUO, provided that an applicant could demonstrate, via design and mitigation, that a permanent dwelling would ensure that people's safety, well-being and property are protected, by reducing risks to acceptable levels.

6. We hold the same view in relation to Ms Dawson's suggested alternative version of the policy. Under either amended version of the policy, there is a recognition that a different, more permissive approach to development of a residential unit is provided with respect to land that falls within Policy 5.2.2.2.1(b)(i), as opposed to any other land within the HFHMA. Having regard to Ms Dawson's version of the policy, we make the following observations:

   a. The inclusion of the words "where flooding risk is predominantly affected by sea-level rise" ensures that the more permissive approach does not apply to any residentially zoned land within the HFHMA, but only to land where the high flood risk predominantly derives from predicted sea level rise as opposed to other risks of inundation. As we understand it, land within the RUO falls within this category. This additional wording ensures that the policy is more refined in its focus and avoids unintentionally providing for a more permissive approach to land which may face more immediate or different types of flood risk. As an observation we note that as this alternative version also does not expressly refer to the RUO, there could still be potential that non-RUO residential land could fall within this policy, provided it could be established that the predominant flood risk derives from sea-level rise. Conversely, if there were land within the RUO which is or becomes

[1] In particular, Objective 3.3.6 and Policies 5.2.2.1.1, 5.2.2.1.2, 5.2.2.1.4 and 5.2.2.1.8.
[2] In particular, Objectives 6.2.1(8) and 11.2.1 and Policy 11.3.1.

subject to other risks of flooding, there is a possibility that this land would not fall within the policy. That being said, the proposed approach of focusing on the nature of the risk appears to be consistent with the approach provided for in Objective 3.3.6.

b. The addition of the wording "from unacceptable risk" at the end of the paragraph does not alter the test to be applied in the sense that it does not render the policy any more or less permissive that the wording proposed by Ms Evans. Our view is that consideration of whether appropriate mitigation protects people's safety, well-being and property must be undertaken in relation to whether the mitigation adequately reduces risks to an acceptable level. Such an approach is consistent with Objective 3.3.6 as well as the higher level policies on natural hazard risk in chapter 5 of the District Plan and the approach provided for in the RPS. However, we consider that the additional wording is helpful in terms of clarifying that the relevant enquiry is focused on ensuring that the level of risk posed by the development is acceptable.

7. We emphasise that while the proposed alternative wording could provide greater opportunity for permanent dwellings to be constructed on RUO land, it would not in any way provide for such development as a *fait accompli*, nor should it do so. The development of residential units in the RUO is a restricted discretionary activity. This means that resource consent is required. The ability to construct a residential unit on such land is not a foregone conclusion – any application to do so must be assessed against the assessment criteria provided for in the rule, having regard to the matters over which Council has restricted its discretion, including the design of the building, minimum floor levels, mitigation of the effects of flooding, safe ingress and egress, and reducing the risk to people's safety, well-being and property resulting from the development.

8. Given the recognisable risk of development on land subject to a risk of flooding (underpinned by modelling) Council will have to consider whether the design and proposed mitigation of the development is such that the risk is reduced to an acceptable level. The onus will be on the applicant to demonstrate that appropriate mitigation can be provided for a dwelling that could still be located on the property when the risk of flooding from sea-level rise is expected to occur. As such, it would be a mistake to view the proposed amendment to the policy as "permitting" permanent residential units within the RUO, as opposed to providing for the possibility that permanent residential units could be built, subject to an applicant demonstrating that any risk from flooding posed to people's safety, well-being and property is reduced to an acceptable level.

ANALYSIS

9. Ms Dawson's suggested amendment to Policy 5.2.2.2.1(b) contains two main variations to the version suggested by Ms Evans:

a. The limitation of Policy 5.2.2.2.1(b)(i) to development of residential units on residential zoned land within the HFHMA where the flood risk predominantly derives from sea-level rise; and

b. The inclusion of the words "from unacceptable risk" at the end of the clause to make it clear that the appropriate mitigation to protect people's safety, well-being

and property must be such as to reduce any risk from the development to an acceptable level.

10. Having regard to the limitation of Policy 5.2.2.2.1(b)(i) only to residential land where the flood risk predominantly derives from sea-level rise, we agree with Ms Dawson's comment that this limitation is important to ensure that the amended policy does not apply more broadly than intended. By limiting the policy to land where the predominant flood risk is from sea-level rise, it avoids application to all residential land within the HFHMA. We note however, that Ms Dawson's alternative version does not expressly refer to the RUO and therefore there is potential that the policy could apply to residential land outside the RUO if it can be established that the predominant flood risk on such land is from sea-level rise. Conversely, if there were land within the RUO which is also subject to other flood risks, there is a possibility that the policy would not apply to that land if the other flood risk were more predominant.

11. While there could be some benefit in terms of certainty and clarity to just expressly limit the policy to development of residential units within the RUO, there could be some merit in taking the approach suggested by Ms Dawson. Ms Dawson's approach focuses on the nature of the risk rather than expressly limiting the policy to particular areas within the HFHMA, an approach which is consistent with the "risk-based" approach provided for in the District Plan.[3]

12. Inclusion of the additional words "from unacceptable risk", does not render the policy any more or less permissive that the proposed wording suggested by Ms Evans. It simply clarifies that the focus in assessing the appropriateness of mitigation should be on whether it reduces any risk to an acceptable level. Such an approach is consistent with Objective 3.3.6 and the higher-level risk-management policies in Chapter 5 of the District Plan. It is also consistent with the relevant objectives and policies in the RPS which also refer to the acceptability of risk when assessing the appropriateness of development in areas subject to natural hazards.

13. Although there is a lot of discussion in the District Plan regarding acceptable and unacceptable risk, there is not a great deal of guidance as to what will constitute an acceptable versus an unacceptable risk. This is no doubt what belies Ms Dawson's comment that the "question of whether a more enabling policy is proposed and how far it goes in terms of enabling the activities provided for by Rule 5.4.6.2 RD2 is up to the Council". It is a matter for the consent authority to determine, what, in the context of a particular proposed development would give rise to an unacceptable risk, and whether any proposed mitigation can adequately reduce that risk. That being said, Policy 11.3.1(1) to (4) of the RPS provides some useful guidance as to what is likely to be considered an unacceptable risk:

> **11.3.1 Avoidance of inappropriate development in high hazard areas**
>
> To avoid new subdivision, use and development (except as provided for in Policy 11.3.4) of land in high hazard areas, unless the subdivision, use or development:

[3] As explained in clause 5.1 of the District Plan.

1. is not likely to result in loss of life or serious injuries in the event of a natural hazard occurrence; and
2. is not likely to suffer significant damage or loss in the event of a natural hazard occurrence; and
3. is not likely to require new or upgraded hazard mitigation works to mitigate or avoid the natural hazard; and
4. is not likely to exacerbate the effects of the natural hazard; or

[...]

14. While we acknowledge that these provisions do not directly apply to land within the RUO (to which Policy 11.3.1(6) applies) these factors, and arguably 1 and 2 in particular, are useful in understanding what is likely to be considered an acceptable level of risk. For example, following this approach in assessing whether appropriate mitigation is provided in relation to a permanent dwelling in the RUO, the enquiry is likely to focus on whether the mitigation ensures that it is not likely that loss of life or serious injury and significant damage or loss of property would result from flooding caused by sea-level rise. In this regard, it would not be necessary to show that no increased risk would result from the development, but simply that any increased risk is within acceptable levels.

15. An interesting case which considered how mitigation of flood risks could be appropriately provided is **Otago Regional Council v Dunedin City Council**.[4] That case considered the proposed development of a residential unit as a non-complying activity within a flood plain. The land was subject to flood risk from river overflow, climate change, storm surge and tsunami. The applicants proposed mitigation including building the house on stilts, having a condition requiring a boat (when not in use) to be attached to the house, and entering into a deed acknowledging and assuming the risk of flooding, agreeing not to complain about the hazards and not to sue the Council for issuing the consent and agreeing to obtain a similar covenant from any future purchaser. The Court, while noting that the deed condition could only be voluntarily offered and not imposed by Council pursuant to section 108(2)(d) of the RMA, considered that the design of the proposal and mitigation offered was such that the risk could be reduced to an acceptable level. In this regard, the Court observed:

> [50] The proposed dwelling and driveway are physical resources which, by virtue of being placed in the floodway, are exposed to risk of damage from floods. This is no different in principle from placing a structure anywhere in New Zealand where it is at risk from an earthquake or tsunami. Te Papa in Wellington is a prime example. The solution is to design the structure to a standard which reduces the risk to an acceptable level and I consider that later.

16. In our view, it would be possible under the proposed amended policy for an applicant to demonstrate that a permanent residential unit in the RUO can be developed in such a way that the risks are mitigated to an acceptable level. This could be achieved through, for example, engineering innovation, design of the unit and/or consent conditions. As such, the changes to the wording of the amended policy do not alter our view that the proposed amendment would allow for the possibility of resource consents being granted for permanent dwellings in the RUO.

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[4] [2010] NZEnvC 120.

17. While the proposed amendment to Policy 5.2.2.2.1(b) would allow for a more permissive approach to development of residential units in the RUO compared to the approach presently provided for, this does not mean that it is a foregone conclusion that any resource consent application for a permanent residential unit within the RUO would be granted under the amended policy. Importantly, construction of a residential unit within the RUO is a restricted discretionary activity not a permitted activity. Resource consent is required, and the onus for establishing that the proposal satisfies the relevant assessment criteria in Rule 5.4.6.2 RD2 rests with the applicant. As the Court recently observed in **Cabra Rural Developments Limited v Auckland Council** in relation to an application for resource consent for a restricted discretionary subdivision:[5]

> [272] If the subdivision does not meet the criteria, the Council has the obligation to decline. A RDA is no less onerous than a fully discretionary activity. The advantage of it, though, is that the issues for consideration have been identified and are clearly articulated and, in a way confined, so both the applicant and the Council are clear on what is at stake.

18. In view of the flood risk applying to land within the HFHMA (including the RUO), while the amended policy would create greater opportunity for residential development in the RUO than at present, it is unlikely that an applicant could demonstrate, even under the amended version of the policy, that a permanent dwelling is appropriate in the RUO without at the very least, an expert engineering report that can demonstrate how the risk of flooding within the life of the development is appropriately mitigated to an acceptable level.

Yours faithfully
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[5] [2018] NZEnvC 90.