BY **COLLEEN PRENDERGAST**, SENIOR TUTOR, DEPT OF PLANNING, UNIVERSITY OF AUCKLAND.

CASE LAW AND S106 OF THE RMA

A RESPONSE TO THE ARTICLE "S106 - ANY VOLUNTEERS TO PROVIDE SOME CASE LAW?" IN THE PREVIOUS ISSUE OF *PLANNING QUARTERLY*

The article "S106 - Any volunteers to provide some case law?" in the last issue of Planning Quarterly briefly discusses the difficulties council planners face in dealing with s106 of the RMA 1991. In concluding that the section is well-intentioned and functional enough, the article notes that some key areas remain untested by case law and poses three questions, viz:

1. Is the reference to "any land" in respect of which consent is sought draconian or reasonable?
2. Would the RMA benefit from quantifying a timeframe within which the likelihood of material damage should be considered, or is the present precautionary approach acceptable? If there is a timeframe, should the Building Act timeframes for structures be considered when assessing effects on structures?
3. What level of risk is acceptable for allowing development in coastal areas where the same factors that cause the scenic beauty of an area may also irretrievably damage private property?

The following thoughts are offered in response.

Is the reference to "any land" draconian or reasonable?

Section 106 of the Resource Management Act 1991 identifies the circumstances where consent shall not be granted to applications for subdivision, and provides:

(1) A consent authority shall not grant a subdivision consent if it considers that either -

(a) Any land in respect of which a consent is sought, or any structure on that land, is or is likely to be subject to material damage by erosion [falling debris], subsidence, slippage, or inundation from any source; or

(b) Any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to that land, other land, or structure, by erosion [falling debris], subsidence, slippage, or inundation from any source - unless the consent authority is satisfied that sufficient provision has been made or will be made in accordance with subsection (2).

(2) A consent authority may grant a subdivision consent if it is satisfied that the effects described in subsection (1) will be avoided, remedied, or mitigated by one or more of the following:

(a) Rules in the district plan;

(b) Conditions of a resource consent, either generally or pursuant to section 220(1)(d);

(c) Other matters, including works.

The predecessor to this section, Section 274(1)(f) of the Local Government Act 1974, was considered in *Maruia Society v Whakatane District Council*[1]. There the High Court held that that section should not be interpreted so as to require the whole of the land in the subdivision to be protected from inundation as this would lead to consequences that Parliament could not have contemplated,[2] viz:

This argument fails to take sufficiently into account both the context in which the subsection and proviso are to be found and the language of the proviso.The council's emphasis must always be on whether the land is suitable for subdivision. That must always be a matter of degree. One would expect the application of the discretion granted in the proviso to be equally a matter of degree. The proviso does not require total or absolute protection. It requires sufficient protection to make the land suitable for subdivision.

The relevance of the *Maruia* decision to cases decided under the RMA was considered by the Environment Court in *Foreworld Developments Ltd v Napier City Council*[3]. In this latter case, Judge Kenderdine referred to the judgement in *Maruia* wherein Justice Doogue stated:[4]

It is axiomatic that not every part of every piece of land is or can be made suitable for subdivision. It does not follow that the land is not suitable for subdivision because part is not suitable. Neither s274 (1)(f) nor its proviso requires that conclusion.

The legislature has given the council a discretion to determine whether sufficient protection is made against inundation. The degree of protection is for the council. It does not have to ensure the whole of the land is free from the risk of inundation. It does have to ensure that in its judgment the land is sufficiently protected to be suitable for subdivision.

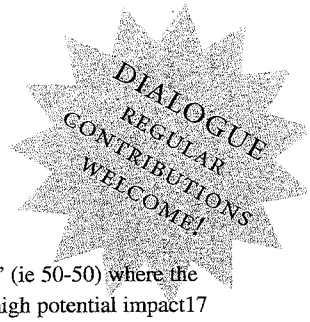
and held that, notwithstanding the differences in the legislation, Justice Doogue's reasoning was still relevant:[5]

Given the differences in the legislation there are some reservations in applying the reasoning in Maruia *to the present case (or any other under s106). In particular the test is not one of protection of the land, but of avoiding, remedying or mitigating the potential effects of erosion and/or inundation. Bearing this in mind, the words of Justice Doogue, quoted above, are however still relevant to the determination of this case. The crux of the test is whether sufficient provision has been made to ensure the land is "suitable for subdivision". The current provision does therefore suggest that a wider range of options may well be available. This does not mean that the options discussed in* Maruia *are necessarily inappropriate.*

On this basis then I believe that, provided the council can be satisfied that the measures proposed will avoid, remedy or mitigate the effects of concern on the part or parts of the land subject to such hazards, consent can be granted to the subdivision application pursuant to s106(2) and subject to appropriate conditions. Reference to "any land" is thus not, in my opinion, draconian; rather it is in line with the purpose of the Act to promote sustainable management.

Timeframe versus Precautionary Approach

Here I think it relevant to remember that the effects of subdivision are permanent. While a structure built on the land so subdivided may have a limited life, the ability to undertake



activities on the lots created by subdivision is ongoing. For this reason, it was accepted in *Foreworld* that any solutions proposed to satisfy s106(2) need to address the effects on both the land and structures (if any).[6]

The precautionary approach of the Act is derived from the provisions of s104(1)(a), s3, and the definition of "environment" in s2(1), and is to be applied in situations where there is potential for serious or irreversible harm to the environment.[7] The council's role under s106(2) is to be satisfied that the measures proposed will be sufficient to avoid or mitigate the effects of concern.[8]

However, nature being what it is, the likelihood of damage and the nature and severity of effects will vary depending upon the circumstances of each particular application. Whether the solutions proposed will be sufficient to mitigate the effects of concern will be, therefore, a question of fact and degree in the particular circumstances of each case, with the considerations required not necessarily dependent upon whether the concerns are likely to occur within a particular timeframe.

It is also relevant to note that a subdivision consent is a type of resource consent, and as such, falls to be considered not only under the sections particular to subdivision, but also under sections 104 and 105 of the Act. These sections require the consideration of, and the decision whether or not to grant consent to, applications for resource consent to be informed by Part II of the Act.[9]

The definition of sustainable management contained in Section 5(2) includes, among other things, the need to sustain the potential of resources so as to meet the reasonably foreseeable needs of future generations and to avoid remedy or mitigate adverse effects on the environment, while enabling communities to provide for their social and economic well-being, and their health and safety.[10]

I think that there are two points of relevance here. Firstly, the need to sustain the potential of resources to meet the reasonably foreseeable needs of future generations seems to be in itself a timeframe of sorts. Secondly, since *Falkner v Gisborne District Council*[11], where it was found that[12]

[T]he governing philosophy of sustainability does not of itself require the protection of individuals' property to be weighed more heavily than the protection of the environment and the public interest generally.

It has been recognised that a unilateral right to protect one's property from the sea is no longer available.[13] Such works are therefore required to gain consent under the Act, with no guarantee that approval would be forthcoming.

Thus, any attempt to satisfy the requirements of s106(2) by quantifying a time within which the mitigation or avoidance of the likelihood of material damage on the land is required, but after which no cognisance is taken of the continuing effect of such damage on the land in the consideration of the subdivision application, would not seem to me to be in accordance with either sustainable management or meeting the reasonably foreseeable needs of future generations, and therefore not of benefit.

Level of Risk Acceptable?

As identified earlier, the likelihood of damage and the sufficiency of the solutions proposed under s106(2) will be a question of fact and degree in each case. The way in which the Environment Court approaches this question was discussed in *McIntyre v Christchurch City Council*:[14]

The basic principles of evidence developed by the general courts provide a valuable guide for fact-finding by the tribunal. It is our understanding that there are three requirements for us to make a finding on a question of fact. There needs to be material of probative value, ie, tending logically to show the existence of facts consistent with the finding (re Erebus Royal Commission: Air New Zealand v Mahon [1983] NZLR 662, 671). *Also the evidence must satisfy us of the fact (ie that there will or will not be such an effect) on the balance of probabilities and having regard to the gravity of the question; but we are not to put either party to having to prove its assertion of fact beyond reasonable doubt. Further, the heart of a finding is that we ourselves need to feel persuaded that it is correct.*

This issue was further discussed in *Shirley Primary School v Christchurch City Council*[15] where it was found that:16

[W]hen deciding whether natural and physical resources will be sustainably managed, the decision maker is usually making decisions about future events and has: (a) under s104(1):

- *to decide what the primary facts are; and*
- *to evaluate those facts as propositions about the future ("risks" if adverse effects, "chances" if beneficial) - usually those propositions are given as the opinions of experts; and*

(b) to carry out a further evaluation when undertaking the weighing and balancing exercise required under s105(1) to decide the ultimate question.

The court went on to find that the effect of s3 is that it is required to evaluate "beyond the balance of probabilities" (ie 50-50) where the risk (even if low) is of high potential impact17 and that:[18]

assessment of the probability of an event with high impact will be affected not only by the objective risk of the impact occurring but also by a necessarily less objective assessment of the nature of the impact in the context of all the relevant factors.

In respect of the burden of proof, the court found that there is no one standard of proof required, rather the appropriate standard is on a sliding scale between the balance of probabilities and beyond reasonable doubt, depending upon the impact of the effect.[19]

In *Kotuku Parks Ltd v Kapiti Coast District Council*[20] for instance, the court accepted that an approach "consistent with sound engineering practice" would be sufficient to avoid or mitigate the likelihood of damage by subsidence induced by earthquake, and by inundation and erosion from the sea, and thus satisfy s106(2), notwithstanding evidence given by specialist geologists to the contrary[21]. It would seem that the court's decision was based, at least in part, on the fact that the extreme events of concern to the geologists had a likely return period of hundreds of years, and that events of such magnitude would affect the entire Kapiti coast, not just the land in question.

Conclusion

Section 106 of the Act is complex, with no easy answers to the way in which it should be administered. It is clear from the case law, however, that each case must be decided on its own merits, and that the purpose of the Act, sustainable management, remains the overriding consideration to be kept in mind when considering applications for subdivision.

Footnotes

1 (1991) 15 NZTPA 65; 2 Ibid at 73; 3 Decision W89/98 (Envt Ct); 4 (1991) 15 NZTPA 65, at 74; 5 Supra at n3, at paras 45-46; 6 Ibid at para 78; 7 *McIntyre v Christchurch City Council* [1996] NZRMA 289; 8 Supra at n3, at para 48; 9 *Mahuta v Waikato Regional Council*, Decision A091/98 (Envt Ct), at 74; 10 Resource Management Act 1991, s5(2); 11 [1995] NZRMA 462 (HC); 12 Ibid at 478; 13 Ibid at 463; 14 Decision A15/96 (Envt Ct) at 26; [1996] NZRMA 289; 15 Decision C136/99 (Envt Ct); [1999] NZRMA 66; 16 Ibid at paras 116-117; 17 Ibid at para 130; 18 Ibid at para 131; 19 Ibid at paras 126-136; 20 Decision A73/2000 (Envt Ct); 21 Ibid at paras 110-118.