

Interpretation Statement IS 08/03

RESOURCE CONSENT APPLICATION FEES AND PROVISION OF WORKS, PROVISION OF INFORMATION AND TRANSFER OF LAND AS CONDITIONS OF RESOURCE CONSENT—GST TREATMENT

Introduction

All references are to the Goods and Services Tax Act 1985 unless otherwise stated.

- 1 Resource consent may be required for the use of land or other natural resources. A resource consent may be granted subject to conditions, including conditions requiring the consent holder to provide services or works, provide information relating to the exercise of a resource consent (such as information relating to measurements and tests required as a condition of a water discharge permit or an emission consent), or to transfer land.
- 2 Examples of conditions relating to the provision of services or works include:
 - a requirement to plant trees along a boundary to reduce the visual impact of a piggery activity: *Ebben v Manuwatu-Wanganui Regional Council* [1994] NZRMA 115;
 - a requirement to replant an orchard, upgrade packing facilities, attend to drainage work and clear up rubbish: *Auckland Regional Council v Rodney District Council* [1994] NZRMA 428;
 - a requirement that the applicant for a fertiliser works consent purchase farms affected by the proposal and owned by objectors if requested to do so within a three-year period: *Lange v Town and Country Planning Appeal Board (No 2)* [1967] NZLR 898; and
 - a condition requiring the construction of a road: *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149.
- 3 The relevant local authority deals with applications for resource consent.
- 4 A fee is payable in respect of applications for resource consent.
- 5 The purpose of this Interpretation Statement is to consider the GST treatment of:
 - fees payable in respect of applications for resource consent;
 - the provision of services or works required as a condition of resource consent;
 - the provision of information as a condition of resource consent; and
 - the transfer of land as a condition of subdivision consent.

Summary

Resource consent application fees

- 6 Resource consent application fees are consideration for the supply of services (considering and making a decision on an application for resource consent) by a local authority. GST is chargeable on the fees.

Provision of works

- 7 Local authorities do not make a supply of goods or services for the provision of works required as a condition of resource consent.
- 8 If a resource consent is exercised and works required as a condition of resource consent are carried out, a supply of services may be made by the consent holder but this is not necessarily so in all cases. If a consent holder makes a supply of services by carrying out works, consideration is not given for the supply in the form of the grant of resource consent or for the supply of any other services by a local authority. GST is not chargeable on the supply of the provision of works by a consent holder who is registered for GST (that is, a registered person).
- 9 If a local authority pays compensation to a consent holder for works required as a condition of resource consent over and above the requirements of the activity for which consent is given, the compensation is consideration for the supply of services by the consent holder. If the consent holder is a registered person and the activity in respect of which the consent is given is carried out in the course or furtherance of a taxable activity, GST is chargeable on the compensation paid.
- 10 If the activity in respect of which consent is granted is part of a taxable activity carried on by the applicant and the activity could not be carried out unless works required as a condition of resource consent are provided, an input tax credit is allowable in respect of goods and services acquired in order to carry out such works.

Provision of information

- 11 Local authorities do not supply goods or services for the provision of information required as a condition of resource consent.
- 12 The provision of information under a condition of resource consent does not constitute a supply of services by a consent holder.

Transfer of land

- 13 A local authority that grants subdivision consent subject to the transfer of land does not supply resource consent or any other services for the supply of land by the applicant. The transfer of land required as a condition of subdivision consent is not consideration for a supply of goods or services by a local authority.
- 14 The consideration for the transfer of the land as a condition of subdivision consent is the compensation paid by a local authority for the land (including any additional survey costs in respect of an esplanade reserve or esplanade strip over

and above the survey costs that the applicant is required to incur in respect of the subdivision).

- 15 If the subdivider is a registered person and the supply of land is made in the course or furtherance of their taxable activity, GST is chargeable on the compensation received.
- 16 The local authority is entitled to a credit for input tax (GST charged on the supply of the land by a registered person or input tax in terms of section 3A(2)) on the compensation paid.

Background

Nature of resource consent

- 17 The Resource Management Act 1991 (“RMA”) prohibits the use of land or other natural resources in a manner that contravenes a rule in a district plan or proposed district plan (or regional plan or proposed regional plan) unless the activity is permitted by a resource consent or the activity is an existing use: sections 9, 11, 12, 13, 15 and 15A–15C of the RMA.
- 18 A resource consent permits the consent holder to do something that would otherwise contravene a provision of the RMA restricting the use of land, the subdivision of land, the use of water rights or the discharge of contaminants or waste: section 87 of the RMA. A resource consent is neither real nor personal property: section 122(1) of the RMA.
- 19 Generally, a resource consent commences when the time for lodging appeals against the granting of the consent has expired and no appeals have been lodged, or any appeal that has been lodged has been determined or withdrawn: section 116 of the RMA. A resource consent lapses on the date specified in the consent or, if no date is specified, five years after the date of commencement of the consent unless the consent has been given effect to or an extension of the consent has been granted: section 125 of the RMA.

Local authority’s obligations

- 20 Applications for resource consent must be made to the relevant local authority: section 88(1) of the RMA.
- 21 The process that the local authority is required to follow in dealing with applications for resource consent is specified in the RMA.
- 22 The local authority’s district plan or regional plan is the framework within which resource consent applications are considered. The rules in a district plan take effect as regulations: section 76(2) of the RMA. Sections 104A to 104D of the RMA permits different degrees of control for different categories of activities. A district plan or regional plan determines whether an activity is a permitted activity, prohibited activity, controlled activity, discretionary activity or non-complying activity.

- 23 Section 77C of the RMA specifies that certain types of activity are prohibited activities. A resource consent is not required for a permitted activity and resource consent cannot be given for a prohibited activity: section 77B(1) and (7) of the RMA.
- 24 A consent authority has discretion as to whether to grant consent to discretionary or non-complying activities. If consent is granted for such activities, the authority may impose conditions: sections 77B(4) and (5) and 104B of the RMA.
- 25 A consent authority must grant a resource consent for a controlled activity “unless it has insufficient information to determine whether or not the activity is a controlled activity” and may impose conditions in respect of matters specified in its district plan or regional plan: sections 77B(2)(aa), (b) and (c) and 104A of the RMA. See *Discount Brands Ltd v Westfield (NZ) Ltd* [2005] NZLR 597.
- 26 Notice of a decision granting resource consent must be given within the time limit specified in section 115 of the RMA.

Conditions

- 27 Section 108(1) of the RMA provides that “except as expressly provided in this section and subject to any regulations” a resource consent may be granted on “any condition that the consent authority considers appropriate”, including any condition of the kind referred to in section 108(2). The conditions referred to in section 108(2) include the following.
- A condition requiring that a financial contribution be made. A “financial contribution” may be made in the form of money or land and money: see the definition of “financial contribution” in section 108(9) of the RMA.

Where a local authority requires a financial contribution as a condition of resource consent under the RMA, the local authority makes a supply to the person who provides the financial contribution: section 5(7B). If a person makes a financial contribution in the form of land, the person is treated as supplying goods or services to the local authority: section 5(7C).
 - A condition requiring that services or works (including the protection, planting or replanting of any tree or other vegetation or the protection, restoration or enhancement of any natural or physical resource) be provided: section 108(2)(c) of the RMA.
 - In respect of a subdivision consent, a condition requiring the creation of an esplanade reserve or an esplanade strip: sections 108(2)(f) and 220 of the RMA. Land contributed for an esplanade reserve or esplanade strip as a condition of a subdivision consent is not a financial contribution: see definition of “financial contribution” in section 108(9) of the RMA.
- 28 A local authority may also include as a condition of resource consent a requirement that the consent holder supply to the local authority information relating to the exercise of the resource consent: section 108(3) of the RMA.

- 29 Conditions imposed under section 108(2) of the RMA must be for the purpose of the RMA, must fairly and reasonably relate to the permitted activity and must not be unreasonable: *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149.
- 30 Section 108 of the RMA does not permit the imposing of a condition that has the effect that the resource consent will not be in existence until the condition is fulfilled: *Director-General of Conservation v Marlborough District Council* [2004] 3 NZLR 127 (at para 16).

Fees

- 31 Section 36(1)(b) of the RMA permits local authorities to fix the charges payable by applicants for resource consent “for the carrying out of its functions in relation to the receiving, processing and granting of resource consents”. The scale for application fees for resource consent is set by the relevant local authority following public consultation: *Harrison v Northland Regional Council* 28 October 2003, Environment Court W67-03. A local authority may require the payment of an additional charge if the charge fixed under section 36(1)(b) of the RMA is inadequate to enable a local authority to recover its actual and reasonable costs: section 36(3) of the RMA. However, a local authority cannot recover more than its reasonable costs in dealing with a resource consent application: section 36(4) of the RMA.
- 32 Section 36(7) of the RMA authorises a local authority to refuse to take further steps in relation to a resource consent application until outstanding fees in relation to the application have been paid.

Legislation

Goods and Services Tax Act 1985

- 33 “Consideration” is defined in section 2(1) as follows.

Consideration, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body:

- 34 Section 3A provides:
- (1) Input tax, in relation to a registered person, means—
 - (a) Tax charged under section 8(1) on the supply of goods and services made to that person, being goods and services acquired for the principal purpose of making taxable supplies:
 - (b) Tax levied under section 12(1) of this Act on goods entered for home consumption under the Customs and Excise Act 1996 by that person, being goods applied or acquired for the principal purpose of making taxable supplies:
 - (c) An amount determined under subsection (3) after applying subsection (2).
 - (2) In the case of a supply by way of sale to a registered person of secondhand goods situated in New Zealand, the amount of input tax is determined under subsection (3) if—

- (a) The supply is not a taxable supply; and
 - (b) The goods are not supplied by a supplier who—
 - (i) Is a non-resident; and
 - (ii) Has previously supplied the goods to a registered person who has entered them for home consumption under the Customs and Excise Act 1996; and
 - (c) The goods are acquired for the principal purpose of making taxable supplies and—
 - (i) The taxable supplies are not charged with tax at the rate of 0% under section 11A(1)(q) or (r); or
 - (ii) The taxable supplies are charged with tax at the rate of 0% under section 11A(1)(q) or (r) and the goods have never, before the acquisition, been owned or used by the registered person or by a person associated with the registered person.
- (3) The amount of input tax is—
- (a) If the supplier and the recipient are associated persons, the lesser of—
 - (i) The tax included in the original cost of the goods to the supplier; and
 - (ii) The tax fraction of the purchase price; and
 - (iii) The tax fraction of the open market value of the supply; or
 - (b) If the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(7A), the lesser of—
 - (i) The tax fraction of the open market value of the deemed supply under section 5(3); and
 - (ii) The tax fraction of the purchase price; and
 - (iii) The tax fraction of the open market value of the supply; or
 - (c) If the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(8), the lesser of—
 - (i) The tax fraction of the valuation under section 10(8) of the deemed supply under section 5(3); and
 - (ii) The tax fraction of the purchase price; and
 - (iii) The tax fraction of the open market value of the supply; or
 - (d) If the supplier and the recipient are not associated persons and the supply is not the only matter to which the consideration relates, the lesser of—
 - (i) The tax fraction of the purchase price; and
 - (ii) The tax fraction of the open market value of the supply; or
 - (e) In all other cases, the tax fraction of the consideration in money for the supply.
- (4) For the purpose of subsection (1)(b), applied does not include—
- (a) The delivery or the arranging of the delivery of the goods to a person in New Zealand; or
 - (b) The making of the delivery of the goods to a person in New Zealand more easily achieved.
- (4A) For the purpose of subsections (1) and (2), if a supply of goods and services acquired by a non-profit body is not acquired for the principal purpose of making exempt supplies, the supply is treated as being acquired for the principal purpose of making taxable supplies.

35 Section 5(7B) and (7C) provide:

- (7B) For the purposes of this Act, a local authority is treated as supplying goods and services to a person if the local authority requires a contribution from the person as—
- (a) A financial contribution that is a condition of a resource consent under the Resource Management Act 1991:
 - (b) A development contribution under the Local Government Act 2002.
- (7C) For the purposes of this Act, a person who makes a contribution to a local authority is treated as supplying goods and services to the local authority to the extent that the contribution consists of land and is—
- (a) A financial contribution that is a condition of a resource consent under the Resource Management Act 1991:
 - (b) A development contribution under the Local Government Act 2002.

36 Section 6(1) provides:

- (1) For the purposes of this Act, the term **taxable activity** means—
- (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
 - (b) Without limiting the generality of paragraph (a) of this subsection, the activities of any public authority or any local authority.

37 Section 8(1) provides:

- (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 12.5 percent on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

38 Section 20(3)(a) and (b) provides:

- (3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—
- (a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of the following:
 - (i) Input tax in relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:
 - (ia) Input tax in relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:
 - (ii) Input tax invoiced or paid, whichever is the earlier, pursuant to section 12 of this Act during that taxable period:
 - (iii) Any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b); and

- (b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of the following:
 - (i) Input tax in relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:
 - (ii) Input tax paid pursuant to section 12 of this Act during that taxable period:
 - (iii) Input tax in relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) of this paragraph applies:
 - (iv) Any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b), to the extent that a payment has been made in respect of that amount; and

...

Resource Management Act 1991

39 Section 36 of the RMA provides:

- (1) A local authority may from time to time, subject to subsection (2), fix charges of all or any of the following kinds:
 - (a) Charges payable by applicants for the preparation or change of a policy statement or plan, for the carrying out by the local authority of its functions in relation to such applications:
 - (b) Charges payable by applicants for resource consents, for the carrying out by the local authority of its functions in relation to the receiving, processing, and granting of resource consents (including certificates of compliance and existing use certificates):
 - (c) Charges payable by holders of resource consents, for the carrying out by the local authority of its functions in relation to the administration, monitoring, and supervision of resource consents (including certificates of compliance and existing use certificates), and for the carrying out of its resource management functions under section 35:
 - (ca) charges payable by persons seeking authorisations under Part 7A, for the carrying out by the local authority of its functions in relation to the allocation of authorisations (whether by tender or any other method), including its functions preliminary to the allocation of authorisations:
 - (cb) charges payable by holders of resource consents, for the carrying out by the local authority of its functions in relation to reviewing consent conditions, if—
 - (i) the review is carried out at the request of the consent holder; or
 - (ii) the review is carried out under section 128(1)(a); or
 - (iii) the review is carried out under section 128(1)(c):
 - (d) Charges payable by requiring authorities and heritage protection authorities, for the carrying out by the local authority of its functions in relation to designations and heritage orders:
 - (e) Charges for providing information in respect of plans and resource consents, payable by the person requesting the information:
 - (f) Charges for supply of documents, payable by the person requesting the document:
 - (g) Any kind of charge authorised for the purposes of this section by regulations.

Charges fixed under this subsection shall be either specific amounts or determined by reference to scales of charges or other formulae fixed by the local authority.

- (2) Charges may be fixed under subsection (1) only—
 - (a) in the manner set out in section 150 of the Local Government Act 2002; and
 - (b) after using the special consultative procedure set out in section 83 of the Local Government Act 2002; and
 - (c) in accordance with subsection (4).
- (3) Where a charge fixed in accordance with subsection (1) is, in any particular case, inadequate to enable a local authority to recover its actual and reasonable costs in respect of the matter concerned, the local authority may require the person who is liable to pay the charge, to also pay an additional charge to the local authority.
- (3A) A local authority must, upon request by any person liable to pay a charge under this section, provide an estimate of any additional charge likely to be imposed under subsection (3).
- (4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:
 - (a) The sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates:
 - (b) A particular person or persons should only be required to pay a charge—
 - (i) To the extent that the benefit of the local authority's actions to which the charge relates is obtained by those persons as distinct from the community of the local authority as a whole; or
 - (ii) Where the need for the local authority's actions to which the charge relates is occasioned by the actions of those persons; or
 - (iii) In a case where the charge is in respect of the local authority's monitoring functions under section 35(2)(a) (which relates to monitoring the state of the whole or part of the environment), to the extent that the monitoring relates to the likely effects on the environment of those persons' activities, or to the extent that the likely benefit to those persons of the monitoring exceeds the likely benefit of the monitoring to the community of the local authority as a whole,—

and the local authority may fix different charges for different costs it incurs in the performance of its various functions, powers, and duties under this Act—
 - (c) In relation to different areas or different classes of applicant, consent holder, requiring authority, or heritage protection authority; or
 - (d) Where any activity undertaken by the persons liable to pay any charge reduces the cost to the local authority of carrying out any of its functions, powers, and duties.
- (5) A local authority may, in any particular case and in its absolute discretion, remit the whole or any part of any charge of a kind referred to in this section which would otherwise be payable.
- (6) Sections 357B to 358 (which deal with rights of objection and appeal against certain decisions) shall apply in respect of the requirement by a local authority to pay an additional charge under subsection (3).
- (7) Where a charge of a kind referred to in subsection (1) is payable to a local authority, the local authority need not perform the action to which the charge relates until the charge has been paid to it in full.

40 Section 108(2)(a), (c) and (f) of the RMA provides:

A resource consent may include any one or more of the following conditions:

- (a) Subject to subsection (10), a condition requiring that a financial contribution be made:
...
- (c) A condition requiring that services or works, including (but without limitation) the protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource, be provided:
...
- (f) In respect of a subdivision consent, any condition described in section 220 (notwithstanding any limitation on the imposition of conditions provided for by section 77B(2)(c) or (3)(c)):

41 Section 108(3) and (4) of the RMA provides:

- (3) A consent authority may include as a condition of a resource consent a requirement that the holder of a resource consent supply to the consent authority information relating to the exercise of the resource consent.]
- (4) Without limiting subsection (3), a condition made under that subsection may require the holder of the resource consent to do one or more of the following:
 - (a) To make and record measurements:
 - (b) To take and supply samples:
 - (c) To carry out analyses, surveys, investigations, inspections, or other specified tests:
 - (d) To carry out measurements, samples, analyses, surveys, investigations, inspections, or other specified tests in a specified manner:
 - (e) To provide information to the consent authority at a specified time or times:
 - (f) To provide information to the consent authority in a specified manner:
 - (g) To comply with the condition at the holder of the resource consent's expense.

42 “Financial contribution” is defined in section 108(9) of the RMA as follows.

- (9) In this section, **financial contribution** means a contribution of—
 - (a) Money; or
 - (b) Land, including an esplanade reserve or esplanade strip (other than in relation to a subdivision consent), but excluding Maori land within the meaning of the Maori Land Act 1993 unless that Act provides otherwise; or
 - (c) A combination of money and land.

43 The conditions described in section 220 of the RMA include:

- (a) Where an esplanade strip is required under section 230, a condition specifying the provisions to be included in the instrument creating the esplanade strip under section 232:
 - (aa) A condition requiring an esplanade reserve to be set aside in accordance with section 236:
 - (ab) A condition requiring the vesting of ownership of land in the coastal marine area or the bed of a lake or river in accordance with section 237A:
 - (ac) A condition waiving the requirement for, or reducing the width of, an esplanade reserve or esplanade strip in accordance with section 230 or section 405A:

Analysis

- 44 GST is chargeable on the supply of goods and services in the course of a taxable activity carried on by a registered person by reference to the value of the supply: section 8(1). The value of the supply is the consideration paid for the supply. The activities of a local authority constitute a taxable activity: section 6(1).
- 45 Local authorities are registered persons for GST purposes. Applicants for resource consent may also be registered persons.
- 46 An input tax credit is allowable in respect of goods or services acquired for the principal purpose of making taxable supplies: sections 3A and 20(3). “Purpose” means “the object which the taxpayer has in mind or in view”: *CIR v BNZ Investment Advisory Services Ltd* (1994) 16 NZTC 11,111; *Norfolk Apartments Ltd v CIR* (1995) 17 NZTC 12,003; *Wairakei Court Ltd v CIR* (1999) 19 NZTC 15,202.
- 47 A principal purpose is the “main or primary or fundamental” purpose: *CIR v BNZ Investment Advisory Services Ltd*; *Coveney v CIR* (1994) 16 NZTC 11,328; *Case T39* (1997) 18 NZTC 8,261; *Norfolk Apartments Ltd v CIR*.

Consideration

- 48 A fundamental principle of GST is that it is a tax on transactions. Therefore, not all payments received by a registered person will necessarily be consideration for GST purposes. GST is imposed on supplies, so it is necessary to identify a supply before there can be a liability for GST. For a payment to be consideration, there must be a sufficient connection between the payment and a supply: *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187, 13,193.
- 49 To determine whether a payment is consideration for GST purposes, it is necessary to consider the legal nature of the arrangement between the parties. In *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075, Blanchard J said (at para 17):

Although the linkage or nexus between a payment and the activity to which it gives rise may be very broad, it is still necessary to have regard to the legal form which is being employed:

... in taxation disputes the Court is concerned with the legal arrangements actually entered into ... not with the economic or other consequences of the arrangements.

([*CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187, 13,192, citing *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694, 706, also reported as *Marac Life Assurance Ltd v CIR*; *CIR v Marac Life Assurance Ltd* (1986) 8 NZTC 5086 at pp 5,097, 5098]). The tax being one on transactions, it is necessary to pay close attention to the legal nature of what has been done. The Crown does not of course suggest that it set up the transaction in a way which disguised or distorted its real nature.

- 50 There need not be a contract between the parties. The supply also need not be made to the person providing the consideration. See *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032.

- 51 The statutory definition of “consideration” includes, but is wider than, the contract law meaning of the term. However, the statutory definition of “consideration” (like the contract law definition) requires an element of reciprocity: *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147.
- 52 Therefore:
- to determine whether a payment is consideration, it is necessary to consider the legal nature of the arrangement between the parties;
 - for a payment to be consideration, it is necessary to identify a supply and establish a sufficient relationship between the payment and the supply;
 - there need not be a contract between the parties, and the supply need not be made to the person providing the consideration.

Whether fees payable in respect of applications for resource consent are consideration for a supply by local authorities

- 53 Section 36(1)(b) of the RMA permits a local authority to recover costs incurred in carrying out its administrative functions in relation to a resource consent (including certificates of compliance and existing use certificates). Existing use certificates and certificates of compliances are treated as if they are resource consents: sections 139(6) and 139A(9) of the RMA. The charges referred to in section 36(1)(b) of the RMA relate to all steps a local authority must carry out in the course of dealing with an application for resource consent: *Wellington Regional Council v Aifric Developments* (1996) 2 ELRNZ 265.
- 54 The fee payable in respect of applications for resource consent is not paid for the grant of resource consent. A fee is payable whether or not resource consent is granted: *Harrison v Northland Regional Council* (at para 17).
- 55 A local authority has a duty under the RMA to consider whether to grant resource consent and whether a resource consent should be subject to conditions having regard to the matters specified in section 104 of the RMA. Where an application for resource consent is made and the fee payable by applicants for resource consent is paid, a local authority has an obligation to consider and make a decision on the application in accordance with the procedure prescribed in the RMA. The fee is consideration for the supply of services (that is, considering and making a decision on the application) by the local authority.
- 56 GST is chargeable on the fees. If the applicant is registered for GST and applied for resource consent for an activity that is part of their taxable activity, they are entitled to an input tax credit in respect of the fees.
- 57 This conclusion is consistent with the conclusion in Question We’ve Been Asked “Building permit fees” *Tax Information Bulletin* Vol 4, No 8 (April 1993), p 13, which states that GST is chargeable on building permit fees (a similar transaction to the payment of resource consent application fees).

Whether provision of works is consideration for a supply by a local authority

- 58 Section 108 of the RMA does not permit the imposing of a condition that has the effect that a resource consent is not effective until the condition is fulfilled: *Director-General of Conservation v Marlborough District Council* (at para 16).
- 59 A resource consent may lapse (if the consent is not “given effect to” within the period specified in the consent or in section 125 of the RMA) without the works having been carried out. A resource consent gives the holder the right to carry out the activity permitted by the resource consent. However, the consent holder is not obliged to carry out that activity.
- 60 If a condition is imposed in respect of a resource consent requiring the provision of services or works, the condition relates to the applicant’s ability to carry out the activities for which consent is granted: *Director-General of Conservation v Marlborough District Council* (at para 17). In other words, if the holder of a resource consent exercises the resource consent, the consent holder must comply with the terms of the resource consent. A local authority may apply to the Environment Court for an enforcement order if a condition of a resource consent has been breached: sections 314 and 316 of the RMA.
- 61 A local authority is not entitled to retain a financial contribution if the activity permitted by a resource consent does not proceed: section 110 of the RMA. It would be inconsistent with section 110 of the RMA if a local authority could require the provision of works under a condition of resource consent if the activity permitted by the resource consent is not carried out. The provision of services and works is required to avoid, remedy or mitigate the adverse effects of the permitted activity. These adverse effects will not eventuate if the activity is not carried out.
- 62 Resource consents are granted subject to conditions rather than for the performance of conditions. This distinction is similar to the distinction under contract law between consideration and a condition: *Thomas v Thomas* (1842) 2 QB 851.
- 63 The consent holder’s right to exercise the resource consent is conditional on the provision of works, but the provision of works is not consideration for resource consent or a supply of any other nature by the local authority. A resource consent takes effect and remains in existence for the duration of the resource consent regardless of whether works under a condition of the resource consent are carried out. Consent holders are obliged to carry out works required as a condition of resource consent only if they exercise the resource consent. A resource consent may lapse without the works required as a condition of the consent having been carried out. A local authority does not undertake any specific obligations in return for the provision of services or works. Therefore, the Commissioner considers that services or works required as a condition of resource consent are not consideration for the grant of resource consent or for a supply of any other nature by a local authority.
- 64 Specific legislation was required in order to make it clear that a requirement for the provision of a financial contribution as a condition of resource consent gives

rise to a supply by the local authority and that the provision of a financial contribution gives rise to a supply by the person providing the financial contribution: section 5(7B) and (7C). Sections 5(7B) and 5(7C) were intended to apply only to contributions made in the form of money and/or land (ie, “financial contributions” as defined in section 108(9) of the RMA). Sections 5(7B) and 5(7C) was not intended to apply to other types of conditions imposed under the RMA. Other types of conditions were omitted from the amendments because of the difficulty of valuing non-monetary contributions and because it was considered that the value of such contributions would not be significant: Inland Revenue Department and The Treasury (2003) *Taxation (Annual Rates, GST, Trans-Tasman Imputation and Miscellaneous Provisions) Bill 2003: Officials’ Report to the Finance and Expenditure Committee on Submissions on the Bill*, Wellington: Inland Revenue Department and The Treasury, available at <http://taxpolicy.ird.govt.nz/publications/files/offrep03.doc>. Therefore, it was accepted that non-monetary conditions imposed in respect a resource consent would not result in a supply by the local authority.

Whether provision of works is a supply by the consent holder for consideration

- 65 If a resource consent is exercised and works required as a condition of resource consent must be carried out. The provision of works or services as a condition of resource consent could constitute a supply by the consent holder but this is not necessarily so in all cases. Although “services” is widely defined, for services to be supplied, there must be some action that helps or benefits the recipient: Case S65 (1996) 17 NZTC 7,408; F B Duvall Ltd v C of IR (1997) 18 NZTC 13,470. Generally works undertaken as a condition of resource consent are necessitated solely by the carrying out of the activity permitted by the consent. Therefore, it could be argued that services are not supplied by the consent holder as the provision of works is carried out for the consent holder’s own benefit (being undertaken to enable the activity permitted by the resource consent to be carried out).
- 66 For the provision of works to be subject to GST, consideration must be provided for the provision works in the form of money or in the form of a supply of goods or services by the local authority. Consideration need not be in the form of money: section 10(2). GST applies to barter transactions: Case T61 (1998) 18 NZTC 8,461; Lanauze v King (2001) 20 NZTC 17,360. Under a barter transaction, the supply of goods or services by one party is the consideration for the supply by the other party. If a local authority does not make payments of cash to a consent holder who has provided works or services, information or transferred land to the local authority, it is necessary to consider whether the local authority has provided consideration in the form of a supply of goods or services to the consent holder.
- 67 As local authorities do not grant resource consent and do not underake any obligations for the provision of works, it follows that local authorities do not provide non-monetary consideration in the form of a supply of goods or services for the provision of works required as a condition of resource consent.
- 68 There may be circumstances where a consent holder receives consideration in the form of money from a local authority for the provision of works. In

Waitakere City Council v Estate Homes Ltd the council paid compensation to a developer because the developer was required to carry out work in excess of the requirements of the development for which consent had been given. The payment of such compensation was required in order to make the condition reasonable.

- 69 If a consent holder receives compensation for carrying out works in excess of the requirements of the activity for which consent was given, the compensation is consideration for a supply of services by the consent holder. Such compensation is subject to GST, if the consent holder is a registered person and the activity in respect of which the consent was given was carried out in the course of furtherance of a taxable activity. However, in the absence of a payment in cash by the local authority, as a local authority does not supply goods or services for the provision of works, the supply of works by a consent holder would not be a supply for consideration (in the form of a supply of goods or services) provided by the local authority.
- 70 If the activity in respect of which consent is granted is part of a taxable activity carried on by the applicant and the activity could not be carried out unless works required as a condition of resource consent were provided, an input tax credit is allowable in respect of goods and services acquired in order to carry out such works. In such circumstances, although the provision of works may not be a taxable supply, the fundamental purpose of the acquisition of the goods and services is to enable the applicant to carry out the activity. On that basis, the goods and services would be acquired for the principal purpose of the taxable activity.

Whether provision of information is consideration for a supply by the local authority

- 71 A condition requiring the consent holder to supply to the local authority information relating to the exercise of the resource consent may (among other things) require the consent holder to make and record measurements; take and supply samples; carry out analyses, surveys, investigations, inspections or other tests; and provide information to the local authority: section 108(4) of the RMA. This information is to be provided at the cost of the consent holder: section 108(4)(g) of the RMA. A requirement to supply information on an ongoing basis could be appropriate, for example, to a water discharge permit or an emission consent.
- 72 A local authority has a statutory obligation to monitor the exercise of resource consents in its area and to take appropriate action: section 35(2)(d) of the RMA; *Woodland Farms (Ruawai) Ltd v Otamatea County Council* 18 September 1985, Planning Tribunal A65/85, at p 4.
- 73 Under section 36(1)(c) of the RMA a local authority is entitled to charge a fee to holders of resource consents in relation to the carrying out of its functions under section 35 of the RMA.
- 74 The RMA contemplates self-monitoring by the holder of a resource consent, and a consent holder must establish that the exercise of the consent complies

with the conditions of the consent: *Juken Nissho Ltd v Northland Regional Council* [2000] 2 NZLR 556 (at para 36).

- 75 The purpose of a condition requiring the provision of information relating to the exercise of a resource consent is to enable the local authority to adequately police compliance with the terms of a consent: *Alliance Freezing Co v Southland Catchment Board* (1977) 6 NZTPA 247, 255; *Juken Nissho Ltd v Northland Regional Council* (at para 17).
- 76 Although the obligation of a local authority to police compliance with the terms of a resource consent is a separate and possibly more onerous obligation, local authorities have a right to charge holders of resource consents a fee to cover their costs in carrying out their monitoring function: section 36(1)(c) of the RMA.
- 77 For similar reasons to those outlined above, the Commissioner considers that the provision of information by the holder of a resource consent under a condition of resource consent is not consideration for the supply of a resource consent or for a supply of any other nature. No specific obligations are undertaken by a local authority for the provision of information.

Whether provision of information is a supply by the consent holder for consideration

- 78 The Commissioner also considers that the consent holder does not supply services (in the form of the provision of information) to a local authority. The holder of a resource consent has an obligation to “self-monitor” compliance with the terms of a resource consent. .

Consideration for the transfer of land as a condition of subdivision consent

- 79 Local authorities are authorised to grant subdivision consents subject to any of the conditions described in section 220 of the RMA. These conditions relate to the creation of esplanade strips or esplanade reserves, the vesting of ownership of land in the coastal marine area or in the bed of a lake or river, or the waiving of a requirement for or reducing the width of an esplanade reserve or esplanade strip. A condition relating to the creation of an esplanade reserve or esplanade strip is imposed in order to avoid, remedy or mitigate the adverse effects of development and to meet the sustainable management objectives of the RMA: *MacDonald v Christchurch City Council* 3 October 2002, Environment Court C121/2002, at para 101.
- 80 Land for an esplanade reserve is transferred to the local authority. When an esplanade strip is created, an interest in land is conferred on the local authority. In some circumstances, land is transferred to the Crown as a condition of resource consent: see sections 231(1), 232 and 237A of the RMA.
- 81 Compensation is not payable when the allotment created by the subdivision is smaller than four acres: section 237E of the RMA. In other cases the amount of the compensation payable for the land or interest in land is to be agreed between the parties: sections 237E–237G of the RMA. If the parties are unable to agree on the amount of the compensation, the amount is to be determined in

accordance with the procedure specified in section 237H of the RMA. Any additional survey costs required in connection with the creation of an esplanade reserve or esplanade strip are to be taken into account in determining the compensation payable: section 237H(4) of the RMA.

- 82 A local authority that grants subdivision consent subject to the transfer of land does not supply resource consent or any other services for the transfer of land. The consideration for the transfer of land as a condition of subdivision consent is the compensation agreed between the parties or determined in accordance with the procedure in section 237H of the RMA (including any additional survey costs in respect of the esplanade reserve or esplanade strip over and above the survey costs that the applicant is required to incur in respect of the subdivision).
- 83 Accordingly, if the subdivider is a registered person and the supply of land is made in the course or furtherance of their taxable activity, GST is chargeable on the compensation received. The local authority is entitled to a credit for input tax (GST charged on the supply of the land by a registered person or input tax in terms of section 3A(2)) on the compensation paid as the land is acquired for the principal purpose of the local authority's taxable activity.