Hazards & Liability Risks

Judith Cheyne
Senior Associate

Simpson Grierson

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Seminar Outline

- Overview of questions asked by LGNZ re liability risks and coastal hazard information
- Findings: Responsibilities – RMA/LIMS/PIMS
- Findings: Negligence/Breach of statutory duty/Judicial review
- Are Councils ‘required’ to use the best available info in determining hazard zones?

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Questions asked by LGNZ

- LGNZ identified potential for liability for Councils from "redrawing" lines/zones for flood hazard areas:
  - Information used – currency/accuracy?
  - Hazard zones incorrect (eg from inadequate information used) – Councils' liability for a property subsequently damaged by the hazard?
  - Implications for property owners from "redrawing" of lines - loss of property value/ increased insurance premiums. Are Councils liable?

Advice covered:

- Councils' responsibilities for including hazard information in RMA plans, or other Council information, including PIMs or LIMs.

- Councils' liability for approval of subdivision or other resource consent (and/or a building consent) – where land was in a non hazard zone area at the time, but following alteration of hazard lines, is now in a hazard zone.

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Advice covered:

- Responsibilities and potential liability in relation to approving resource consents & building consents where land is already in a hazard zone.

- In determining where coastal hazard lines/zones should be, are Councils required to use the best available information?

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Findings – RMA/LIMs/PIMs

- Under RMA and LGOIMA (LIMS) Councils must keep information about natural hazards.
- Under RMA information needed so a Council can consider whether to impose controls on land, either through conditions on a consent or by way of plan provisions.
- Introducing new/amended plan provisions – if Councils use the best information, should reduce objections (and resulting time and money spent on addressing objections).
- But if challenged - a more robust hazard zone because of input from a number of experts - HZ will often be finally decided by the Courts rather than the Council.

Findings – RMA/LIMs/PIMs

- 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. Consent authority role under the RMA is not to protect individual landowners against economic loss.
- S 85 RMA - no compensation for imposing controls on land through rules in a plan. Landowner remedy - application to the Environment Court asking it to delete or direct the deletion of the relevant provision

Findings – RMA/LIMs/PIMs

- To avoid liability, where hazard information not yet in a RMA plan, Councils should still take into account the most recent, accurate information known to it - in making decisions about what information it needs to provide in LIMs and PIMs, and whether or not to grant consents and/or what conditions to impose.
- Evidence relating to hazards must be authoritative and accurate (provided by a person with sufficient expertise and be recent) for Council/Court to accept that a certain condition should be imposed or a consent refused.

Findings – Most likely liability

(In relation to holding/ using hazard zone information):

- Claims in negligence for **including information on a LIM or PIM** stating that land falls within a HZ (or, possibly, judicial review claims regarding decision to include the information and seeking removal).

  Ability to successfully defend any claim primarily depends on accuracy of information. If information is factually correct, its difficult for claimant to succeed, since it is mandatory to include this information on a LIM (if not already noted in the D. plan).

Findings – Most likely liability

(In relation to holding/ using hazard zone information):

- Claims in negligence or breach of statutory duty where Council **fails to include information that it is aware of, or fails to include 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.

Findings – Most Likely Liability

(In relation to holding/ using hazard zone information):

- 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/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

Findings – Most Likely Liability

(In relation to holding/ using hazard zone information):

- 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.

Findings – Negl/Br of Stat duty – Resource Consents

- *Bella Vista Resort Ltd v Western Bay of Plenty District Council* - decisions of Councils to grant subdivision or land use consents are quasi judicial - unlikely a duty of care could be established. (May be subject to a JR review claim)
- Historical subdivision decisions may give rise to a duty of care, but a number of hurdles - 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). Breach must also have caused the loss being claimed.

Findings – Negl/Br of Stat duty – Building Consents

- Decisions to grant building consents are not quasi-judicial - more easily challenged in Courts (or through determinations process provided in the BA04).
- If building consent is granted under s72 of the BA04 Council has greater protection from liability. If consent can be granted under s71 of the BA04, liability can be minimised by taking a cautious approach to being satisfied the land, building and other property will be adequately protected from the hazard (so, need sufficient information on hazard to determine this).

Findings – Judicial Review

- JR a possibility. Most likely grounds relied on, in 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 *Rennie & Ors v Thames Coromandel DC and Anor* (2008) 14 ELRNZ 191 Court found Council had acted on information that was less that adequate, and therefore the decision not to notify was invalid.

Findings – Judicial Review

- Councils need to ensure that applicant for RC provides 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.
- May not be possible to bring a judicial review of a decision to issue a building consent. In *Rennie* the Court noted there is a question as to whether/to what extent a building consent is reviewable because the Building Act itself prescribes a process to resolve disputes (determinations to the DBH) and for rights of appeal on questions of law.

Findings – are Councils 'required' to use the best available information?

- Using best available information (BAI) will put a Council in the strongest position to defend any type of court action, so advisable that they do so, where possible.
- BUT, for a Council to meet its statutory responsibilities in every situation BAI not always needed.
- "Adequate" and accurate information may withstand challenge, (particularly re notification of a R. consent).
- Plan provisions must 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).

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Findings – are Councils 'required' to use the best available information?

- Different councils have different resources and financial priorities. These may be relevant factors re level of information it is reasonable to expect Council to obtain.
- The decision in *Maruia Society Incorporated v Whakatane District Council* 15 NZTPA 65 provides some support for this view: *"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".*

Findings – are Councils 'required' to use the best available information?

- *Maruia* 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*". (Although this was in the context of the Council being able to take that information into account, rather than it being *required* to use the information.)

Findings – are Councils 'required' to use the best available information?

- If Councils were required to pay for/obtain the BAI – that could have an effect on a Council's spending priorities.
- That *may* be a relevant policy consideration, leading to a duty of care not being established. But, probably only one factor to be considered and depending on circumstances other factors may outweigh this "burden" on a Council.
- In summary - not likely to be a mandatory requirement on Councils, but Councils will receive the best protection from liability claims if they do obtain and use the BAI.

Charging for the best available information?

- Possible authority for Councils to include in a LIM fee a charge for 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*".
- General principle - Council charges must be reasonable – might be reasonable when it is mandatory information Council is required to include on a LIM.
- May also be possible for a Council to spread the cost across RC/BC consent charges (not investigated).

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End

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