Coastal Panel Meeting 3 December 2013

Introduction

1. My name is Chris Mitchell. Sue Smith (my wife) and I own 99 Tutere St at Waikanae Beach. We have owned it since 1995 but do not live there though we frequently use it. This property is in the PDP's Coastal Hazard Management Area.

2. I am a lawyer and work mostly in resource management and local government law. A large part of my work is as an independent hearing commissioner under the RMA. I have co-authored 2 books on local government law in New Zealand. I have noted this professional background for 2 reasons: first, so you can see I have nothing much to contribute on your review of the science itself; and second, so you can also see that there is some experience behind the points I am going to make on the statutory framework within which all this science is particularly important to the Council and its communities.

3. Before I move on to the statutory framework and why you need to understand it, I will quickly mention the insight I have into the way science informs the issues which arise with any coastal development.

4. Most of New Zealand's population lives in areas which are vulnerable to some form of significant natural hazard, so measures to identify these risks, and options for managing them are an essential aspect of statutory planning. In my work as a lawyer acting for developers or submitters ,or as an independent hearing commissioner, I have been involved in quite a few cases concerning the coastal environment, from Kapiti to South Taranaki.

5. In these cases decision makers might typically hear from coastal geomorphologists, coastal ecologists, and engineers about what is happening and what can be predicted in a given area; but we will also hear from iwi or hapu with decades or centuries of traditional local knowledge; and residents and farmers who live in the environment and observe its changes. The most powerful and persuasive evidence exists when all these views are fundamentally aligned - but the most unhelpful evidence is where the professional science and the local observations are inconsistent.

6. For your purposes I would draw 2 points from this unscientific experience.

7. First, if there is a fundamental disconnect between a scientific conclusion and the general local understanding and experience of the same issue, the problem may well be with the former. The strength of scientific analysis is its ability to apply a depth and breadth of knowledge to specific data and thus make predictions - but that is also

its weakness. Second, a scientific conclusion which predicates a homogenous environment in order to be useful (or to meet a budget), runs the risk of looking foolish if the real environment is plainly not homogenous: straight lines on maps may have a purpose for surveyors, but any observer of natural processes knows that they do not represent the real world.

The RMA context

8. So far as the RMA is concerned, I have read and generally agree with Joan Allin's paper on Science and Law. However I would add (or emphasise, as it is already implicitly there) an important qualification to paragraphs 40 and 43: that is that the contributing scientists need to understand the context in which the information or opinion sought from them is to be used.

9. The importance of that point to your review of the Shand work is that it is by no means clear that he understood that context and, moreover, it is reasonably clear that the Council officials who commissioned the work did not understand it either. While it is possible to have 'pure' science, it is very uncommon for local authorities to fund it. The reality is that this work has a specific purpose - and that being so, the relevant context is critical.

10. The Shand report's consideration of the statutory context for this work is limited to the NZCPS 2010 and a Ministry for the Environment guidance paper on coastal hazards and climate change. That reduces the whole available context to two policies in the NZCPS and a set of generic predictions in the MfE Guidance Manual.

11. There is not the time, and this is not the place to discuss the missing elements or to examine whether the elements that were included were properly understood. What I emphasise here is that the context which was used was so limited and so selective that a skewed result was inevitable.

12. Lest there be any doubt, I fully accept that the RMA allows local authorities to actively manage the potential effects of properly identified and understood coastal erosion risk. This and other hazards are and have been managed through district plans in many areas of New Zealand. But the more such active management affects private interests, the more the underlying understanding will be scrutinised.

Other legislation

13. In view of the background you have been given on the RMA the rest of my comments on statutory context are directed to two other statutes which complete that context. These are the Local Government Act 2002 (LGA) and the Local Government (Official Information and Meetings) Act 1987 (LGOIMA). Both statutes can be complex but that

is not a reason to ignore them or to misunderstand them, particularly as the consequences of doing so can be expensive for both the local authority and its communities.

LGA context

14. The LGA is the statute which creates and generally empowers local authorities in New Zealand. Local authorities are given powers and responsibilities under many statutes (for the example the RMA and the Building Act 2004) but even under these lengthy and highly specific statutes, the way in which a local authority goes about its business and activities is subject to the LGA. Where section 14 LGA sets out the principles that relate to local authorities, these apply to all activities.

15. Generally these principles are 'followed up' with more specific directions. For example, the principle in section 14(b) states that *a local authority should make itself aware of, and should have regard to, the views of all of its communities;*

16. The implementation of that principle can be seen in the broad obligation imposed by section 78(1) LGA.

A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.

17. Of course in commissioning and implementing the Shand report the Council not only failed to comply with these fundamental requirements, but there is also no reason to believe that the staff responsible even knew that they existed. My understanding is that no legal advice was sought, and no formal political oversight was given either. Given the size of the community affected and the impact of the consequential decisions by the Council, it is difficult to exaggerate the magnitude of this failure. Whether this or subsequent decisions are invalidated by Court challenges or whether the Council embarks on a litigation war with its own community at massive cost hardly matters.

18. You might think that these Council obligations have nothing to do with a commission to carry out scientific research. The answer is that the scientist cannot have it both ways. If we are considering 'pure science', unconstrained by any direction as to the purpose or use for the product of the research, then it does not matter whether the scientist understands the statutory framework. But as I have said above, if the context for the work is specified then that understanding becomes very important. And if the understanding is not specified, clarification is needed.

19. It was plainly KCDC's intent to use the Shand work for its district plan review **and** to ensure that the essence of conclusions and/or recommendations were entered on to LIM reports for the hundreds of properties affected by it. Any scientist offering his services on a

commercial basis for this kind of work would be remiss in not understanding the context and potential impact of any conclusions and recommendations.

LGOIMA context

20. The immediate practical application of the Shand report was that any property within the defined coastal area was blighted with a land information memorandum (LIM) issued under LGOIMA. You need to understand the importance of LIMs in the New Zealand system.

21. From my professional perspective, the best illustration is this: any lawyer acting for a prospective buyer of a property who does not ask for a LIM for that property is professionally negligent unless the buyer specifically doesn't want one. So every time one of these coastal properties is offered for sale, the prospective buyer and any prospective lenders are told that the Council regards the property as subject to a significant natural hazard. I am not aware of anywhere in New Zealand (outside of Christchurch) where a local authority has done this on such a large scale in a developed area.

22. From the scientist's perspective the critical contextual understanding is that any assessment is going to be treated by the Council as 'information'. A further necessary understanding is whether a particular hazard should be identified as 'a special feature or characteristic of the land concerned'.

23. 'Information' is not defined. Most lawyers (though apparently not KCDC) would agree that information which is wrong, or possibly wrong in some material respect, is not 'information' for the purposes of a LIM. Even if it were indifferent to the interests of a property owner, a competent local authority would be careful in including suspect information in a LIM because of the statutory presumption that it is correct (s.44A(5) LGOIMA) and the potential liability if it later turned out not to have been correct.

24. 'Special' is not defined either. The best interpretation is that, whilst it does not mean 'unique', it excludes (in the hazard context) a general characteristic shared with many other properties. A long term coastal erosion hazard identified for the whole Kapiti Coast is not 'special' to any particular property.

25. The Shand report should have emphasised (rather than hinted) that the broad scale conclusions might *in fact* have quite different effects along a 40km stretch of coastline. That would have saved the costs, and the frankly unprofessional spectacle, of the same consultant now reviewing individual properties. An acceptance of variability in this large area of coastal environment would also have given the report a little more credibility with the public.

26. This is a case where the science is only helpful it is carried with an understanding of the real world and the legal framework within which critically important decisions are made. I do not know whether or to what extent the Council's misunderstanding of law and process affected the scientific component of the Shand report, but the outcome is that the report is 'damaged' and will be of little benefit if the Council perseveres with this part of its PDP.

27. I strongly recommend that your review of the report should make an attempt to understand and consider the whole context in which it is to be used.

Chris Mitchell
3 December 2013