



Report

Subject: **Defining Council's Risk Appetite - Consenting**

To: Audit and Risk Committee

From: Ross McNeil, Chief Executive

Date: 31 January 2018

File: 3-OR-3-2

1 Background

- 1.1 Rangitikei District Council has, as one of its strategic priorities, a goal to enable and support development in the District. The primary outcome being improving economic wellbeing of communities, particularly increasing employment and/or the capital value of the District.
- 1.2 In terms of Council's roles and responsibilities, the primary enabler (or barrier) to development are the policy and regulatory frameworks in place, and their application/implementation. The policy/regulatory frameworks consist of:
 - 1.2.1 Non-statutory and statutory policies, such as fee waivers for consents/permits and grants, and rate remissions, and;
 - 1.2.2 The regulatory framework, such as the District Plan, and building and resource consents.
- 1.3 Council has, in recent years, moved to be more overtly development-friendly, and this has been directly reflected in changes to policies, the District Plan and the way in which consents are considered.

2 Current Situation

- 2.1 The primary development consents issued by Council are Building Consents, issued pursuant to the Building Act 2004 (BA) and the Resource Consents, issued pursuant to the Resource Management Act 1992 (RMA) and having regard to the provisions of the Rangitikei District Plan.
- 2.2 In 2016/17, Council introduced specific provisions in its rates remission policy to provide rates relief to owners looking to develop properties containing earthquake-prone buildings and/or assist in the establishment/development of new businesses/business opportunities. The rationale for these policy changes was based on a presumption that any investment in property and/or new businesses would increase the overall capital value of a property, resulting in an enhanced future rate take. The added benefit being the potential for the creation of new jobs and associated 'knock-on' development opportunities and economic/social benefits.

- 2.3 In parallel with the rates remission policy review was a review of the Rangitikei District Plan, completed in late 2016. The purpose of the review was to address anomalies in the Plan (as made operative in 2013), particularly matters of inconsistency and provisions that served little or no benefit in terms of promoting effective management of natural and physical resources or reducing adverse effects of activities. This was evident in the high proportion of resource consent applications processed for largely administrative reasons (i.e. resource consents were required because of District Plan provisions lacking any clear purpose/rationale).
- 2.4 The BA contains wide-reaching powers of discretion accorded to territorial authorities (TLA), including the granting of exemptions and waivers in relation to compliance with the Act/Building Code. These powers can only be exercised in the context of dealing with a building consent application (i.e. before any work is started), as there is no statutory ability to retrospectively apply these discretions. In Council's case, this discretion has been conferred on the Chief Executive (and selected senior staff) by way of a delegated authority.
- 2.5 The BA provides for a Certificate of Acceptance (CoA) process, where work is done without a building consent and the applicant seeks confirmation that the work complies with the Building Code. In most cases a CoA cannot be issued because it is often not possible to ascertain compliance with required standards (e.g. unable to confirm concrete floors have the right footings/steel reinforcing). It is important that the 'threshold' for considering a CoA remains high so that there is no perception of there being an easy path around the need for obtaining a building consent when one is required. This has not always been the case.
- 2.6 An important distinction is that the powers of discretion relating to waiving or exempting compliance are held by the territorial authority rather than the building control authority (that part of the TLA where the building consent function is managed). This was a deliberate move by the Government to enable consents to be issued by independent accredited entities, including a shared service arrangement or a private party. This means consents would still be issued within the policy framework of the resident city/district council. This is not a matter for concern in the short term as independent BCAs will take some time to establish themselves (if ever).
- 2.7 As with all regulatory professional groups within local government, Building Control Officers (BCOs) have the ability to exercise discretion when it comes to the application of the technical aspects of the Building Act/Code (i.e. the application of building standards and the 'full letter of the law'). This is about applying judgment based on professional experience/expertise having regard to particular circumstances, and the overall risk exposure to Council is invariably low.
- 2.8 In order to maintain the integrity of the BCA function, which is subject to a statutory independent accreditation/audit process, it is not appropriate that BCO's have the ability to exercise any of the statutory compliance discretions because they are part of the BCA (and the discretionary authority sits with the TLA). However, where opportunities/requests for exercising this discretion are forthcoming, it is appropriate that BCOs provide advice on the technical aspects associated with each situation so that the Chief Executive can weigh up the nature, extent and pros/cons of a particular proposal/request when considering whether or not to exercise the discretionary powers.

It is critical that any decision to exercise the exemption/waiver provisions of the BA is done so in a matter that doesn't compromise the status of the BCA. Reporting the exercise of these discretionary powers to Council as they are applied would help ensure transparency and consistency of application. As the authority to exercise discretion is accorded by the BA to the Council, any use of the delegated authority by the Chief executive (or senior staff) would not limit the opportunity an objection to the Council if a customer felt the level of discretion was not reasonable.

- 2.9 Unlike the Building Act, the RMA offers no such explicit provisions for exercising discretion or exemptions in relation to statutory compliance. In this case reliance is placed on the decision-making framework set out in the District Plan, which in itself is largely a discretionary framework (as the focus is on considering the extent of any adverse effects associated with an activity/development).
- 2.10 In 2016, Council staff completed a review of how business/development enquiries and projects are handled. The review highlighted the absence of a single, coordinated path by which these enquiries could be channelled through the relevant consenting and approval processes within Council. To address this the 'Taking Care of Business' initiative was launched. This provides a 'one-stop-shop' service where by new business, development or event proposals would be allocated a dedicated staff member, who would assist/provide guidance through the consenting/approval process once a clear view of a proposal and required approvals were known (i.e. staff do the 'running around' rather than the customer).
- 2.11 It is important to note that both the BA and RMA/District Plan carry the key principle of 'existing use rights'. That is, where something was lawfully established before the introduction of new/updated rules/standards, it can continue and (generally) those new rules/standards cannot be applied. However, where an activity with existing use rights is changed (e.g. addition, modification, expansion, change of use, etc), then the relevant standards at the time of the change(s) are applied. This is the principle of 'incremental improvement' inherent in legislation promoting health, safety, wellbeing or environmental outcomes.
- 2.12 In exercising the discretionary powers under the BA (i.e. not requiring a building consent or for the work to comply (in part or in full) with the Building Code), Councils must be satisfied that the building work "is unlikely to endanger people or any building, whether on the same land or on other property." However, more specific discretion is provided for in the BA where buildings are altered, including increasing the number of household units.

3 Analysis/Comment

- 3.1 From 2016/17, the Chief Executive has been actively considering requests for exemptions/waivers/etc, and, where appropriate, exercising those discretionary powers. It is now customary practice for Council's BCOs to advise customers of the opportunity for the Chief Executive to exercise discretion where circumstances warrant that action. It is also now customary for Council's planning team to review proposals to determine the extent to which any requirement for a resource consent is predominantly 'administrative'

(i.e. there is a technical requirement for a resource consent - as per the District Plan - but the 'issues' to be addressed are either insignificant, not relevant or non-existent).

3.2 The following table sets out some examples of discretions recently sought and the consequential outcome.

Building Act 2004		
Earthquake strengthening in a building that doesn't meet current Building Code requirements	Granted	Consent required but requirement to upgrade rest of building to meet code requirement not imposed
Fire Wall on a boundary	Granted	Nature of adjoining property such that no building work will occur, so Fire Wall waiver granted
Change of use to a building previously used for commercial purposes) (addition of a household unit)	Not Granted	Owner unable to demonstrate people/building safety

Resource Management Act 2002 (District Plan)		
Construction of a separate garage/shed in the Hazard 2 (Flood) zone where the floor will be lower than 500mm above the predicted 1 in 200 year flood event.	Granted	Non-habitable building with low risk of inundation
Construction of a new residential building in the Hazard 2 (Flood) zone, where the garage floor will be lower than 500mm above the predicted 1 in 200 year flood event.	Granted	Non-habitable part of a building with low risk of inundation
Redevelopment of a commercial/retail provision which triggered the requirement to provide onsite parking spaces.	Consent not required	No ability for the owner/developer to acquire/secure the number of on-site carparks required by the District Plan. A resource consent process would have confirmed the inability to provide the requisite parking spaces, and consent would have been granted on the basis of extensive adjacent/nearby on-street public parking.

Principles for considering applying the statutory discretions available:

- All new builds are expected to comply with the relevant standards
- Earthquake strengthening works alone won't trigger a requirement to upgrade the building
- Requests for exemptions/waivers/discretion won't be considered outside of a (building) consent process (i.e. not after the work has been done). Note that the CoA process still available.

- Where Council is aware of non-compliant building work, a notice to fix will be issued. Removing/upgrading non-compliant work within the scope of a building consent will allow for the consideration of exemptions/waivers
- Adaptive re-use of disused/under-used commercial buildings is to be encouraged/supported
- No exemptions/waivers will be granted where people/fire/structural safety is compromised.

3.3 Human nature would suggest universal support for further reducing (or removing) consenting requirements. However, the current practice has been well received by customers, who invariably recognise the need to take a targeted approach to exercising discretion while maintaining basic standards of compliance (e.g. health and safety). There is no evidence to suggest significant support, either inside or outside of Council, for extending the application of these discretionary powers.

4 Conclusion

4.1 Council has significant discretionary powers accorded by the Building Act 2004 to grant exemptions and waivers to building projects that might otherwise have to fully comply with the Act and relevant building standards. These powers, which have been delegated to the Chief Executive and other senior staff, come with a caveat, in that they should only be exercised if the person exercising them is satisfied that basic health and safety (people and structures) outcomes/standards are not compromised. Council staff are exercising these powers in accordance with the intent of the Act and a set of core guiding principles that provide a clear and transparent framework.

4.2 There are no explicit discretionary powers contained within the RMA. However, staff have been exercising professional discretion in relation to the need for, and assessment and granting of resource consents.

4.3 In both cases, the discretion being exercised offers substantial benefits to business/property owners and developers by increasing flexibility and reducing constraints, without compromising basic health, safety and environmental outcomes. The risk to Council in this approach is low, and the practice/approach should be continued in accordance with the guiding principles.

4.4 There has been no demand to extend the application of these discretionary powers beyond the current scope. To do so would require a detailed assessment of the benefits/costs and risks to Council and the public.

5 Recommendations

5.1 That the report 'Defining Council's Risk Appetite – Consenting', dated 31 January 2018 be received.

5.2 That the Audit and Risk Committee endorse:

- 5.2.1 The pragmatic approach to exercising the statutory discretionary powers pursuant to the Building Act 2004 and the professional judgement exercised in relation to the application of the provisions of the Rangitikei District Plan; and,
- 5.2.2 The application of the following principles when considering the exercise of discretionary powers;
- All new builds are expected to comply with the relevant standards
 - Earthquake strengthening works alone will not trigger a requirement to upgrade the building to meet current building standards
 - Requests for exemptions/waivers/discretion will not be considered outside of a (building) consent process (i.e. not after the work has been done). Note that the Certificate of Acceptance process is still available, subject to meeting the test of 'compliance assurance'.
 - Where Council is aware of non-compliant building work, a notice to fix will be issued. Removing/upgrading non-compliant work within the scope of a building consent will allow for the consideration of exemptions/waivers.
 - Adaptive re-use of disused/under-used commercial buildings is to be encouraged/supported
 - No exemptions/waivers will be granted where people/fire/structural safety is compromised.

Ross McNeil
Chief Executive