

8 November 2015

Dr Karleen Edwards

Chief Executive
Christchurch City Council
Christchurch

By email

karleen.edwards@ccc.govt.nz

cc Doug Johnson, MD, Tonkin and Taylor NZ, Auckland
djohnson@tonkintaylor.co.nz

Tonkin and Taylor Coastal Hazards Assessment Stage 2 for CCC

Thank-you for your letter of 6 November 2015.

It sounds as though you are uncomfortable dealing with this and would like me to go away.

However the public interest is to ensure that the coastal hazard assessment used in both the planning process and recorded on the LIMs is as accurate as possible. Later in this letter you will see the Courts have stated "it must of course be accurate, must state the position fairly, and it must not mislead".

That is where the Council's responsibility lies and the fastest way to do this is for the Council to engage on the detail of what is being said about their efforts so far.

It isn't sufficient to just say you are relying on the views of others (whose expertise seems confined to short-term coastal processes) and expect to be able to leave it at that. There is no evidence that they have even applied their minds to the legal issues raised by Joan Allin (and reinforced in the case of precaution by DOC Guidance on the NZCPS 2010) or the statistical and modelling issues I have raised.

For example there is no doubt that T&T applied precaution on numerous occasions, quite explicitly stating it on a number of times. They clearly selected unlikely events (e.g. 0.01% storms) in developing their hazard zones. How does the Council reconcile that with what is stated on the LIMs, or the definition of the zones used on the LIMs?

If you feel it was alright to make these assumptions then you do need to engage in the debate at that level. There are ratepayers suffering direct stress and possible financial loss as a consequence of the Council apparently just relying on advice from

people working outside their area of expertise. If they are expert and/or have a different view then let them state it.

T&T for one have been silent on this matter apart from confirming one error and indicating they relied on guidance based on the NZCPS 1994 rather than NZCPS 2010. Surely that alone should cause the Council concern and start it to engage on getting to the bottom of this with people with the required expertise and experience?

I admit that the issue is complex so to aid understanding of my review I've prepared the enclosed two pager summary of it to help the Council and others understand the issues.

Turning to the remaining content of your last letter there are three issues that require comment.

Use so far of T&T

You suggest that the issue of fitness for purpose of T&T's work for use under the RMA lies in the future now that the coastal hazard provisions have been withdrawn from the Christchurch Replacement District Plan.

This is incorrect.

Attachment 1 of my initial letter to you specifically addresses the evidence given by Mr Ivamy of Tonkin and Taylor on behalf of CCC in the earlier stages of the RDP process. This is now reflected in Chapter 5. CCC is right now in the situation where its expert witness has given incorrect evidence materially in my view misleading the hearings panel.

LIMs

You say in your letter that you propose to continue to use the T&T information for the LIMs while a plan change with properly constituted hazard assessment and zones can be put in place. Your suggestion seems to be that once the latter is done this issue will all be cleared up.

If so this means the Council doesn't intend to engage on this issue for the next year or so. On this basis for a brief period in time you will issue adverse LIMs, but after the regulatory process for the plan change and the plan is made operative those properties will likely no longer be deemed to be in erosion hazard zones and there will be no reason for the LIMs to say anything on this matter.

I doubt the Council will find this a particularly tenable public position. I suspect you will be forced to address the T&T issue in respect of the LIMs now despite your view that the "purpose of the LIM is not to become a forum for competing ideas and accordingly we do not think it helpful to reference your report."

I think you will also find that this view is not consistent with your Council's legal obligations in recording information on LIMs. As noted above, these require it to ensure that the information "must of course be accurate, must state the position fairly, and it must not mislead." (see High Court, Weir case para 68 of the Weir interim decision dated 19th December 2013).

In the Christchurch situation your Council is not in a position to be satisfied that the information it possesses meets this test. The information your Council holds has not been put to the test, whether or not you accept the errors I've identified or whether the advisers you are relying on are right or wrong.

You will note that in the Weir case the High Court in its final paragraph (para 74) directed the parties "to confer over appropriate amendments to ensure clarity, fairness and balance." The outcome was that KCDC removed the untested information completely from affected peoples' LIMs (and in their case from the Proposed District Plan).

I frankly think this judgement leaves the Council with no option but to remove the T&T-based information from LIMs until it like KCDC has conferred with appropriate parties to ensure clarity, fairness and balance. This is somewhat different from running the wording past community leaders.

My disclaimer

Disclaimers are common, a point I will return to. But in my case that was then and this is now. My report has now been through a process of specific review for error by both T&T and yourselves. No problems have been identified with it. This allows both your Council and the public at large to put much greater weight on it. This particularly applies to T&T's silence on my piece since, from both your letters to me, you are obviously putting significant store on their views.

You can now use my review with confidence.

What did surprise me though was your progression from my disclaimer to stating "we do not consider your report to be of direct relevance to the information required to be put on a LIM" [emphasis added]. The properties that are affected are defined by T&T 2015 from the probability distribution they put around the future coast line, and the use of "likely" and "potentially" used in the LIM, are directly derived from T&T 2015. It is those issues precisely that I addressed. I'm at a bit of a loss to understand your argument.

Returning to the issue of disclaimers, most firms do this. T&T's from the report in question states:

The report identifies areas susceptible to coastal hazards (inundation and erosion) for the main coastal settlement areas within Christchurch and on Banks Peninsula. As there is always uncertainty inherent within the nature of natural processes and natural events, Tonkin & Taylor gives no warranties of any kind concerning its assessment and estimates, including accuracy, completeness, timeliness or fitness for purpose and accepts no responsibility for any actions taken based on, or reliance placed on them by any person or organisation other than Christchurch City Council.

Tonkin & Taylor excludes to the full extent permitted by law any liability to any person or organisation other than Christchurch City Council for any loss, damage or expense, direct or indirect, and however caused, whether through negligence or otherwise, resulting from any person or organisation's use of, or reliance on this report. [emphasis added]

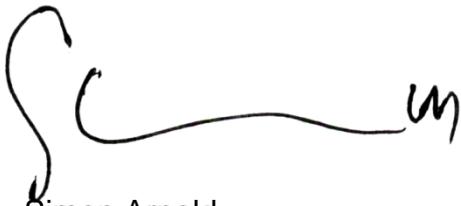
If T&T 2015 proves to be inaccurate and not fit for purpose this disclaimer makes it clear T&T will not be accountable.

T&T gives no warranties that they applied the law correctly, their assumptions were reasonable in light of the requirements, or that their results were accurately based on those assumptions. Each are areas where my review finds them wanting. If the Council is concerned about disclaimers it should perhaps reflect on how much confidence T&T's gives.

The T&T disclaimer also raises an interesting point about the use of the report on the LIMs. Because s. 44A (and 44A (5) in particular) of the LGOIMA creates a presumption of correctness of the information in the LIMs, but T&T excludes any liability to third parties, one rather assumes that CCC has now taken on the liability for its correctness in using the report in this way.

I look forward to your response (and those of your various advisors) to the specific and detailed issues I've raised on T&T 2015 in my review, and your intentions in light of this and the Weir High Court interim decision in respect of the LIMs.

Kind regards

A handwritten signature in black ink, appearing to be 'S Arnold', with a stylized flourish at the end.

Simon Arnold
Managing Director

simon.arnold@arnold.co.nz
+64 27 248 1753