

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2004-485-1838  
CIV 2004-419-1776**

UNDER the Resource Management Act 1991

IN THE MATTER OF two appeals under section 299 of the  
Resource Management Act 1991 from a  
decision of the Environment Court

BETWEEN COROMANDEL WATCHDOG OF  
HAURAKI INCORPORATED  
(CIV 2004-485-1776)

AND THE THAMES-COROMANDEL  
DISTRICT COUNCIL  
(CIV 2004-485-1838)  
Appellants

AND CHIEF EXECUTIVE OF THE MINISTRY  
OF ECONOMIC DEVELOPMENT

AND NEW ZEALAND MINERALS  
INDUSTRY ASSOCIATION  
Respondents

Hearing: 30 June 2005

Appearances: Sir Geoffrey Palmer and D Tegg for Coromandel Watchdog of  
Hauraki Incorporated  
S J Berry and S R Brownhill for The Thames-Coromandel District  
Council  
H Rennie QC and R Macky for Chief Executive of the Ministry of  
Economic Development  
R Fisher and M L van Kampen for New Zealand Minerals Industry  
Association

Judgment: 2 September 2005

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**JUDGMENT OF SIMON FRANCE J**

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## **Introduction**

[1] This case concerns when it is permissible for a planning authority to use the “prohibited activity” status provided for in s 77B(7) of the Resource Management Act 1991 (“the RMA”). The Environment Court has held that:

... unless it can definitively be said that in no circumstances should mining [the activity in question in this case] ever be allowed on a given piece of land, a prohibited status is an inappropriate planning tool.

[2] The appellants say this is wrong and unduly curtails the flexibility of planning authorities. The respondents say the particular case involves no question of law, but that if it does the Environment Court is correct.

## **Background facts**

[3] In 1999 the Thames Coromandel District Council issued a Decisions version of its Proposed District Plan. The respondents commenced proceedings in the Environment Court challenging the lack of provision in the Plan for mining activity, and particularly surface mining.

[4] Prior to the hearing the Council agreed to some modifications but they were not enough to settle the matter.

[5] The Environment Court noted that it had been asked to deal with the case at a high level of abstraction. It saw the resolution of the case as turning on its conclusions as to when it is appropriate to use a “prohibited activity” classification. The various planning experts called during the proceedings gave their views on when it was proper planning practice to use the “prohibited activity” classification.

[6] The Court reached the conclusion noted in para [1] above. It then applied this conclusion to the modified Plan before it. As a consequence, the Court made further changes to the Plan. Several areas of prohibited activity were changed to a “non-complying” activity status. For example, surface mining in the recreation and

open space policy areas of rural zones became a non-complying activity for which a resource consent could be sought.

[7] Appeals were filed in this Court by the Council and by the Coromandel Watchdog Group. The appeals originally covered many aspects of the decision, but by agreement between the parties they were narrowed down to the single issue of whether the Court's approach to the use of "prohibited activity" was correct.

[8] The parties to this proceeding, other than the Council, are helpfully described in the judgment under appeal (paragraphs [3]-[5]).

[3] The New Zealand Minerals Industry Association represents twelve operational mining and quarrying companies, and a further fourteen firms involved in the sector as contractors, consultants, and the like. Its purpose is: *To promote and be recognised as a profitable and environmentally responsible industry in New Zealand.*

[4] The Chief Executive of the Ministry of Economic Development has an interest in the matter because the Ministry is responsible for advice to the Government on mineral markets and industries, and manages Crown minerals. It wishes to see the District Plan give *appropriate recognition of mineral and aggregate resources, and provision for their use ...*

[5] Coromandel Watchdog of Hauraki Incorporated is an environmental group having as one of its objects: *... to work for the protection of the Coromandel Peninsula ... from precious metal mining in inappropriate places and of inappropriate scale and to support careful planning for the economic, social and spiritual well-being of the lands, waters and communities of the Coromandel Peninsula ...* It acts as an umbrella organisation for such organisations as the autonomous Thames Environment Society Incorporated and Tairua Environment Society Incorporated, both of which have similar objects, but with emphasis on matters of concern to their immediate locales.

## **Judgment under appeal**

[9] It is inevitable that, in the course of this judgment, significant extracts from the ruling under appeal will be cited. It is therefore convenient to set out in full paragraphs [12] to [15] of the judgment since these contain the Environment Court's reasoning on the point.

[12] The *Concise Oxford* defines *prohibit* as *... formally forbid by law, rule etc ...* and that seems an entirely appropriate way of regarding the term in this context. In the abstract, *prohibiting* an activity is a legitimate planning tool, but one to be used sparingly and in a precisely targeted way.

Section 77B(7) provides that if an activity is so classified; ... *no application may be made for that activity and a resource consent must not be granted for it.* It is, therefore, a distinct exception to the permissive, effects based, philosophy of the Act as a whole. It is not, we think, legitimate to use the *prohibited* status as a de facto, but more complex, version of a non-complying status. In other words, it is not legitimate to say that the term *prohibited* does not really mean *forbidden*, but rather that while the activity could not be undertaken as the Plan stands, a Plan Change to permit it is, if not tacitly invited, certainly something that would be entertained. We note that the Hauraki District Plan has something of the same format. We do not regard that as a sound precedent, although we do commend other parts of that Plan later in this decision.

[13] We think that the correct approach to a *prohibited* status is that offered by Mr Serjeant, a consultant planner for MIA; viz that it should be used only when the activity in question should not be contemplated in the relevant place, under any circumstances. That would be the first of the two *extreme examples* given in the decision in *Re an Application by Amoco Minerals NZ Ltd* (1982) 8 NZTPA 449:

*To give two extreme examples there could be cases where social and/or environmental factors are so important that no mining should occur on certain land notwithstanding the importance of the mineral resources there; or in another case, the importance of the mineral resources in a particular place in national terms might outweigh very substantial local environmental damage.*

That approach both fits the meaning of *prohibited*, and requires a precise targeting of the status at areas of land for which, or circumstances in which, the activity in question should never be contemplated.

[14] That said, we recognise that a significant mining proposal will almost certainly require a Plan Change in any event, because of the many planning issues each will raise, even if resource consents might theoretically be available. That was the basis, for instance, on which the Martha and Golden Cross mines were established in the Hauraki District. But that does not alter the basic proposition that a *prohibited* status should be confined to those activities and those places which truly justify it. Nor should a Plan Change application be forced upon a would be miner in circumstances where the Council should have foreseen all along the possibility of mining interest, and made appropriate provision for that in its plan. As something of an aside, we observe also that under Clauses 25 and 27 of the First Schedule to the RMA the Council can, subject to appeal, decline to accept a Plan Change application for two years after the Plan becomes operative.

[15] As Mr Cowper says in his closing submission, the position has not advanced much on what was said in another extract from *Re an Application by Amoco Minerals*:

*But even if a large scale operation is more likely than one of smaller scale, we have concluded that the question whether it should be permitted on this land should not be answered finally until the nature and extent of the ore body has been ascertained and the proposed mining operations defined more clearly.*

We think that view still holds good, and it emphasises the point that unless it can definitively be said that in no circumstances should mining ever be allowed on a given piece of land, a *prohibited* status is an inappropriate planning tool.

### **Issue one – do the proceedings involve a question of law?**

[10] The relevant appeal power is s 299(1) of the Resource Management Act 1991 (“the RMA”). It provides:

A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a point of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[11] The principles governing the application of s 299 have been discussed on numerous occasions. Oft-cited summaries are found in *Countdown Properties (Northland) Limited v Dunedin City Council* ([1994] NZRMA 145, 153) and *Nicholls v Papakura District Council* ([1998] NZRMA 233, 235). In *Nicholls*, the principles were set out in this way:

There are important aspects which this Court must bear in mind in considering any appeal before it. These principles are laid down in the various cases that have come before the Court, and are relevant in this case –

- (a) The High Court will not concern itself with the merits of the case under the guise of a question of law; *Sean Investments v Mackellar* (1981) 38 ALR 363.
- (b) The appellate Court’s task is to decide whether the Tribunal has acted within its powers; *Hunt v Auckland City Council* [1996] NZRMA 49.
- (c) The question of weight to be given to the assessment of relevant considerations is for the Environment Court [Planning Tribunal] alone, and not for reconsideration by the appellate Court as a point of law; *Hunt* (supra), *Moriarty v North Shore City Council* [1994] NZRMA 433.
- (d) Any error of law must materially affect the result of the Environment Court’s [Planning Tribunal’s] decision before the appellate Court will grant relief; *Countdown Properties* (supra); *BP Oil NZ Limited v Waitakere City Council* [1996] NZRMA 67.
- (e) To succeed, an appellant must identify a question of law arising out of the Environment Court’s [Planning Tribunal’s] determination and then demonstrate that that question of law has been erroneously decided by the Environment Court [Planning Tribunal]; *Smith v Takapuna City Council* (1988) 13 NZTPA 156.

- (f) On an appeal under s299 it is not for the High Court to say whether the Environment Court [Planning Tribunal] was right or wrong in its conclusions but whether it used the correct test and all proper matters were taken into account; *West Coast Regional Abattoir Co Ltd v Westland County Council* (1983) 9 NZTPA 289.

[12] I am satisfied the appellants' case falls within paragraph (f) of these principles. It is an appeal based on the proposition that the Court, in evaluating the Proposed Plan, has applied an incorrect legal test.

[13] The issue before the Court was when it is appropriate to use one of the six activity status classifications provided for in s 77B of the RMA. In paragraph [14] of its decision the Court emphasises that it is setting out "a basic proposition" as to the correct use of prohibited activity.

[14] In the particular case the Court could have addressed the issue at various levels from a specific finding that mining in a particular zone should not be prohibited, through to a more general finding about mining the Coromandel, through to a decision on the appropriate use of prohibited status regardless of the activity in question. In my view the Court, no doubt in response to the general level of which the case was presented, has done the last of these and accordingly s 299 is engaged. Further, its conclusion on the appropriate test has led it to change several classifications. Accordingly, I am satisfied that a question of law is involved, and it is one that has materially affected the outcome.

#### **Issue two – has the Court applied an incorrect test?**

- (a) *Appellants' submissions*

[15] Counsel for the appellants divided the argument up between them, leaving counsel for the Watchdog Group to present the primary submissions on why the Court was wrong in its approach to "prohibited status". These were supplemented by counsel for the Council who explained the difficulties the Council saw with the Court's restrictive approach to use of prohibited status. Mr Berry also argued the question of law issue and whether the alleged error materially affected the outcome.

[16] A preliminary point arose from Mr Berry's submissions. In preparation for this hearing, the Council had a group of planning consultants collect data as to how many District and Regional Plans throughout the country used "prohibited activity" status in Plans, and to comment on the impact the Environment Court decision might have on this practice. Objection was taken to this evidence, and I heard submissions on the point during the hearing. I ruled the evidence inadmissible and said I would give brief reasons in the course of this judgment. It was, in many ways, a storm in a teacup in that the use the Council was making of the research was in my view of no probative value. The Council wished to advise me that 47 of 72 District or City Councils use the "prohibited activity" status in their plans. However, standing alone that information says nothing of the basis on which the activity is used, nor whether the way it is used matches the Environment Court approach. The figure also shows that 25 do not use it at all, which equally says nothing until it is known why "prohibited activity" is not used. The simple basis for my ruling is therefore that the material, used in this way, is irrelevant.

[17] Mr Berry submitted that he would be entitled to place before me the 72 Plans, which are public documents, and that I could take judicial notice of their contents. Accordingly, he submitted, I should take equivalent notice of the results of a report which simply avoids the need to do that. I consider there are real dangers in this type of use of "judicial notice". It should not be used as a substitute for proper expert evidence where such evidence is needed. In my view, all I could do with the Plans is read them to extract the same type of information noted in the preceding paragraph. In relation to the Report itself, which Mr Berry also tendered, the same objection applies unless it does provide expert elucidation on the figures. If it does do that, then it was not provided to the other parties in time, and on proper prior application. The objections taken on this ground were valid, and accordingly I declined to receive it. Before leaving this topic, I do observe that evidence on the general practices of other authorities may well have been of considerable value to the Court in deciding the issue.

[18] Returning then to the appellants' primary submissions on why the court was in error, Sir Geoffrey summarised his submission in this way:

It is submitted that the interpretation by the Environment Court of the term “prohibited activity” under the Resource Management Act was unduly narrow, restrictive and wrong as a matter of law, given the statutory context in which the term is used and the purpose of the Act. If the interpretation were held to be correct it would be difficult if not impossible to include “prohibited activities” in Plans for areas of special environmental quality. Such was never the intention of the Act.

[19] Five points were then advanced in support: 1) it was wrong to place weight on the dictionary definition; 2) the Act contains no restrictions on when prohibited activity status can be used; 3) the Court’s ruling is inconsistent with the purposes of the Act; 4) the Court’s ruling is inconsistent with the scheme of the Act; 5) the Court’s ruling undermines the intent of s 61(1A) of the Crown Minerals Act 1991.

[20] The first point was really the flip-side of the other four. In the appellants’ submission the predominant factor must be the legislation, and it is to that rather than dictionary meanings that one should turn in order to determine the meaning and intent of concepts such as “prohibited activity”. To deal with this aspect immediately, I do not consider anything turns on the Court’s reference to the dictionary. Of itself it is nothing unusual. Further, the Court merely uses it to confirm that the statutory definition of prohibited matches the ordinary meaning of the word. What is in issue is the implications of the definition on the issue of when “prohibited activity” status should be used.

[21] Looking first at the words of the Act, it was submitted that on its face the legislation did not purport to limit the use of prohibited activity. There was no express restriction. Further, the situations that are deemed by s 77C(2) and (3) of the RMA to be “prohibited activities” were submitted to not support the Court’s concept of a prohibited activity, being one that “is not to be contemplated under any circumstances”. For example, under the Historic Places Act, as a punishment for breaching that Act, a person could be subject to a temporary prohibition on otherwise authorised activity. This was an overtly temporary suspension of activity, yet for the time it lasted the activity in question was deemed to be “a prohibited activity”. The temporary duration of this deemed “prohibited activity” was submitted to be inconsistent with the Court’s conception of a prohibited activity.

[22] Likewise, s 77C(2) provides that mining for Crown minerals in the internal waters of the Coromandel Peninsula is deemed to be a prohibited activity, except where expressly authorised by s 61(1A) of the Crown Minerals Act 1991. Sir Geoffrey argued that a corollary of the Act dealing specifically with one aspect of mining was that the proper classification for mining in the Coromandel was otherwise an open issue. However, there are several difficulties with this. I am unsure why a provision dealing specifically with one aspect of mining, and dealing with it only in the sense of deeming an activity to be prohibited, is relevant to the broad issue I am being asked to address. It could be relevant only if in fact the judgment, and the appeal, are more case-specific than the earlier s 299 analysis suggests. I can see that s 77C(2) might be relevant to informing individual decisions on the particular District Plan, but not that it is relevant to the broader issue of when prohibited activity status should generally be used. Second, if it is relevant to interpretation, I suggest there is an equally strong argument that the specific delineation by Parliament of when some mining is prohibited tells against the Council attaching the same label to other mining situations. Ultimately, I do not consider either analysis of s 77C(2) is valid. In my view it stands on its own and has little significance to a broader statutory interpretation exercise.

[23] The general thrust of this part of the appellants' submission was that, far from suggesting a restricted approach, the text of the RMA suggested "prohibited activity" was an essential tool in carrying out the Act's purposes. The other specific references in the Act to prohibited activities are ss 86, 310, 360(ha), 371(2) and 418. I have considered them but do not consider they advance the issue.

[24] Concerning the RMA's purposes, it was submitted that limiting the use of the "prohibited activity" status was inconsistent with the Act's emphasis on sustainable management, and the obligation to mitigate adverse effects. Matters to be weighed by a local authority include adverse effects, amenity values, s 6 matters of national importance, such as the preservation of the natural character of the coastal environment, s 7 matters such as the intrinsic value of eco-systems, and the principles of the Treaty of Waitangi. Tasked with balancing all these factors it is submitted it is incorrect to read into the Act a restriction on the use of one of its tools, namely "prohibited activity" status.

[25] The scheme of the Act was also said to emphasise the broad task facing a local authority, and the processes it must follow. It should be permissible for a Council to conclude, following this process, that it wished to prohibit an activity for reasons other than the narrow opening allowed by the Court's decision. Further, the Plan by definition exists for only its intended lifespan – it must be reviewed every 10 years. The Court's approach was submitted to be inconsistent with this in that it contemplates designating particular use (or non-use) of a piece of land forever.

[26] Mr Berry explained the Council's concern with the Court's test. The key to the Council's approach lay in the processes that accompanied various classifications. In its view, even though a planning authority might contemplate a particular activity occurring, it was preferable to "prohibit" it so that a person who wished to conduct that activity would need to initiate a plan change procedure. The nature of some activities – e.g. mining – was such that it was preferable to use the more consultative processes attaching to a plan change rather than those that attached to the other available option – a resource consent procedure.

[27] Mr Berry explained that a significant difference between the resource consent procedure and the plan change procedure was that the latter involved an extra round of public consultation. There was an extra phase where all the submissions were summarised and publicly notified.

[28] Mr Berry submitted that as long as the Plan made it clear that prohibited activity did not really mean "prohibited", the process was legitimate. He referred to an example of this that can be found in the Hauraki District Plan (section 2.2.5).

In the urban zones, surface mining has been given a prohibited activity status. This is an option available under the Resource Management Act 1991 which prevents resource consent applications being made for the activity so prohibited.

However, the allocation of prohibited activity status does not mean that surface mining will be prevented from taking place in these zones if a privately initiated plan change is upheld. In effect, the Council has adopted a policy direction that any surface mining proposal in the urban zones is to be processed and assessed by means of a private request for a plan change.

[29] Mr Berry gave another example based on the Waikato Regional Council's Proposed Regional Coastal Plan. It concerns a situation where the Council was satisfied that there should be one marina in a given area, but there were six possible sites for it. If the resource consent route were used, the Council would be obliged to consider in a vacuum the suitability of whichever site was the subject of application. By contrast, if the application had to be made by way of a Plan Change, there was more capacity to bring into play the possible alternative sites. This approach would be lost if the Environment Court's approach remained because it was plain that it could not be said that the activity of a marina could not be contemplated under any circumstances.

(b) *Respondents' submissions*

[30] Mr Rennie QC appeared for the Ministry and by agreement went first. He explained that the Ministry's involvement in the case came through its responsibilities in the areas of economic development, its role as manager of the Crown minerals, and because it administers the Crown Minerals Act 1991.

[31] The Ministry supported the Court's approach, emphasising that the scheme and purpose of the Act was the *management* of resources. It was therefore correct for the Court to seek to circumscribe the use of "prohibited activity" with its effect of banning the activity. Mr Rennie submitted the present case was a good example, in that initially the proposal was to prohibit all mining in significant areas. In his submission the Court was right to reject that as a planning model.

[32] Mr Rennie submitted that the appellants were overstating the emphasis the Court placed on the dictionary definition. Far from determining the Court's approach, it was only confirmatory of the Court's view of the proper use of prohibited activity status. The Court was, he submitted, a specialist body and the particular Court a very experienced panel. It was, in his submission, not so much a matter of defining prohibited status but rather of assessing its appropriate use within a scheme of available classifications.

[33] The test the Court had adopted was submitted to be complementary to the natural and ordinary meaning of prohibited. It would not be correct to use prohibited activity status as a means of placing mining outside the Plan and requiring an applicant to seek a Plan Change. The purposes of the Act require that mining, like other activities, be allowed to operate within the existing provisions of a Plan unless it is the Council's view that it is an activity that cannot take place under any circumstances.

[34] Mr Rennie submitted the Watchdog Group were in error. The Court's decision does not circumscribe the capacity of Councils to discharge their function; rather it requires that they do it within the proper purposes of the Act, which is the sustainable *management* of resources. An approach which prohibits resource consents being ever obtained is not consistent with the purposes of the Act.

[35] Finally, I should record that Mr Rennie began by suggesting the Court's decision flowed from the fact that the Council had not properly done its job and undertaken the appropriate research and consultation. Rather, it had simply avoided the issues by an inappropriate use of the "prohibited activity" status. In reply Mr Berry strongly objected to this, saying it was incorrect, there was no suggestion of that in the judgment, and it was not supported by the evidence. I am not in a position to resolve it, nor do I need to for the purposes of this ruling. The fact that I do not address it further should not be taken as endorsing to any degree either position. I simply decline to enter into the issue.

[36] For the Minerals Industry Association, Mr Fisher adopted Mr Rennie's submissions concerning the correctness of the Court's approach. In Mr Fisher's submission the scheme of the Act is permissive, and so it is appropriate for the Court to adopt a narrow approach to the use of "prohibited status". He submitted that requiring a sector to seek Plan Changes was not operating within the scheme and purposes of the Act; it was keeping that group outside the proper functioning of the Act. If the Council considers an activity might occur, it should not prohibit it and make anyone seeking to pursue that activity apply for a change to the Plan to enable it to do something that the Council accepts might occur in appropriate circumstances.

(c) *The evidence*

[37] The evidence was included in the agreed bundle for the appeal. While I was not particularly referred to any of it during the hearing, I have subsequently read it. The oral evidence (as opposed to the read briefs) is particularly illuminating of the conflict between the parties on the proper use of prohibited activity.

[38] Mr Mathieson was called by the Council. He is an experienced planner who has worked extensively in the region. He had been asked by the Council to review its proposed plan. He suggested changes which formed the basis of the Council's modified position that was adopted at the start of the hearing. The following exchange occurred with a member of the Court.

Q. I want to test my understanding a little if I can, as I understand it the proposal within the district plan for mining activity is for there to be a plan change applied for by a mining undertaking and a resource consent application made by the same applicant. Am I correct on that?

A. In general the approach that would be adopted with the plan change would be the plan change would provide for that particular extraction of minerals to occur within maybe a controlled activity, consent or a restricted discretionary with appropriate framework there to allow for that application to be made.

Q. So the plan change would establish some criteria for the particular proposal and then also establish a status for the consent associated with it?

A. That would be the appropriate way to do it though the plan change, to establish the resources there and was to be extracted and then the resource consent and assessment criteria would be tailored for that particular situation, yes.

Q. Now, am I correct then in understanding that the alternative to that that we've heard about is for the plan to have assessment criteria for mining activities in each of the zones which would also create a status for the consents that were necessary in the plan then the developer would have to get a resource consent in accordance with those provisions. Is that the alternative that ---

A. Essentially that's the alternative, yes.

Q. Yes, and in your view is it possible to write such provisions in the plan to allow the second alternative?

A. It is possible but it's with this plan reasonably difficult for say example the coastal zone which has a framework which is very much about protecting that area of national importance so it would be very hard, I

would think, to write a general provision for the coastal zone as a whole that would indicate how mining would be provided for in that zone, that's why I'm suggesting that it's better for where a particular application has come to a certain level where it's sought to be extracted that a plan change tailored to that particular environment would be able to be dealt with through that process.

[39] This exchange illustrates the use of the plan change procedure for which the Council contends. In essence it submits that with an issue such as surface mining, it is preferable to prohibit it and await a specific application by way of plan change. That would enable the Council to establish broad policies for the area where the application is focussed, and then to contemplate a specific resource consent. In other places in the transcript this was referred to as establishing a new "spot zone" by plan change, and then according mining a particular activity status within that newly created zone. The plan change applicant, having successfully sought a change, would then apply for a resource consent. It can be seen from the questioning that Mr Mathieson accepted that a general framework could be prepared in advance but that it would be very difficult.

[40] A further answer in cross-examination assists to illustrate. In the passage there is a reference to zones. These are the sectors that the particular district had been divided into – for example, coastal, industrial, and rural:

- A. ... I think the plan change process allows, at a policy level, for the Council to very carefully consider the reason why the zone or the policy area is there, the resource that it's looking to manage and in the event that Council was shown that the resource of the mineral was also of significance, then, at that policy level, it allows the Council to look at that throughout the district, and in the event that the resources can be managed appropriately it may consider that the extraction of the mineral resource is actually in some instances of more importance than the reason why the zone or policy area is there.

[41] The approach of the Council is therefore to see prohibited status as having two purposes. First, it can mean, as the Court says it should only mean, that the activity is not and will not be permitted. Second, however, it can be a device by which a certain procedure is required, namely the plan change procedure. By prohibiting an activity, the Council requires an applicant to follow the First Schedule procedure. This enables it to defer allocating the activity status in the abstract, and

to enable it to develop broad policy and rules for a set area that is the subject of a particular application, if and when such application emerges.

[42] Before leaving the appellants' evidence it should be noted that the Watchdog Group called Mr Lawrence, an expert planner. He too was questioned as to the preference for prohibited activity plus plan change over non-complying activity and probably also plan change.

[43] The respondents called, inter alia, Mr Serjeant. His views on the appropriate use of prohibited activity are referred to favourably in the decision under appeal. The passage approved by the Court provides:

- A. I consider that the use of the prohibited activity status should be very carefully and used in a – carefully used and used in a very confined way. In situations where the effect of the activity which is being prohibited will always have effects that the community considered inappropriate no matter how that activity may be limited in scale or intensity so that even on into the future if the activity was to be reconsidered, even in the light of new information, that is a very strong likelihood that a community and Council would come to the same conclusion as to the fact that that activity should be prohibited. I guess the one example in the Thames-Coromandel plan is the rather odd one on ....., but I mean I am aware that ..... are also prohibited in other district plans and it is something that stems from our concern with biodiversity. Now reconsideration of that prohibited activity I couldn't imagine is going to lead to a different conclusion anywhere else at another time, or anywhere else so in summary I think that the prohibited activity status should be used in a very confined way and that there aren't many activities that are actually warranted that status throughout New Zealand unless you are very careful to define the specific area that you are going to prohibit them. In other words the presence of some alternative resource is so high that the consideration of activity – that activity that you are wanting to prohibit you know it wouldn't – it would never – you would never contemplate allowing that activity to happen in those specific areas.
- Q. So could I summarise what you have just been saying by suggesting that prohibited means what it says. It doesn't mean, "come back with some other planning technique"?
- A. That is correct. I don't – I don't consider – I am just reflecting back on the statement of Mr Lawrence's about the sort of coupling up of prohibited activity status and plan changes. I don't see those being natural partners at all. I would see the coupling up of non-complying activity status' and the plan change as being the natural sort of marriage, if you like, such that where an activity came along that didn't meet the thresholds of the plan either in terms of effects being minor or the objectives and policies under a non-complying activity status that

you then wanted to modify those provisions – specifically the objectives and policies, to the point where you could then apply after the plan change and the ground rules would have changed. But if something is prohibited I don't consider that it would be appropriate for the ground rules to change at some time in the future.

[44] This review of the evidence highlights that whether the Court is correct does not turn only on a linguistic analysis on the text of the RMA. It also involves a broader understanding of the role that activities play, and are meant to play, in the overall process required by the RMA.

(d) *Section 77B of the Resource Management Act 1991*

[45] Section 77B of the RMA provides:

**77B Types of activities**

(1) If an activity is described in this Act, regulations, or a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

(2) If an activity is described in this Act, regulations, or a plan or proposed plan as a controlled activity,—

(a) a resource consent is required for the activity, and the consent authority has no power to decline that resource consent; and

(b) the consent authority must specify in the plan or proposed plan matters over which it has reserved control; and

(c) the consent authority's power to impose conditions on the resource consent is restricted to the matters that have been specified under paragraph (b); and

(d) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

(3) If an activity is described in this Act, regulations, or a plan or proposed plan as a restricted discretionary activity,—

(a) a resource consent is required for the activity; and

(b) the consent authority must specify in the plan or proposed plan matters to which it has restricted its discretion; and

(c) the consent authority's powers to decline a resource consent and to impose conditions are restricted to matters that have been specified under paragraph (b); and

(d) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

(4) If an activity is described in this Act, regulations, or a plan or proposed plan as a discretionary activity,—

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent; and

(c) the activity must comply with the standards, terms, or conditions, if any, specified in the plan or proposed plan.

(5) If an activity is described in this Act, regulations, or a plan or proposed plan as a non-complying activity,—

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the resource consent with or without conditions or decline the resource consent.

(6) Particular restrictions for non-complying activities are in section 104D.

(7) If an activity is described in this Act, regulations, or a plan as a prohibited activity, no application may be made for that activity and a resource consent must not be granted for it.

[46] The symmetry of s 77B is obvious. The initial classification is “permitted activity” for which no consent is required. The last classification is “prohibited activity” for which no consent can be given. Between these two extremes there are gradients – controlled, restricted discretionary, discretionary, and non-complying.

[47] In all, six options are provided. Each carries its own process. Again, at the extremes there is no process because no application is required. Within the other four options the process becomes more difficult – as Mr Fisher eloquently put it, one must jump higher each time:

a) controlled activity allows the imposition of conditions;

b) restricted discretionary involves the Council saying in advance the limited bases on which it reserves the right to decline;

- c) discretionary is as its name suggests, but contemplates that the Plan will have already prescribed standards and conditions which will attach to the activity if approval is given;
- d) non-complying is similar but contains no reference to pre-ordained standards, terms and conditions.

(e) *Decision*

[48] I consider there can be little issue that the test identified by the Court must generally be the right one. Once one acknowledges the clear statutory effect of a prohibited activity classification, then in the context of the RMA a test which has the effect of limiting the use of “prohibited activity” is intuitively correct. It is hard to reconcile liberal use of the prohibited activity status with an overall purpose of sustainable management of resources. In my view the true issue on this appeal is not whether the Court’s test is generally correct, but whether the Court was correct to say it is the only circumstance when the “prohibited activity” label may be used.

[49] The Council’s position is that it should be able to use the classification also as an on-going planning tool, not to prohibit absolutely an activity but to dictate a process for identifying the circumstances in which that activity will be allowed. What the Council wishes to do, and has done, is defer decisions about a contemplated activity in an area until there is an application to do it.

[50] On appeal I have not been satisfied that the Court was wrong to conclude that the Council’s approach was incorrect, and contrary to the RMA.

[51] Looking first at the scheme and purposes of the Act, I accept Sir Geoffrey’s propositions that the Act requires broad consultation leading to an informed, but judgment laden, assessment of the appropriate activity classification. However, I do not see the Court’s approach as being inconsistent with this. It is important to note the Court is not purporting to circumscribe the reasons why a planning authority might decide that a particular activity should not be countenanced in a certain area. Such an assessment will need to be reached after the proper processes have been

followed, and will need to flow reasonably from the information gathered. But within those constraints, the Court by this test does not limit the Council's discretion to decide why an activity should not be countenanced. Rather, what it is doing is requiring the Council to reach such an assessment rather than use "prohibited activity" for a different aim.

[52] A second issue is transparency, something which plainly troubled the Court. The Plan as submitted to the Court in this case did not contain the type of invitation found in the Hauraki District Plan (see para [28] above). That Plan openly encouraged applicants who wished to undertake certain prohibited activities to initiate a plan change. In terms of addressing transparency, it is preferable to consider the Council's approach as if it did contain the type of explanation contained in the Hauraki Plan.

[53] Even with this explanation, the Environment Court rejected the Hauraki Plan model. In my view this was correct. In the present case, an application of the Council's approach meant that initially most mining in what is acknowledged to be a resource rich area was prohibited. I do not consider that qualifying the prohibitions, in the way the Hauraki Plan does, removes the problem. Such a blanket apparent prohibition does not meet the needs of the RMA, nor does it adequately inform members of the public as to what the position is in relation to mining, or whatever other activity is involved.

[54] During the course of the hearing I was referred to a passage from the Chief Justice in *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17. It was referred to me for a different purpose, but the passage does, I consider, affirm the role of predictability and transparency.

[10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. *People and communities can order their lives under it with some assurance*. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed. (my emphasis)

[55] Turning next to the consequences of the Court’s decision, the Court heard evidence on the advantages and disadvantages of the Council’s approach. That evidence was not sufficient to lead the Court away from what it considered was the appropriate limited use of “prohibited activity”. The practical concerns identified by Mr Mathieson and Mr Lawrence did not persuade the Court that it was not possible to operate within the six “activity” options set out in the statute. Having reviewed the evidence, I am of the view the Court was entitled to reach the conclusions it did.

[56] The legislation already provides six categories of activity. Two do not involve resource consents, four do. It is difficult to imagine that Parliament intended the plan change procedure set out in the First Schedule to be used as a seventh option. Plan changes must be provided for, since circumstances will change and not everything can be anticipated. However, the Council’s approach, as exemplified by the Hauraki District Plan, is to make plan changes an integral part of the plan itself. As with the Environment Court, I do not see anything in the Act that supports such an approach.

[57] Finally, one can query the validity of the reasoning that would support a “prohibited activity” classification in the circumstances contemplated by the Council. Obviously, a planning authority is to be given a fair measure of discretion as regards its assessment of which activity classification is the correct one. However, the activity status that is ultimately decided upon must logically and reasonably flow from the information gathered by the Council as a result of complying with the RMA’s processes. If, as a result of those processes, the Council concludes that activity in question is one which could or might be undertaken in an area as long as suitable conditions are attached, it is difficult to see that prohibiting it is a logical or reasonable consequence of that process.

## **Conclusion**

[58] For the reasons given, the appeal is dismissed. The appellants have not persuaded me that the test adopted by the Court is wrong in policy terms, in terms of the overall scheme of the Act, or on the plain wording of the Act.

[59] At counsel's request, costs were reserved. If agreement cannot be reached, then memoranda may be filed. The respondents should file by 20 September, and the appellants by 27 September. If this timetable is not met costs will not be able to be dealt with until mid-November.

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Simon France J

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