Simpson Grierson

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Partner Reference
Duncan Laing

Local Government New Zealand
P O Box 1214
WELLINGTON 6140

For: Frances Sullivan

Writer's Details
Direct Dial: +64-3-365 0961
Fax: +64-3-379 5023
E-mail:
judith.cheyne@simpsongrierson.com

Dear Frances

Liability Risks for Councils re Coastal Hazard Information

This is an update of our opinion to you dated 3 April 2009. The opinion now includes commentary on the amendments to the Resource Management Act 1991, that came into force on 1 October 2009.

Introduction

1. You have asked us to provide you with advice on the potential liability Councils (both territorial authorities and regional authorities) may face as a result of "redrawing" hazard lines/zones in coastal areas (and on flood plains). The need for Councils to "redraw" these lines is likely to arise as a result of climate change, as well as other factors. Over time the extent of predicted change means that more properties are likely to be captured within a hazard zone when they were previously not in such a zone. This has implications for those property owners in relation to potential loss of value of their property and also increased insurance premiums. You want to know if Councils face any liability in relation to such economic loss.

2. There is also an issue with regard to the information which Councils use to "redraw" hazard lines and whether, if Councils do not get their hazard zones correct (particularly as a result of inadequate information being used) they face any liability with regard to property that might be subsequently damaged by a water hazard.

3. The alteration of hazard lines may occur through changes to district and regional plans under the Resource Management Act 1991 **(RMA)**, although some Councils keep hazard information in non-statutory documents outside the plans, for example in hazard registers.

4. This advice considers the liability risk for councils in terms of the RMA, as well as under the Building Act 2004 **(BA04)**, and for general information requests under Local Government Official Information and Meetings Act 1987 **(LGOIMA)**, as well as territorial authority responsibilities and liability in relation to issuing project information memoranda (**PIMS** - under the BA04), and land information memoranda (**LIMS** - under the LGOIMA).

5. The following key matters are addressed in this advice:

   (a) what are Councils' responsibilities in relation to including hazard information in RMA plans, or in other Council information, including within a PIM or LIM issued by the Council?;

   (b) what liability might Councils face for approving a subdivision or other resource consent (and/or a building consent) in an area which at the time of Council giving consent was not in a hazard zone but as a result of an alteration of hazard lines is now in such a zone? (Discussion of this issue also looks at responsibilities and potential liability in relation to approving resource consents and/or building consents where the land is already in such a zone.); and

   (c) in determining where coastal hazard lines/zones should be, are Councils required to use the best available information? (You are aware, that there is a variability in Councils' ability to access the 'best information' to use in the alteration of hazard lines[1]).

6. This advice does not consider whether Councils might face any liability where the Council is an owner of land or buildings in a hazard zone, or any responsibilities arising out of that ownership (which would generally be the same liability that any property owner might face). As it is a relatively remote risk, this advice also does not address any possible criminal liability of Councils, arising from people being injured or killed by a hazard event, through any failure to provide hazard information/sufficient hazard information or hazard protection works.

Executive Summary

7. The Council has duties in both the RMA and the LGOIMA (relating to LIMS) to keep information about hazards. Under the RMA that information is needed so the Council can consider whether it should impose any controls on land, either through conditions on a consent or by way of plan provisions.

8. In many instances Councils will face legal challenges through the RMA processes to the proposed redrawing of hazard zones, where these are to be included in a district or regional plan/an amendment to a plan. Before the Council embarks on a plan change it will want to ensure it uses the best information available to it, in order to reduce the number of challenges and resulting time and money spent by the Council in dealing with such challenges. The result is likely to be a more robust hazard zone because there will be input from a number of experts, and will often be finally decided on by the Environment Court, and possibly a higher court.

9. The plan change process on its own should not lead to any "liability" on Councils for any effect the creation or redrawing of hazard zones may have on property owners. The role of a consent authority under the RMA is not to protect individual landowners against economic loss.

[1] You have told us that many Councils cannot afford LIDAR which is generally recognised as the best information you can get to determine topography and therefore flow paths for floods or elevation above sea level (other than extremely expensive ground survey).

10. It is clear from section 85 of the RMA that Councils do not have to pay compensation for imposing controls on land through rules in a plan. Landowners have a remedy available to them, under that section, where a plan provision renders land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in land. Application can be made to the Environment Court asking it to delete or direct the deletion of the relevant provision.

11. There will be instances, however, where a Council has not included hazard information in a RMA plan, or the most recent information known to the Council is not yet included in those plans. Councils should take into account the most recent, accurate information known to it in making decisions about the information it needs to provide in LIMs and PIMs, and whether or not to grant and/or what conditions to impose, on subdivision and land use consents (and building consents). Evidence relating to hazards must be authoritative and accurate (provided by a person with sufficient expertise and is up to date) for a Court to accept that a certain condition should be imposed or a consent refused.

12. The most likely liability for Councils in relation to its holding and use of hazard zone information will be:

(a) Claims in negligence in relation to the **inclusion of information on a LIM or PIM** that land falls within such a zone, or, possibly, judicial review claims seeking the removal of that information from a LIM or PIM. A Council's ability to defend either claim would depend primarily on the accuracy of the information recorded on the LIM/PIM. If the information is factually correct, it would, in our view, be very difficult for a plaintiff to succeed, particularly as it is mandatory to include such information on a LIM (if it is not already noted in the district plan.)

(b) Claims in negligence or breach of statutory duty where a Council **fails to include information that it is aware of or the correct information on a LIM or PIM**. Accurate recording of the most recent information available to the Council on LIMs/PIMs, is likely to reduce the scope for such claims.

(c) Claims in negligence (and/or possibly breach of statutory duty) where a Council **fails to provide information about a hazard in response to a request, outside the context of a LIM or PIM**. Section 41(1) of LGOIMA provides reasonably comprehensive protection from civil claims based on disclosure of information in response to a request, but not from claims based on failure to disclose information or on incorrect information volunteered by the Council.

(d) Claims in negligence (and/or possibly breach of statutory duty), or judicial review, in relation to the **granting of subdivision, land use or building consents in respect of land in a hazard zone** (including a decision not to notify a consent that is later granted) - or possibly, in relation to the refusal to grant consent where the plaintiff alleges the land is not in fact subject to any such hazard.

Negligence/Breach of statutory duty

The *Bella Vista Resort Ltd v Western Bay of Plenty District Council* case (discussed in further detail below) is relevant to decisions of Councils to grant subdivision or land use consents. Such decisions are quasi judicial and it is unlikely that a duty of care could be established to allow a claim in negligence to succeed (or breach of statutory duty) where a Council grants these types of consents. Those decisions may be subject, however, to a judicial review claim being made. Historical subdivision decisions may give rise to a duty of care, but there are a number of hurdles before succeeding in a claim, including time limitation issues, and the need to prove the Council breached any duty of care (which would involve showing at the relevant time the Council was or should have been aware of the hazard), and that the breach caused the plaintiffs loss.

Decisions to grant building consents are not quasi-judicial and are more easily able to be challenged by way of a negligence claim/breach of statutory duty (or through the determinations process provided in the BA04). If a building consent has been granted under section 72 of the BA04 there will be greater protection from liability for the Council, although the Council is required to first consider whether the consent can be granted under section 71 before it turns to section 72. If a consent can be granted under section 71 of the BA04, then liability can be minimised by taking a cautious approach and ensuring that the Council is satisfied that the land, building and other property will be adequately protected from the hazard if the Council grants the consent. It would do this by ensuring it has sufficient information on the hazard.

Judicial review

It may not be possible to bring a judicial review of a decision to issue a building consent because there are other options available to challenge decisions under the Building Act. In *Rennie & Ors v Thames Coromandel DC and Anor* (2008) 14 ELRNZ 191 (discussed further below) the court noted that must be some question as to whether or to what extent a building consent under Building Act is susceptible of review because the Act itself prescribes a process to resolve disputes between local authorities and property owners and for rights of appeal on question of law.

However, judicial review of LIM decisions and RMA decisions, particularly decisions not to notify resource consents are a possibility. Where judicial review is available, the most likely grounds that would be relied on, in relation to a decision involving hazard information, is that the Council has made a mistake or acted unreasonably in not relying on correct or sufficient information. In the *Rennie* case the Court found that a council in considering whether or not to notify a resource consent had acted on information that was less that adequate, and therefore the decision not to notify was invalid. In this type of situation Councils need to ensure that applicants provide it with the appropriate information. If the information used by a Council is accurate and adequate any challenge to a decision based on that information will be difficult.

13. In answering the question on whether Councils are required to use the best available information in relation to its information on coastal hazard lines/zones it is relatively clear that using the best available information will put a Council in the strongest position to defend any type of court action, so it is certainly advisable that they do so, where possible. However, for a Council to meet its statutory responsibilities in any particular situation the best available information may not always be needed. "Adequate" and accurate information may be sufficient to avoid a successful challenge, particularly in relation decisions as to notification of a consent under the RMA. Information for plan provisions may also not need to be exact, provided they define an "*administrative boundary which is conveniently ascertainable*" (see *Bay of Plenty Regional Council v Western Bay of Plenty District Council,* A27/02, 8/2/02).

14. It is beyond the scope of this advice to consider in detail what might be best practice in relation to the collation of information about natural hazards. We also note that different councils have different resources and financial priorities. Those things may be relevant factors in terms of the level of information it is reasonable to expect a Council to obtain.

15. The decision in *Maruia Society Incorporated v Whakatane District Council* 15 NZTPA 65 supports this view. The decision states that *"an authority would [not] have to go to any particular lengths to determine what are clearly difficult areas in respect of likely future changes in sea or ground level"*. This case also referred to the Council being able to take into account not only past information but the "best evidence available" to it, and "the best evidence of future probabilities". However, that was in the context of the Council being able to take that information into account, rather than it being *required* to use such information.

16. When considering whether a duty of care is owed in any case, the effect a finding of a duty of care, which would mean the Council must obtain and pay for the best available information, will have on a Council's spending priorities may be a relevant policy consideration, leading to a duty of care not being established. However, it is likely that this would only be one factor that would be considered by the Courts and depending on the circumstances there may be other factors which outweigh this "burden" on a Council.

17. Council's may be able to obtain and fund the best available information by recovering the cost through its ability to charge fees. If it is information being provide in a LIM, then *Altimarloch Joint Venture Ltd v Moorhouse* 3/7/08, Wild J, HC Blenheim CIV-2005-406-91 appears to provide authority that the Council could make allowance for that cost in its LIM charge, but it is not within the scope of this advice to provide a view on that or investigate whether other charges the Council makes under the RMA or the BA04 might also allow some recovery of such a cost.

18. In summary, our view is that although, in general, there is not likely to be a mandatory requirement on councils to use the best available information, they will receive the best protection from liability claims if they do obtain and use the best available information.

Relevant legislation concerning hazard information

Resource Management Act 1991

19. Section 30 of the RMA states:

> *"(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:*
>
> ...
>
> *(c) The* ***control of the use of land*** *for the purpose of—*
>
> ....
>
> *(iv) The* ***avoidance or mitigation of natural hazards****:*
>
> *....(d) In respect of any* ***coastal marine area*** *in the region, the control (in conjunction with the Minister of Conservation) of—*
>
> ...
>
> *(v)* ***Any actual or potential effects of the use, development, or protection of land, including the avoidance or mitigation of natural hazards*** *and the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:..."*
>
> (Regional Authorities also have control over planting on the bed of a water body to avoid or mitigate natural hazards)

20. There are of course a number of other functions in section 30 which may have an indirect bearing on the avoidance or mitigation of natural hazards.

21. Section 31 of the RMA sets out similar but not identical functions for territorial authorities:

> *"(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*
>
> ....
>
> *(b)* ***the control of any actual or potential effects of the use, development, or protection of land****, including for the purpose of—*
>
> *(i)* ***the avoidance or mitigation of natural hazards; and..."***

22. A natural hazard is defined in section 2 of the RMA as "*any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment*". This clearly includes hazards in a coastal area such as erosion, flooding, landslips etc.

23. Section 35 of the RMA imposes general and specific duties on both regional and territorial authorities to gather information, undertake research, and to monitor the operation of the RMA in their district or region, and review the results of their monitoring. Subsection (3) requires that a council is to "*keep reasonably available at its principal office, information which is relevant to the administration of policy statements and plans, the monitoring of resource consents, and current issues relating to the environment of the area, to enable the public*" to be better informed about local authority duties and to enable effective participation in the RMA by the public. Information to be kept under subsection (3) includes (see section 35(5)(j)) "*records of natural hazards* ***to the extent that the local authority considers appropriate for the effective discharge of its functions***".

24. The question arises as to what information is "*appropriate for the effective discharge*" of local authority functions. The functions are identified in sections 30 and we consider that there should be sufficient information available so that, for regional councils, they can impose controls over land to avoid or mitigate natural hazards, and in the coastal marine area (and for territorial authorities, for other land) they can control potential or actual affects of the use of land including avoiding or mitigating natural hazards.

25. Although section 35 does not expressly include a duty to monitor hazards, it is implied by section 35, as well as by sections 30(1)(c)(iv) and 31(1)(b)(i). A Council would need to monitor natural hazards so it can ascertain whether there is any need to provide for controls on land for avoidance or mitigation purposes, either through plan provisions or when granting subdivision (or land use) consents. This in turn implies that information will be relatively up to date (although we come back to this issue in the discussion of the case law below). We also need to identify who has the primary responsibility for this information – regional or territorial authorities or both.

26. Section 62(1)(i)(i) requires that a regional policy statement must state the local authority that is responsible for specifying the objectives, policies, and methods for the control of the use of land to avoid or mitigate natural hazards or any group of hazards. (If no responsibilities are specified for the natural hazards function then a regional council retains primary responsibility for it– section 62(2).) The control of the use of land for the avoidance or mitigation of natural hazards is therefore at a threshold level within the power of both regional councils and territorial authorities, but the regional policy statement for a particular region allocate that responsibility to the territorial authority or the regional authority with a default position in terms of section 62(2).

27. In *McKinlay v Timaru DC* C24/01 (6 NZED 308), the Court held that for a regional council to control the use of the land for the purposes of avoiding or mitigating natural hazards it must have implemented regional rules which do, in fact, exercise some control. Simply setting out in the regional policy statement which authority takes responsibility for developing objectives, policies and rules only provides for the right to control, and falls short of actual control and the exercise of that right.

28. Therefore, there needs to be a certain level of coordination and working together on natural hazards issues by regional and territorial authorities. Clearly, a territorial authority can make any rules it considers appropriate for the control of land use, provided such rules are not inconsistent with anything that is provided for in the Regional Policy Statement (see section 75(4)), are required to ensure sustainable management of resources, and can be justified in terms of section 32. We note that

the 2009 amendments to the RMA include new sections 86A - 86G, that replace sections I9-20 and change the regime concerning when proposed plan rules have "legal effect" and when proposed plan rules render previous rules inoperative. These new provisions will be relevant for Councils to consider if they are proposing plan changes relating to hazards.

29. As you have noted, in this situation most Councils' plans already identify coastal hazards and the situation which we are asked to consider relates to changes to those hazard areas, so they are properly identified, and appropriate, rules as to the subdivision or development of land, and the use of such land, are put in place. Rules and assessment criteria in the District Plan can also require that subdivision and land use consent applications relating to land *adjacent* to a natural hazard, will be considered with regard to criteria specific to the hazard in question.

30. While there is no express statutory duty for territorial authorities to include content specific to natural hazards in their district plans, the Environment Court has previously expressed its approval for such a practice in a number of recent cases (see below). Councils have a discretion however, to be exercised in terms of the RMA, as to whether and to what extent to incorporate specific provisions in its Plan relating to particular land or more generally.

31. It should be noted that section 85 of the RMA expressly states that compensation is not payable for controls being placed on land through rules in plans. The effect of section 85(1) is that property owners have no right to financial compensation in lieu of their interests in property, if those interests are taken away or adversely affected by such rules. Section 85(2) provides a means to challenge such a proposed rule. Section 85(3) provides an alternative remedy where a plan provision or proposed plan "*renders any land incapable of any use*"; and "*places an unfair and unreasonable burden on any person having an interest in the land*".

32. The notification requirements in sections 93 to 94D of the RMA (which were subject to considerable change in the 2009 amendments) are also relevant to mention. For the purposes of this advice, the recent amendments do not change the fact that a consent authority must have sufficient information, at the stage of deciding whether or not it must publicly notify or give limited notification of a resource consent application. It needs to make the notification decision on a properly informed basis with reliable information regarding the nature and context of the application and the issues it raises from a planning perspective, including so the authority can determine the likely effect. The level of scrutiny to be given by the authority needs to reflect the importance of the decision not to notify. (See, generally, the decisions in *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 and *Sawmill Workers Against Poisons Inc v Whakatane District Council (No. 2)* [2006] NZRMA 500.)

33. When the Council is making a decision on a consent under section 104, it has been said that there are three requirements to make a finding on a question of fact (see Brookers' commentary on the RMA, at paragraph RM104.03):

> " • *There needs to be material of probative value which tends to logically show the existence of facts consistent with the finding (See Air New Zealand v Mahon [1983] NZLR 662, 671).*

• *The evidence must satisfy the Court of the fact that there will or will not be such an effect on the balance of probabilities and having regard to the gravity of the question; but neither party has to prove its assertion of fact beyond reasonable doubt. However, there is an evidentiary burden on a party who makes an allegation to present evidence tending to support the allegation. See West Coast Regional Abattoir v Westland CC (1983) 9 NZTPA 289.*

• *The heart of a finding is that the Court needs to feel persuaded that it is correct. See McIntyre v Christchurch CC A015/96, (1996) 2 ELRNZ 84, [1996] NZRMA 289, 1 NZED 149 cited in Baker Boys Ltd v Christchurch CC C060/98, [1998] NZRMA 433, 3 NZED 500. Refer also Wellington Club Inc v Christchurch CC [1972] NZLR 698.*"

34. We note that there are two new subsections in section 104 that relate to the adequacy of information included with an application, as follows:

> "(6) A consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.
>
> (7) In making an assessment on the adequacy of the information, the consent authority must have regard to whether any request made of the applicant for further information or reports resulted in further information or any report being available."

35. Evidence relating to hazards must be authoritative and accurate if the Court is to grant a consent/accept that a certain condition should be imposed, or refuse a consent. This means a person with sufficient expertise needs to provide the evidence and that it is up to date. It is important to note the new timeframes in the RMA (especially the curtailed ability to stop the clock while waiting for further information).

36. Councils will need to ensure their initial requests for further information are comprehensive, but should also carefully consider the distinction between deficient applications that should be rejected under section 88(3), information needed for notification, and information needed prior to the hearing or officer decision. In line with new sections 104(6) and (7), ultimately an application can be declined if information is inadequate, and that assessment may include whether any request for further information or reports has been met. We also note new section 95C which provides that if further information is sought but not provided, and the consent authority has not yet decided whether to give public or limited notification of the application, then the application must be publicly notified.

37. Section 106 of the RMA provides that a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that "*the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source*" or "*any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source*".

38. Section 106 is not necessarily dependent on the consent authority having identified any "*erosion, falling debris, subsidence, slippage, or inundation from any source*" in its

district plan (note that the term "natural hazards" is not used in section 106), and even if hazards are identified in the district plan, that does not prevent the Council from seeking more information. For example, in *Foreworld Developments Ltd v Napier City Council*, EnvC W89/98, 22/10/98, the Council sought further information on the geological conditions on the part of the coast that was the subject of a subdivision application, even though it had hazard information in its plan.

39. In the past, section 106 has been interpreted narrowly. The Court has held that for land to be "*subject to*" a natural hazard, there must be an actual occurrence, continuous or recurrent. An increased risk of the occurrence does not satisfy the test for refusal of subdivision consent[2].

40. The Environment Court in *Kotuku Parks Limited* v *Kapiti Coast District Council,* A73/00, held that although a property was subject to an event which could cause extensive inundation or erosion at anytime, it was not standard practice to design a subdivision for such extreme events. By raising the building platform levels as proposed (which was to a level equivalent to the 1-in-100-year flood level), sufficient provision would be made to avoid or mitigate likelihood of damage. The applicant was only required to design to generally accepted engineering practices in order to demonstrate that the test in section 106 of the RMA was met.

41. The *Foreworld* case is also authority for the view that it is legitimate for a council to seek to avoid liability in determining whether a proposal is satisfactory. However, that cannot be its primary concern because it is not part of the statutory framework in section 106. We discuss below other relevant RMA cases in assessing the level of information that should be used, and liability arising for Councils in relation to its actions and omissions in relation to hazards.

Building Act 2004

42. Council powers under the BA04 that are relevant in relation to natural hazards include issuing PIMs under sections 34 and 35 (discussed further below) and sections 71-74. These sections relate to the approval of building consents where the land on which a building is to be located is subject to a "*natural hazard*".

43. Section 71 provides:

> *"(1) A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if—*
>
> > *(a) the land on which the building work is to be carried out is subject or is likely to be subject to 1 or more natural hazards; or*
> >
> > *(b) the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.*
>
> *(2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—*
>
> > *(a) protect the land, building work, or other property referred to in that subsection from the natural hazard or hazards; or*

[2] Paragraph A106.02, Brookers commentary to Resource Management Act 1991.

(b) restore any damage to that land or other property as a result of the building work.

(3) In this section and sections 72 to 74, natural hazard means any of the following:

(a) erosion (including coastal erosion, bank erosion, and sheet erosion):
...

(d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding):..."

44. However, section 72 then specifies that an application for building consent that must be refused under section 71, must be granted under section 72, if the consent authority considers that:

"..(a) the building work to which an application for a building consent relates will not accelerate, worsen, or result in a natural hazard on the land on which the building work is to be carried out or any other property; and

(b) the land is subject or is likely to be subject to 1 or more natural hazards; and

(c) it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned.."

45. The phrase "*is likely to*" in these sections is the same as that used in relation to the dangerous buildings provisions (see section 121 BA04/section 64 of the 1991 Act). There have been cases in that setting which have discussed the meaning of the phrase. "Likely to" does not mean "probable", as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is "*a reasonable consequence or [something which] could well happen*". (See *Auckland CC v Weldon Properties Ltd* 7/8/96, Judge Boshier, DC Auckland NP2627/95, [1996] DCR 635 (upheld on appeal in *Weldon Properties Ltd v Auckland CC* 21/8/97, Salmon J, HC Auckland HC26/97.)

46. If a consent is granted under section 72, then section 73 specifies who must be notified in relation to the granting of the consent. This notification results in a "tag" being placed on the certificate of title for the land of the fact of the consent being granted and identifying the natural hazard concerned.

47. Sections 392(2) and (3) provide relief from liability for the Council in certain circumstances where it grants a section 72 consent:

"..(2) Subsection(3) applies if—

(a) a building consent has been issued under section 72; and

(b) the building consent authority has given a notification under section 73; and

(c) the building consent authority has not given a notification under section 74(4) that it has determined that the entry made on the certificate of title of the land is no longer required; and

(d) the building to which the building consent relates suffers damage arising directly or indirectly from a natural hazard.

(3) The persons specified in subsection (4) [the building consent authority concerned and its employees and agents] *are not liable in any civil proceedings brought by any person who has an interest in the building referred to in subsection (2) on the grounds that the building consent authority issued a building consent for the building in the knowledge that the building for which the consent was issued, or the land on which the building was situated, was, or was likely to be, subject to damage arising, directly or indirectly, from a natural hazard...."*

48. These sections have been the subject of some debate as to their scope, particularly compared with the equivalent, but slightly different sections under the Building Act 1991. In our opinion, sections 72(a) to (c) are conjunctive in that a council is only required to grant building consent under section 72 if all three paragraphs are satisfied. However, the view has been expressed that section 72(c) does not apply unless a Council is required to consider a waiver or modification of the building code in any particular case.

49. This was the approach taken by the Department of Building and Housing in Determination 2006/49, and Determination 2007/110 (which concerned a building consent for a house on a site subject to coastal hazards). The Council in Determination 2006/49 had taken the view that because building plans complied with the building code, there was no need to grant a waiver or modification of the code, so section 72(c) was not satisfied and if a consent cannot be granted under section 72, it must be declined.

50. The determination held that "*section 72(c) has no application unless the territorial authority is considering granting a waiver or modification of the Building Code because it is inconceivable that Parliament should have intended to prevent territorial authorities from granting building consents for building work that complied with the Building Code.*" However, this does not mean section 71 also has no application.

51. In Determination 2007/110, the determinations manager made it clear that whether a consent can be granted under section 71 must be considered first, so that section 72 is only considered if consent is declined under section 71 (see pages 30-33 of the determination).

52. When applying section 71(2) a council has to accept that building work complying with the code must be adequately protected from the hazard, and so section 71(2) can apply only in respect of the land or other property. The limitation with this is that a Council's powers under the BA04 relate to the building code, which in turn does not have controls relating to "the land", and only has controls in limited circumstances that are relevant to "other property", but there will still be circumstances when a Council can be satisfied there will be adequate protection, or restoration of any damage, to the land or other property. We note that in Determination 2008/82, there is a very helpful flowchart of the decision making requirements when assessing building sites that may be subject to hazards.

53. In terms of liability issues, a council will only be protected against civil liability under section 392 of the BA04 when it grants a building consent pursuant to section 72, but a

council cannot "force" a developer not to take steps to comply with section 71(2) simply in order that the Council can issue the consent under section 72. Owners will often prefer to try and satisfy section 71, because there are insurance implications for such owners, if they have their consent granted under section 72 and a "tag" is put on the title. Where a council considers that section 71(2) of the BA04 is satisfied and grants a consent under section 71, then liability could potentially arise if the Council was found to be negligent in having granted consent when the land, building or other property had not been adequately protected from the natural hazard.

54. In our view, where section 71 is applicable, the Council can minimise liability by ensuring that it has sufficient information to satisfy itself that the hazard protection is adequate to bring the application within section 71(2). Otherwise it should apply section 71(1) and refuse to grant consent

55. Moreover, in relation to liability, if any claim relates to the Council issuing a building consent or code compliance certificate then there is a 10 year limitation period set out in section 393 of the BA04. Any such claim, can only be brought within 10 years: "*civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based*". This provides an additional layer of protection for Councils in relation to historical claims.

56. We also note that where land is subject to a natural hazard (and in other cases), the Council could grant a consent for a building that is intended to have a limited life. Section 113 provides:

> *"(1) This section applies if a proposed building, or an existing building proposed to be altered, is intended to have a life of less than 50 years.*
>
> *(2) A territorial authority may grant a building consent only if the consent is subject to—*
>
> > *(a) the condition that the building must be altered, removed, or demolished on or before the end of the specified intended life; and*
> >
> > *(b) any other conditions that the territorial authority considers necessary.*
>
> *(3) In subsection (2), specified intended life, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use."*

57. The commentary on section 113 in Brookers' Building Law text notes that:

> *"A building having a specified intended life, which may not be more than 50 years, can sometimes be designed for less demanding conditions than would otherwise be the case. That is particularly so for steel structures likely to suffer fatigue failure after a certain length of exposure to fluctuating and reversing loads such as wave and wind effects. Similarly, the design of a building need not take account of events that will not occur during its specified life, which might include coastal erosion.*

Another possibility is that if the long-term durability of a building is in doubt, that building might be acceptable for a specified life without the need to waive the other provisions of the Building Code."

58. This section may provide another option for Councils when dealing with buildings on land that may not currently be subject to a hazard and does not meet the "likely to" test, but where the Council still has some concerns, such as that the land is adjacent to a hazard. We note that section 113 was applied in conjunction with section 72 in Determination 2007/110.

LGA02

59. For the sake of completeness, we also note that section 92 of the LGA02 requires Councils to "*monitor and, not less than once every 3 years, report on the progress made by the community of its district or region in achieving the community outcomes for the district or region.*" Councils must decide how to monitor progress, but it must seek to secure the agreement of any organisations and groups with whom agreement was sought in relation to the process for identification of community outcomes.

60. If the community outcomes for a Council include any reference to hazards - eg. "risks from hazards are managed and mitigated", then the monitoring requirements in this Act may also be relevant with regard to the Council keeping appropriate information on hazards, regardless of whether or not the Council also keeps that information for RMA or BA04 purposes.

LIMs/PIMs

61. Both regional and territorial authorities have obligations under the Local Government Official Information and Meetings Act 1989 (LGOIMA) in relation to information it holds about hazards in these regions or districts. The LGOIMA has two different parts which are relevant in terms of record keeping; information which may need to be included in a LIM requirement under section 44A (relevant to territorial authorities, and the rest of the Act, which concerns the holding, and release of, official information (applicable to both). Territorial authorities also have similar obligations as with LIM information, under sections 34 and 35 of the BA04 in relation to information it includes on a PIM.

62. A LIM can be obtained by any member of the public, but a PIM can only be obtained by the owner of the property, in relation to carrying out building work. Therefore any liability issues that arise with a PIM compared to LIM will only be in relation to the owner not any third parties. The advice below with respect to claims against the Council under a LIM also apply to PIMS, but should be read in that light.

Obligations under section 44A LGOIMA

63. Section 44A provides for the release of information in a LIM and relevantly provides that:

> "*(1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum* ***in relation to matters affecting any land in the district*** *of the authority.*
>
> *(2) The matters which shall be included in that memorandum are:*

(a) Information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to ***potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation****, or likely presence of hazardous contaminants, being a feature or characteristic that -*

(i) ***Is known to the territorial authority****; but*

(ii) ***Is not apparent from*** *the district scheme under the Town and Country Planning Act 1977 or* ***a district plan*** *under the Resource Management Act 1991*

...

(3) In addition to the information provided for under subsection (2) of this section, a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.
..."

64. We note in passing that section 35 of the BA04 requires a PIM to include information about special features of the land concerned, which special features includes potential natural hazards likely to be relevant to the design of the building, that is known to the territorial authority and that are not apparent from the district plan.

65. Under section 44A(2)(a), information identifying each special feature of the land concerned, must be included in a LIM if it is known to the Council, but is not apparent from the district plan. Accordingly, where a hazard zone is included in a district plan, the Council would only have to provide information on hazards if there was additional/new information it had relating to hazards that might affect the land for which the LIM is sought.

66. If information on hazards is only found in the regional plan, then that information must still in our view be included in the LIM, as it is likely to be considered information that is (or should be) known to the territorial authority[3]. Hazard information which the Council becomes aware of from other sources, such as other resource consent hearings, would also be information that it should include in a LIM (where the information is relevant to the particular land in question). Such information does raise some difficult issues for a Council, especially if there was conflicting evidence (expert or otherwise) at the resource consent hearing.

Other requests for official information

67. Under LGOIMA, any person may request any local authority to make available to that person any specified official information (see s10). "*Official information*" means any information held by a local authority, although there are a few exceptions. Information relating to a specific property or properties, including any hazard reports, would be examples of official information.

68. Section 7 sets out "good reasons" for withholding information under LGOIMA, that apply unless, in the circumstances of a particular case, there are other considerations which make it desirable for the information to be made public. Unless hazard reports and the like have been obtained in the course of litigation (relying on legal privilege)

[3] Note that if a Council is a unitary authority, then the *Altimarloch* case is relevant in relation to consent information on a LIM. In that case the Court held that the Marlborough District Council was required to have water permit information on its LIM, even though, if the Council had not been a unitary authority, the permit would have been issued by the regional council and so the information would not be held by or known to it and so would not be mandatory information to be included on a LIM.

there is unlikely to be a good reason to withhold that information when weighed against the public interest.

69. It should also be noted that section 41(1) gives an authority protection from civil and criminal proceedings for providing official information, or for any consequences in providing the information, where that information is made available in good faith under parts 2-4 of the Act (not where information is provided in a LIM)). Good faith in this context means where the information is provided honestly and without any ulterior motive. There is no protection however, from claims based on failure to disclose information or on incorrect information volunteered by the Council.

Claims regarding the inclusion of hazard information on a LIM

70. Claims in negligence could potentially be made by those owners who object to the inclusion of hazard information on a LIM or PIM, to the extent that their land now falls within a hazard zone. Alternatively an owner might bring a judicial review claim regarding the Council's decision to include such information on a LIM or PIM and to seek its removal. As you have identified, the effect on owners of that new information may be diminution in value of their property and increased insurance premiums, or difficulty in obtaining insurance.

71. A Council's practical ability to defend such claims largely depends on the accuracy of the information recorded on the LIM/PIM. If the information is factually correct, it would be very difficult for a plaintiff to succeed leaving aside any specific legal issues (such as the existence or scope of a duty of care, causation or limitation periods). For information to be factually correct it will usually be the most recent information, based on expert/authoritative advice (cases on best available information are discussed below).

72. The fact that a property's value reduces can be caused by a number of factors, including such things as the current economic climate, and is not necessarily caused, or only the result of a change in planning information about that property. A claimant would have to not only prove that that the Council was negligent in including that information or a LIM or PIM but would then have to prove that the inclusion of that information had caused the reduction in value.

Failure to warn/negligent misstatement claims where information was not in a LIM/PIM

73. There is a potential for claims in negligence or possibly breach of statutory duty to be made against Councils in relation to the Council's duty of care where the Council has failed to include information or provided incorrect information, in a LIM or as a result of another information request. The potential claimants are past LIM recipients, or those who have sought specific information from the Council. For example, current owners who bought houses in an area which has now become a hazard zone area, and who obtained a LIM before their purchase which did not advise of the hazard zone, and who built a house, all may consider the Council should have warned them about the potential hazard prior to them building. These owners are also likely to claim diminution in value, or for the cost of repairs if a building has been damaged by the hazard.

74. There are a number of relevant "information" cases which assist in determining the type of circumstances in which a Council may be held liable. Some arise purely from a

specific incident relating to the provision of information by the Council, and some are where information was provided as part of the process of granting a building or resource consent.

75. In *Brown v Heathcote County Council* [1986] 1 NZLR 76, (CA) (the Court of Appeal decision was upheld by the Privy Council in *Christchurch Drainage Board v Brown* [1987] 1 NZLR 720) a claim was brought against the Christchurch Drainage Board and the Council arising from a building permit issued for land which was prone to flooding. The Court held that the Christchurch Drainage Board was the one authority in Christchurch with comprehensive and accurate information about flood levels, and that the evidence established that it was looked to by local authorities and property owners as the repository of knowledge about the rivers.

76. The Court concluded that the Board owed a duty of care which had been breached by it by not even issuing a simple warning about the possibility of flooding. It was also noted that "*the Board was of course not an insurer of the Browns; if they had decided to take the risk despite a warning from the competent authority they could have had no complaint*" (page 82). However, the High Court ([1982] 2 NZLR 584) had earlier held that the County Council was not liable, because, there was no duty on the Council in relation to a landowner, to regulate what a landowner did on their own property for their protection. Neither the Council nor its officers has been asked either directly or by obvious implication, to advise on flooding, and, at that time, there was no requirement on a Council to enquire of a landowner (or make other enquiries) as to the susceptibility of the land to flooding prior to issuing a building permit.

77. In *Dancorp Developers Limited v Auckland City Council* [1991] 3 NZLR 337, the High Court considered a claim against the Council in negligence in relation to the subdivision approval of a site which had previously been used for a timber treatment plant. When enquiries were made by the applicant prior to the subdivision, the Council did not inform the applicant of the potential contamination.

78. The Court held that an ad hoc special relationship between the plaintiff and the defendant existed because of the inquiries made of the Council by Dancorp's agent which gave rise to a duty of care. However, in considering whether the duty of care had been breached, the Court held that the matter had to be looked at in the light of standards at the time, and noted that the problem of soil contamination had never previously been known to be a factor affecting subdivision.

79. The Court held that the Council could not reasonably have been expected to establish a more sophisticated filing system which would have thrown up for the engineer the possibility that the site might be contaminated and, in that respect, the Council was accordingly not in breach of the duty or care which it owed.

80. The Court also noted that if there had been a failure to issue a warning, that failure was not causative of the loss, as the developer would have still proceeded. The Court noted that the developer was already aware of the risk, and that the developer was already running a number of more substantial risks in relation to the development. The claim accordingly failed.

81. A Council will not normally be under a duty to offer unsolicited information about a site. The must be special factors of the kind documented in the *Brown* case and there must

be a "*special relationship*" (*Dancorp*) which may not be held to exist if no specific enquiry is made.

82. Another case on the provision of information is *Bronlund v Thames Coromandel DC* 2/4/98, Tompkins J, HC Hamilton CP48/94, noted [1998] BRM Gazette 89. In *Bronlund*, the council had negligently failed to ensure that the necessary planning information was entered on the property and information index card. The Bronlunds were not made aware of the relevant planning restriction, and a building permit was issued for building work contrary to a provision of the relevant subdivision consent. The Council was held liable in negligence for failing to maintain proper records and for granting an incorrect building permit.

83. In *Resource Planning & Management Ltd & Anor v Marlborough District Council*, unreported, HCt Blenheim, France J, 10 October 2003, the adequacy of disclosure by the Council to the plaintiffs in its LIMs was at issue. In particular, the issue arose whether adequate information regarding inundation and erosion, and on the effect of the Flood Hazard Overlay (a new planning tool introduced by the Council), had been provided.

84. The Court found that the hazardous nature of the land had been disclosed in the LIMs and in other documents, but it did not consider that the Council had an obligation to disclose anything about the Overlay (and other matters it was alleged were not disclosed) because there was adequate disclosure of the hazardous nature of the site, and the effects of the Overlay were minimal. At paragraph 166, France J noted that a council "*... is not required to provide all of the information on its files ...*" and therefore "*... there has to be some cut off point*".

85. The most recent "LIM" case is *Altimarloch Joint Venture Ltd v Moorhouse* 3/7/08, Wild J, HC Blenheim CIV-2005-406-91, where the Court considered a claim by a purchaser of a property regarding a LIM issued by the council that contained no record of water permits having been transferred. The Court found that the LGOIMA provided a statutory obligation that required the council to keep information on the LIM accurate and up to date. The Court did not accept a disclaimer of responsibility in the LIM as an adequate defence to liability, holding that it was ineffective because it cut across the duty imposed on the Council. The Council was liable to the claimants for 34% of the total damages.

86. For a breach of duty of care to arise in the type of situation which is being considered in this letter, the omission of hazard information from any LIM would have to be due to the negligence of Council. That would depend on factors such as when the LIM was issued in relation to the "redrawing" of the hazard zone by the Council, and whether the Council was aware of that information, even if it had not yet formally made any changes to its hazard zone information. The *Altimarloch* case confirms that Councils are responsible for keeping accurate and up to date information on matters that will be included in a LIM.

87. There may be situations where hazard information that the Council is aware of, and is satisfied it is accurate is, however, non-specific or uncertain and cannot be readily related to a specific property. Such information may not meet the test as mandatory information under section 44A(2) but nevertheless, and if in doubt, it could still be included as discretionary information under section 44A(3).

88. It is also clear from the *Dancorp* case, that if a hazard was, at particular time, not identified, and that "non-recognition" was in accordance with the existing standards of the time, then a Council will not be at fault for only later recognising and addressing the issue.

89. Other factors will also be relevant, such as whether there was information on the LIM that the property was near an existing hazard zone which may be subject to change as a result of climate change. That type of information could also be included in a LIM under section 44A(3),– the fact that the land is near a hazard zone which may change.

90. If there is found to be a breach by a Council, then the claimants still need to show they have suffered loss, and that the Council's breach was causative of their loss. If the claim relates to diminution in value of a property, then property value can be affected by a large number of factors, not simply a failure to provide information. However, if the "missing" information is highly relevant and would affect the price paid for a property, then a Council can potentially be liable for the economic costs caused by change in value.

91. In *Ladstone Holdings Ltd & anor v Leonora Holdings Ltd & Waitakere City Council* [2006]1 NZLR 211 (extract), the Council admitted liability for negligent misstatement for incorrectly advising the plaintiff prior to an auction that a stormwater drain passing beneath the property, was housed in a large tunnel and was ceramic not plastic. The Council also incorrectly advised that the drain was owned by it, whereas it was privately owned in favour of the adjoining property. The Council argued that these factors had no affect on the market value of the property, but the Court disagreed, finding that a prudent purchaser, if faced with the information that was reasonably obtainable concerning the drain, would have factored a significant discount into an assessment of the market value of the land, because of the uncertainties which the drain introduced.

92. If actual damage has been caused to a property, as a result of a hazard about which the Council was aware and about which it could have warned the owners through a LIM or PIM, then the Council's responsibility for any of that loss will also depend on whether the owner has received payment from a body such as the Earthquake Commission, and whether any contributory negligence of the owner can be shown. An example is where they may have independently been aware of the possible hazard and proceeded with their plans regardless of that knowledge.

Legal principles applying to the types of claims that might be made against Councils

93. In relation to the situations identified above, there are three types of claim that are most likely to arise. These are claims in negligence and breach of statutory duty in addition to judicial review proceedings. We briefly discuss the relevant principles required to establish such claims.

Negligence

94. In order to succeed in a claim of negligence, a plaintiff needs to demonstrate that:

(a) the Council owed the plaintiff a duty of care;

(b) the Council breached that duty of care;

(c) the damage arising from that breach was or should have been foreseen by the Council; and

(d) there was a direct causal link between the damage and the Council's actions.

95. The Court of Appeal decisions in *Rolls Royce v Carter Holt Harvey* [2005] 1 NZLR 324 (paras 58-65) and *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (paras 35-57) are useful decisions setting out the approach to determining the evidence or otherwise of a duty of care. The ultimate question when deciding whether a duty of care should be recognised is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The first general area of inquiry is however the degree of proximity or relationship between the parties, and the second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case

96. These issues have been dealt most recently in *Altimarloch Joint Ventures Ltd v Moorhouse & Ors*, above, where the Council had issued a LIM which included incorrect information in relation to water permits attaching to a property (it did hold the right information in its files). The Court held that a duty of care was owed by the Council, after applying the following relevant factors as to the proximity of the relationship from the *Rolls Royce* and *Body Corporate* cases:

- the degree of analogy with cases in which duties are already established – the Court cited the *Resource Planning Management Ltd v Marlborough District Council* case[4] as support for the imposition of a duty of care in relation to information in a LIM as well as *Smaill v Buller District Council* [1998] 1 NZLR 190 and *Bronlund v Thames Coromandel DC* (all of these cases are discussed further below);

- the need to balance the plaintiff's moral claim to compensation for avoidable harm and the council's moral claim to be protected from undue restriction on its freedom of action and from an undue burden of legal responsibility – the Court held that the plaintiff's loss would have been avoided completely if the LIM had accurately stated the position regarding the A water permit. The Court also took into account the section 35 RMA duties to keep such information, and that the need for section 44A(2) information in a LIM to be accurate and complete was 'obvious' from the wording in section 44A.;

- the nature of the risk and relevant loss; and

- general considerations around the plaintiff's vulnerability, its access to other remedies and who is best placed to avoid the risk.

and after taking onto account the following policy considerations:

- the imposition of a duty of care would be consistent with the scheme, purposes and provisions of LGOIMA, including the fact that section 41 of the LGOIMA, providing protection from some liability, does not extend to section 44A;

[4] Unreported,10 October 2003, HCt Blenheim, CIV 2001-485-814

- there is no discretionary element of local government policy making, nor even of decision making under the LGOIMA; and

- the fact a fee can be charged for a LIM and that charge could include an allowance for insurance against the type of careless omission that occurred in this case.

97. In relation to the Court's statement about the LIM fee, this may also provide authority for Councils to include in the LIM fee a charge allowing for the cost of obtaining best available hazard information. Section 44A(4) provides that an application for a LIM must be "*accompanied by **any** charge fixed by the territorial authority in relation thereto*".

98. A general principle in local government law is that Council charges must be reasonable; however, it may be reasonable for a LIM fee to cover the cost of providing best available information, when this is mandatory information which the Council is required to include on a LIM. It may also be possible for a Council to spread this cost across resource and building consent charges. However, we have not investigated this issue in any detail as it is outside the scope of the advice that has been sought.

99. In the *Body Corporate* case, the following policy considerations were also identified as relevant to considering duties of care owing by public bodies:

> "[*41] **Statutory functions that involve quasi-judicial or legislative powers are not appropriately the subject of duties of care**, see for instance Cooper v Hobart (2001) 206 DLR (4th) 193, Kimpton v Attorney-General (2002) 9 BCLR (4th) 139, Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg (1970) 22 DLR (3d) 740 and Yuen Kun Yeu v Attorney-General of Hong Kong [1988] 1 AC 175.*
>
> *[42] **The Courts are slower to impose duties of care in relation to omissions to act (non-feasance) as opposed to the positive exercise of statutory powers (misfeaseance)**, see Stovin v Wise [1996] AC 923. As well, **the more policy-orientated and less operational the power in question is, the less likely a duty is to be imposed** (albeit that the policy/operational test is not always altogether easy to apply, cf Stovin v Wise at 951). The further removed the public body is from day to day physical control over the activity which directly caused the loss, the less likely the Courts are to impose a duty of care, see for instance Yuen Kun Yeu at 196 per Lord Keith of Kinkel.*"

100. We also note that when assessing proximity and policy factors, in relation to whether a duty of care is owed in any particular case, particularly a novel duty of care, it may also be relevant to look at the effect a finding of a duty of care might have on a Council's spending priorities.

101. This was not an issue that was directly raised in, or directly relevant to the *Altimarloch* case, given the ability to charge a LIM fee, and the fact that they were not in a situation where the Council would have had to pay someone to provide better information than the Council had available. However, several overseas cases have commented on this point, including *Stovin v Wise* [1996] 3 WLR 388, and *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL15, Lord Hoffman.

102. The rationale in these cases, on this point, is that it should be for a local authority to consider how and when its services should be expended in relation to its various local authority obligations.

103. These cases were cited recently by the Supreme Court in *Couch v Attorney General* [2008] 3 NZLR 725, in relation to discussing novel duties of care:

> *"[53] Except in cases of clear impediment (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be intensely fact-specific. Lord Steyn in Gorringe v Calderdale Metropolitan Borough Council emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of "great complexity and very much an evolving area of the law". Kirby J in Pyrenees Shire Council v Day thought it best to accept that liability in negligence in such hard cases is fixed by reference to a "spectrum" of factors of the kind examined in Stovin v Wise by Lord Nicholls and by the "candid evaluation of policy considerations" by Lord Hoffmann in the same case. We agree with that view..."*

104. A Council may make a decision about financial priorities and, either directly or indirectly, that decision means certain works or activities (for example physical works, or obtaining reports) may not be done by the Council. However, there have been no New Zealand cases to confirm that in this type of situation a Council will not be liable for not carrying out that work/activity, because of the earlier policy decision. But this is clearly a factor that would be taken into account.

Breach of statutory duty

105. To succeed in an action for damages for breach of a statutory duty, a plaintiff would need to establish the following:

(a) a breach of a statutory duty;

(b) that the breach of the duty caused damage to the plaintiff;

(c) a legislative intention that breach of that obligation:

(i) should give rise to civil liability in relation to a class of persons to which the plaintiff belongs; and

(ii) allows damages of a kind for which the law awards damages and against which the statute was designed to give protection.

106. A case setting out these principles and in which a breach of statutory duty was found is *Smaill v Buller District Council* [1998] 1 NZLR 190. In *Smaill*, Panckhurst J concluded that a breach of section 641 of the Local Government Act 1974 conferred on an affected permit holder *"a right to seek damages."* This section is now repealed but it did impose a duty on local authorities to refuse building permits where certain circumstances existed.

107. His Honour held that the statutory duty was obligatory and well defined, and plaintiffs who are granted building permits comprised an easily ascertainable class of persons. His Honour also held that the statute did not provide "*any form of remedy in favour of persons affected by a breach*". In *Smaill*, the Council's grant of the building permit caused damage to the plaintiffs in terms of diminution in property values as a result of the instability of a nearby cliff face.

108. A breach of statutory duty was also found in the *Altimarloch Joint Ventures Ltd* case (above), with the Court finding that there was a clear statutory duty in relation to information which was mandatory to provide under section 44A(2)(d). Those who obtain LIMS are a limited class, and there is no other remedy or sanction provided in the LGOIMA to enforce the duty. (The Court had already found that the plaintiffs loss would have been avoided if a correct LIM had been provided.)

Judicial review

109. It has been stated that "*judicial review is a judicial invention to ensure that a decision by the executive or a public body was made according to law, even if the decision does not otherwise involve an actionable wrong*" (see the Laws of New Zealand, Administrative Law, Chapter 2, paragraph 3).

110. The bringing of an action for judicial review of a decision made by a Council (to grant or not grant a consent, or to provide hazard information) could be made on almost any of the grounds on which a judicial review action can be based: that the decision is unreasonable, it failed to take into account relevant considerations or took into account irrelevant considerations, the Council made an error of law, or possibly a mistake of fact, or has acted outside of its powers or in abuse of its powers, or acted unfairly/breached natural justice in arriving at the decision.

111. The basis for judicial review actions in relation to decisions involving hazard information are most likely to be that the Council has used incorrect or insufficient information. Mistake of fact has occasionally been treated as a separate ground of judicial review, but there is some judicial resistance to this: see *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546. However, other judicial review grounds may also be relevant when the standard of the information is in question. A lack of an evidential basis for findings of fact in a decision may be reviewable on the ground of breach of natural justice or error of law, or a clearly unsupportable finding of fact, may also amount to unreasonableness.

112. An example of a recent judicial review case where one of the grounds raised was that there was insufficient information on which the Council based its decision, is *Rennie & Ors v Thames Coromandel District Council & Anor* (2008) 14 ELRNZ 191. The Council had decided not to notify, and subsequently granted, two resource consents. The plaintiffs, who were owners of neighbouring properties vulnerable to ponding, were concerned that the unacceptable increase in elevation of the subject property relative to their property and the reduction of its ponding capacity, would deflect flood waters to their properties. The plaintiffs argued that the council notification decisions were based on an incorrect basis and on inadequate and inaccurate information.

113. The Court held that its first task was an assessment of the reasonableness of the consent authority in electing to act on the material that it had, because the Council's decision stands or falls on the adequacy and accuracy of the council officer's report

and materials on which he relied. If the information was less than adequate then the decision not to notify is invalid.

114. The Court noted that the fact each side obtained an engineers' assessment once the application for review was filed, almost immediately raised questions about the adequacy and accuracy of the materials. The Court ultimately found in favour of the plaintiffs and made a declaration that both resource consents were invalid and set them aside, ordering the Council to reconsider them on a notified basis[5].

115. Whether or not a judicial review proceedings in relation to hazard information that informs a decision will be successful will largely depend on the particular factual circumstances surrounding the decision. However, the better the information which the Council uses in reaching a decision, the less chance there will be that the Council's decision would be challenged. Nevertheless, the case law in this area focuses on the need for a Council to have "adequate" information, which is not necessarily the same thing as the best available information.

116. In assessing the adequateness of information, a Court would likely take into account whether the information was of a reasonable standard for the Council at the particular time, in relation to the particular matter at hand, and, may also look at adequacy in light of the different competing interests for Council spending. The standard of the information required is also considered in the next section of the opinion.

Other relevant case law

Best available information?

117. In *Maruia Society Incorporated v Whakatane District Council* 15 NZTPA 65, the appropriate standard of information to be used by the Council in relation to assessing a hazard affecting a subdivision consent was discussed. The passage below comes from a discussion of the *Maruia* case at pages 17-19 of *Bay of Plenty Regional Council v Whakatane District Council* (1994) 1 NZELR 28:

> *"The appellant sought judicial review on a number of grounds, including the district council's failure to take into account rising sea levels. Section 274(1)(f) of the Local Government Act 1974 was relied on, with the words "subject to ... inundation" being pointed to* ***as indicating that the council should have taken into account its knowledge of what was likely to occur to the land in the future, based upon the best evidence available to it.*** *Section 274(1)(f) reads:*
>
> > *"(f) Without limiting the generality of paragraph (a) of this subsection, -*
> >
> > *(i) The land or any part of the land in the subdivision is subject to erosion or subsidence or slippage or inundation by the sea or by a river, stream, or lake or by any other source; or*
> >
> > *(ii) The subdividing of the land is likely to accelerate, worsen, or result in erosion or subsidence or slippage or inundation*

[5] Interestingly, in the *Rennie* case, building consents had also been issued for the work, but the Court queried whether, or to what extent a decision to issue a building consent could be reviewed, because the Building Act provides its own process to resolve disputes (through the determinations regime) and allows for rights of appeal on questions of law.

by the sea or by a river, stream, or lake, or by any other source, of land not forming part of the subdivision:

Provided that this paragraph shall not apply if provision to the satisfaction of the council has been made or is to be made for the protection of the land (whether part of the subdivision or not) from erosion or subsidence or slippage or inundation; or ... "

His Honour went on to state (p.72):

"Having regard to its opening words ***it is difficult to see how s.274(1)(f) could prevent an authority such as the council from taking into account not only what has occurred in the past, but what is on the best evidence available to the council likely to occur within the foreseeable future****."*

Significantly, it was pointed out that this did not mean that a consent authority would be expected to resolve what were termed "conjectural matters". As the learned Judge put it (ibid):

"That is not to say that an authority would have to go to any particular lengths to determine what are clearly difficult areas in respect of likely future changes in sea or ground level*. Whether the evidence at present available in respect of matters such as the "greenhouse" effect is anything more than conjectural I do not know. I neither accept nor reject the evidence that was placed before me in respect of such matters as it does not fall within my province.* ***It would be a matter entirely for the council or the Planning Tribunal as to the extent to which it took such information into account****.*

A related issue is whether the proviso to s.274(1)(f) enables the council to take into account its present knowledge of what is likely to occur in the future based not only on past inundation ***but on the best evidence of future probabilities****. The proviso lends itself to the interpretation that it encompasses all likely future inundation. There is nothing in its language that requires the council to limit itself to historical events. Whilst the proviso is to meet the consequences of the application of the subsection, its very language speaks against a limited meaning being intended for the subsection.*

On the face of it there is nothing in the subsection, or in the proviso, which justified the advice given by the development engineer to the council that they could not take into account likely future events, to put his advice into simple and general terms.

As a result of the development engineer's advice the council failed to take into account what information was available as to likely increases in sea level in the immediate and foreseeable future. There is nothing in s.274(1) preventing that information being taken into account." ..."

118. In the 1994 *Bay of Plenty* case mentioned previously the Court held that for the purposes of that case a forecasting period to 2050 was reasonable, although the Court was careful to stress that such a time period may not be applicable in other situations. However, in both *Bay of Plenty Regional Council v Western Bay of Plenty District Council,* A27/02, 8/2/02 and *Fore World Developments Ltd v Napier City Council,*

EnvC, W29/06, 13/4/06 the Environment Court held that it was sound to plan for a 100 year risk period.

119. In the 2002 *Bay of Plenty* case, at paragraph 64, the Court discussed the level of information required and available in respect of the hazard, and commented on "*the importance of carefully analysed and integrated planning in managing the actual and potential effects of natural hazards within the coastal environment. Such a course may be expected to incorporate* ***an informed assessment of****: (a) a coastal area's resources, including (in this case) the combination of natural and man-made elements; (b) the range of recognised natural hazards to which the area is realistically subject; (c) the range of options for avoiding or mitigating related effects; and (d) the pertaining values, directives and guidance under the RMA, the NZCPS and other relevant instruments.*"

120. At para 67, the Court noted that the "***identification and analysis of coastal hazards*** *and accompanying risk levels, and the means of avoidance or mitigation of related adverse effects, all in the context of multi-faceted values and interests,* ***is no easy assignment***".

121. Then at para 75, the Court commented on the degree of alignment between the Coastal Protection Area (CPA) proposed in the District Plan and the equivalent zone in the Regional Council's Plan and found that it was "*sufficiently comparable and not at odds in degree or purpose as to be impermissibly inconsistent. Rather, the landward position of the CPA is (to use the description in the Save the Bay case) an administrative boundary which is conveniently ascertainable ... the various properties in the CPA are liable to be subjected significant adverse coastal hazard effects of one form or another within the order of the next century, based on the data and analyses available to Environment BOP for regional planning purposes, and the expert reports commissioned by the District Council - firstly before preparing its plan for notification in 1994, and additionally prior to notifying the variation in late 1997.*"

122. At paragraphs 79 and 80, the court noted that after having weighed the evidence received from various experts "*we are not convinced that the survey data and other information bearing on erosion trends are sufficient in detail and reliability to predict long term fluctuations on these ocean beaches with confidence. ... In the upshot we were by no means convinced that the CPA as identified in the plan for each beach (employing the right lining mechanism earlier explained) is an ill-conceived over-conservative hazard zone that fails sensibly to take account of identified coastal hazards. Neither is it a zone that fails adequately to identify the properties that are expected to be subject to adverse effects, whether in their entirety or as to significant parts, during the loo-year period earlier discussed. The inherent uncertainties in this area of planning and the precautionary element that the NZCPS points to are signal factors.*"

123. In effect, the court adopted a precautionary approach given the uncertainties in relation to the effects of climate change on sea level rise and the like. Although information was provided during the course of the hearing, it was clearly not conclusive and the Court had to make the final determination of the appropriate "line" to be drawn for the coastal hazard area in that case.

124. If a Council follows a similar precautionary approach and reaches an informed assessment on a hazard area based on a variety of information[6], then it appears that will be sufficient even if that information is not necessarily the "best available" information. This proposition relies on the comment in the *Maruia* case that "*an authority would [not] have to go to any particular lengths to determine what are clearly difficult areas in respect of likely future changes in sea or ground level*".

125. It is beyond the scope of instructions to consider in detail what might be best practice in relation to the collation of information about natural hazards. We would also observe in passing that different Councils have different levels of resources and financial priorities which, as noted above, may be relevant factors in terms of what level of information it is reasonable to expect a Council to obtain.

Other cases on historical liability for approval of subdivision and building consents

126. A Council may face civil liability in relation to approving subdivisions and building consents in an area which is later included in a hazard zone, if owners can establish that the Council did so negligently, in the knowledge that there was an existing hazard at the time of approval. Liability on this basis was established in relation to a rockfall hazard in the case of *Smaill v Buller District Council* [1998] 1 NZLR 190 (discussed briefly above).

127. In *Smaill*, concerns were raised in late 1991 about the stability of a cliff face near a settlement at Little Wanganui. No actual harm had occurred at the time of the court case (in 1997), but the instability problem had affected the value of properties and sections. The Court dismissed the claim that Council officers should have recognised the threat posed by the cliff in1973, but held that from February 1984, when the Council's County Engineer and a geologist from the DSIR visited the site, the Council was on notice of the risk of instability of the adjacent bluffs. However, there had been no adequate and timely response to the problem by the Council, and the Council was found to be liable in relation to the issue of some of the building consents.

128. However, the *Smaill* decision is also authority for the principle that a Council is not liable in nuisance or negligence for the exercise of its quasi-judicial powers in granting resource consents, even where the subject land is or is likely to be affected by a natural hazard. In *Smaill*, it was found that there was a quasi-judicial process and that judicial immunity prevented an action in nuisance or negligence arising from the grant of an application for a change of land use. (This is not the case in relation to decisions on building consents, which are not quasi-judicial.)

129. The recent decision of the Court of Appeal in *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 also supports the view that a decision to grant a resource consent is a quasi-judicial function that is not easily susceptible to a corresponding duty of care.

130. In that case, the plaintiffs were advised that an existing consent for a hotel could be varied, allowing an attached function centre to be built, and there would be no need to obtain new consents from the neighbours. The Council approved the variation but that decision was subsequently challenged by the neighbours through judicial review

[6] Which will likely be a combination of information it has obtained for itself, or during the course of consent hearings, information which the regional council (or territorial authorities – in the case of a regional council) has available, or other national or international bodies such as the IPCC.

proceedings, and the High Court cancelled both the consent and the variation. The plaintiffs brought a claim in negligence against the council on the basis that the council owed a duty of care to "*all persons, natural and corporate, who relied on either the consent or the variation or both*".

131. The Court held that there were strong policy considerations that negated the finding of a duty; it would create an intolerable burden on decision making authorities and would work against the purpose of section 94 of the RMA. In reaching this view, the Court of Appeal upheld the earlier High Court decision in *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331. The Court also noted the difference between this type of decision by a council and information given by a Council employee (see William Young P at para 72):

> "*Obviously, the more closely the pleading focuses on the precise statutory functions of the council as a consent authority, the more it engages policy considerations which point away from the imposition of a duty. The statement of claim unhelpfully focuses on the council's quasi-judicial responsibilities rather than on the broader context in which the relevant decisions were made. In Morrison the District Court judgment against the council in favour of Ms Morrison in relation to a negligent advice claim – which seems to have been closely associated with her ultimately unsuccessful claims – was not challenged on appeal. There is other authority which supports the view that negligent planning advice given by a local authority can sound in damages (see, for instance, my own judgment in Court v Dunedin City Council [1999] NZRMA 312)*"

132. The plaintiff in *Bella Vista* was advised by a council officer that the function facility could be the subject of a variation of the existing consent, but that alleged advice was not the subject of a separate claim for negligent misrepresentation. . However, Chambers J at para 16 stated that "*given the close connection between the advice and the granting of the variation, it is far from clear that such a claim could be asserted independently of the claim based on the council's alleged negligence in issuing the variation. If policy considerations negative the existence of a duty of care as to the issuing of the variation, the same policy considerations might be thought to negative a duty of care as to closely related advice*."

133. It appears from this that if the negligent information is given in a situation which is closely aligned with a decision on a consent by a council, this may not give rise to a duty of care even though in a similar situation, but one separate from a consent decision, the policy considerations may be such that a duty of care could be established. For example in the *Court* decision mentioned above, the faulty planning advice was given to a prospective purchaser of a property resulting in the plaintiffs losing an unconditional sale of land. The basis for the duty of care was that the employee was a professional with specialist knowledge who would know the plaintiff would rely on the correct advice being given.

Conclusion

134. The issues raised by this opinion are complex, and whether liability arises in any particular case must always be assessed against the facts specific to the situation. Nevertheless there is unlikely to be any liability for Councils to property owners for loss of value of their property or increased insurance premiums by the redrawing of hazard

lines, unless the Council has not used adequate and accurate information, or has failed to provide that information.

135. In our view although, in general, there is no mandatory requirement on councils to use the best available information, they will receive the best protection from liability claims if they do obtain and use the best available information. We are happy to discuss this advice with you further.

Yours faithfully
SIMPSON GRIERSON

Judith Cheyne
Senior Associate