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Dear Frances

## Liability Risks for Councils re Coastal Hazard Information

### 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<sup>1</sup>).
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.
7. We note in passing, that a number of the RMA provisions referred to in this advice are subject to amendments in the Resource Management (Simplifying and Streamlining) Amendment Bill (**RM Bill**). We have not referred to these changes except where they could have a material impact on our advice. We however recommend that this advice is updated when the RM Bill is passed.

### **Executive Summary**

8. 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.
9. 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.
10. 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.

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<sup>1</sup> 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).

11. 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.
12. 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.
13. 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 than 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.

14. 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).
15. 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.
16. 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.
17. 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.
18. Councils 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 *Altmarloch 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.
19. 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.

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## Relevant legislation concerning hazard information

### **Resource Management Act 1991**

20. 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)

21. 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.

22. 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...**"*

23. 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.

24. 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"*.
25. 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.
26. 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.
27. 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).
28. 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.
29. 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.

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30. 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.
31. 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.
32. 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*".
33. The notification requirements in sections 93 to 94D of the RMA (which are subject to considerable change in the RM Bill) are also relevant to mention. A consent authority must have sufficient information, at the stage of deciding whether or not to notify a resource consent application, so as 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.)
34. 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.*

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• *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.*"

35. We note that the RM Bill proposes that a new section 104(1)(ba) is inserted:
- "(ba) whether it has adequate information to enable it to determine the application, including whether a request under section 92 or 92A resulted in further information or a report being available, and"*
36. Evidence relating to hazards must be authoritative and accurate if the Court is to accept that a certain condition should be imposed or a consent refused. This means a person with sufficient expertise has provided the evidence and that it is up to date.
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<sup>2</sup>.
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

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<sup>2</sup> Paragraph A106.02, Brookers commentary to Resource Management Act 1991.

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*

*(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.

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**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

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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<sup>3</sup>. 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) 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

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<sup>3</sup> Note that if a Council is a unitary authority, then the *Altmarloch* 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.

