



Building Control Liability Assessment Draft Report

Ashburton District Council

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Private and Confidential

This draft liability report has been prepared solely to provide Ashburton District Council with risk management advice that may enhance Council's liability control. It is private and confidential between RiskPool and the Ashburton District Council. It is not to be relied upon by any other party.

Please note that we are not tendering legal advice. We recommend that Council refer to its legal advisors for legal advice.

Introduction

RiskPool provides Council with Public Liability and Professional Indemnity cover and is committed to assisting its member Councils manage their liability risks.

All Councils have the same statutory duties, functions and obligations yet we see Councils discharging their duties in quite different ways. Over the years we have come to realise that there are a number of ways of achieving the same goals. We have seen some innovative systems and procedures and good risk management practices being employed. This, we are sure, in some way accounts for the reduction in the frequency of claims involving Resource Consents and Land Information Memoranda.

Our claims out-turn continues to be overrepresented by building defects claims. Claims involving alleged negligent issuing of Building Consents, negligent inspections and the issue of Code Compliance Certificates for dwellings that have been found to have latent defects continue to rise. We have also experienced difficulty from time to time defending claims of this nature due to the sometimes deficient nature of inspection documentation.

Most Councils, depending on when they entered the fund, have now had two assessments. The first assessment undertaken was very broad and looked at all areas across Council that could give rise to a claim. As an example, we looked at Council's tendering processes, complaint recording systems and all regulatory areas. The second assessment focused on the areas of highest risk which our claims history identified as Land Information Memoranda, building control functions and planning matters.

As building control matters continue to be the highest risk area it is appropriate that our third assessment concentrates on that area initially. It is our intention, in the long term, to conduct more in depth assessments of all high risk, high claim frequency areas.

The purpose of this assessment is to evaluate current practices in the area of building control functions and provide advice where we believe that Council could improve systems, procedures and practices to better manage liability risks.

All references are to the Building Act 1991 unless otherwise stated.

Assessment Objectives

The aim of this assessment is to:

- Evaluate the building control systems, procedures and practices of Council in its performance of the requirements of the Building Act, with regard to the issuing of PIMs, Building Consents, Code Compliance Certificates and to determine whether these requirements are being met.
- Review the adequacy of inspection documentation to ensure that a comprehensive record of what the inspector approved or did not approve is recorded and maintained and to ensure that the documentation is adequate to defend any future claims.
- Assist Council in improving systems and procedures if required.
- Encourage Council to adopt a qualitative approach in relation to the processing of applications, inspections and reports, and the receipt and review of Producer Statements.
- Make recommendations where we see room for improvement in Council's current procedures.

Executive Summary

The processing documentation sampled for PIMs and Building Consents was of a reasonably high standard. Processing documentation provided a good level of commentary rather than a 'tick box' approach. The planning notes demonstrate a very good knowledge of the district plan. It is also evident that a good relationship exists between the planning and building units and this is reflected in Council's good claim notification record. It was evident from one particular file sampled that the proactive approach taken by staff quite probably averted a potential claim.

While the Building Act does not require Building Officials to have a knowledge of, or to give consideration to, Resource Management Act (RMA) matters and while the RMA does not require Planners to be involved in PIMs and Building Consents, where this does happen we see it as positive in avoiding claims. The professional relationship between the planning and Building units at Ashburton District Council is a good example of how it should work.

Council's inspection regime appears to be reasonably robust but could be enhanced by the implementation of a system to record and track requests for inspections. Inspection notes sampled were generally comprehensive and complete.

The issue of Code Compliance Certificates is a high risk area. Council staff are aware of the risks involved in issuing a Code Compliance Certificate where they do not have reasonable grounds to believe that the building complies with the Code.

With regard to Council's current practice for accepting Producer Statements, we encourage Council to require design calculations wherever possible to be able to challenge the author's thinking or decisions at a later date if needed. Requiring the provision of calculations also enables Council to identify if any obvious error has been made.

While it is obvious that Council has a number of informal building control policies and procedures in place it would be beneficial to Council and staff if those policies and procedures were articulated in writing. This would also assist consistency in approach.

Overall, Council has in place some good systems and procedures and we think the introduction of a peer review system would further enhance Council's performance.

PIMs

EXPECTATIONS

We expected that Council would have:

1. Always issued a PIM, even if not expressly applied for (section 30(2)).
2. Checked that the following information was submitted and assessed with a PIM application (section 30(3)(b)) (dwelling example).

Authorisations or requirements in respect of:

- The intended use
 - The location and external dimensions of the proposed building work
 - Provisions for vehicle access
 - Provisions for building over or adjacent to any road or public place
 - Provisions for stormwater and wastewater
 - Precautions where building work is over existing services
3. Maintained *documented* evidence, including processing sheets, to demonstrate that it had researched and provided all information required (section 31), including:
 - All special features
 - Details of relevant existing stormwater and wastewater systems
 - Confirmation that work may be undertaken; and/or
 - Notification that work may not be undertaken because of other authorisations that have yet to be obtained or have been refused
 - Any other information relevant to the proposed building work, e.g. are adjacent sites affected by building work?

4. Reviewed PIMs, at least periodically, to identify any potential areas for improvement in the information supplied. We would expect Planners and Asset Managers to have participated in the review process.
5. Maintained PIM records for the life of the building to which it relates (section 27(2)(b)).

FINDINGS

1. We are pleased to note that Council issues PIMs even if not expressly applied for. Council issues a separate PIM document even if processed and issued with the Building Consent.
2. The PIM application files sampled contained all relevant information required to be assessed by Council in accordance with section 30(3)(b) of the Act. We are pleased to note that the application form used by Council is in the prescribed form provided for in the Building Regulations, we think this is good practice as it clearly informs the applicant of what information is required to be submitted with the application. We also note that the PIM application is circulated to other staff, it was good to see that the planning notes were particularly comprehensive.
3. The files sampled, including processing documentation, provided documentary evidence that Council Officers processing the PIMs are researching the majority of information required by section 31 of the Act. It was noted that in relation to 'special features' the processing documentation and the issued PIMs referred to only some of the special features. While it is clear from talking to staff that all special features are being considered not to list all features detailed in section 31(2)(a) of the Act in the processing documentation or in the actual PIM could be construed as Council staff not having considered these particular features. To list all special features would remove any ambiguity.
4. PIMs are not currently peer reviewed. The Senior Building Official advises that PIMs were reviewed when staff were under training and while they were relatively new but peer review ceased once they were fully trained.
5. All PIM records are maintained on the Building file in accordance with the Act.

RECOMMENDATIONS

We recommend that:

- Council includes in the attachment to the PIM a list of all special features to remove any doubt as to what has been researched.
- PIMs be periodically peer reviewed to provide assurance that they are being processed and issued correctly. Peer review is a good way of ensuring that documents are being processed and issued in a consistent manner.

Building Consents

EXPECTATIONS

We expected that Council would have:

1. Documented a summary discussion where pre-application meetings were held for major or controversial projects.
2. Carried out an initial assessment of the application to identify that sufficient information had been received to enable the processing of the consent.
3. Engaged the appropriate expertise to assess an application if the expertise was not in-house (e.g. for complex projects); or to have called for a Producer Statement or some other form of verification that Council could rely upon.
4. Maintained the appropriate processing documentation to demonstrate that Council has considered all matters required including a check of the plans and specifications submitted with the application.
5. Issued consents in a timely manner within the legislative time frame and in the prescribed form (Building Regulations 1992 section 6(1)(a) and (b) and section 4).
6. Issued *stamped approved* plans.
7. A peer review or management review system in place (random as minimum).
8. Maintained an adequate audit trail.

FINDINGS

1. Building Officials advise that it is not common for them to engage in pre-application meetings with potential applicants or their agents prior to receiving an application. On the rare occasion when pre-application meetings are held it is usually regarding planning issues so planning staff are included in the meeting. We think this is good practice. Building Officials also advise that if they are asked to meet on site to discuss building matters they will note in their diaries that they went on site.
2. Most Building Consent applications are received over the counter. The Environmental Services Clerk receives most of the applications and has a checklist which she works through to check that the information provided is sufficient. We think this is good practice as it ensures that applications are not held up further down the track.
3. Council's Building Officials are multi skilled. While they all have a background in building they have completed, or are currently undergoing, plumbing and drainage training courses. Council staff advise that they make good use of Producer Statements and will seek external advice if and when required.
4. The processing documentation sampled for Building Consents was comprehensive. We were pleased to find a clear audit trail had been maintained. We also found that Council maintains a checklist providing documentary evidence that plan checks have been conducted, we think this is good practice.
5. Staff advise that approximately 95% of Building Consents are issued within the statutory timeframe. Council advises that issuing consents within the statutory timeframe is an issue from time to time due to resources available.
6. We are pleased to note that Council issues stamped approved plans. It is Council practice to stamp each page of the plans and random pages of the specifications. We think this is good practice.

7. Building Consents are not currently peer reviewed. The Senior Building Official advises that like PIMs, Building Consents were peer reviewed when staff were under training and while they were relatively new but review ceased once staff were fully trained.
8. The processing forms completed by Building Officials and other contributors within Council appear to provide a comprehensive audit trail.

RECOMMENDATIONS

Council should be able to demonstrate that all applicable information has been received and considered hence, comprehensive processing documentation is invaluable.

We recommend that:

- Where pre application meetings are held that they are fully documented.
- Council implements a bring up system to try and increase the number of consents issued within the statutory timeframe.
- Building Consents be periodically peer reviewed to provide assurance that they are being processed and issued correctly.

Building Inspections

EXPECTATIONS

We expected that Council would have:

1. A system in place that recorded and tracked requests for inspections.
2. Required that all stamped approved plans and specifications be on site for all inspections and that inspections were not carried out in their absence. (Whether they be Council's copies or the consent holders').
3. Carried out the appropriate number of inspections. Good practice has dictated that a minimum of eight inspections should be carried out for a new dwelling. However, the WHRS determination, *Kelleway v Waitakere City Council & Ors*, appears to have extended Council's duty of care and further inspections should be carried out for face clad type claddings. The minimum for non face clad type claddings should be:
 - Site/foundations
 - Plumbing and Drainage sub floor
 - Floors
 - External Cladding
 - Pre-Line (including plumbing)
 - Post-Line
 - Plumbing and Drainage
 - Fire systems (if applicable)
 - Block walling (if applicable)
 - A final inspection

4. Ascertained the following for face clad type claddings:
 - Installation of appropriate drainage for the plaster cladding system
 - That the clearance between the bottom of the plaster system and the finished ground level was adequate
 - The placement of reinforcing mesh
 - Waterproofing around external joinery
 - Installation of control joints
5. Maintained comprehensive inspection documentation which recorded:
 - Whether the inspection passed or if re-inspection was required
 - Full details of any areas of non compliance
 - That if re-inspection was required that the inspection notes clearly indicated the fact
 - Evidence that the owner/agent was notified of non compliance
 - The date the inspection was conducted and the identity of the Building Officer
6. Carried out inspections against the Building Code **and** consent conditions.
7. Ensured that the appropriate moisture control methods were installed for walls that are used in a basement as an internal retaining wall.
8. Taken the appropriate action when an inspection identified a significant difference between the plans and what was actually built.

FINDINGS

1. Requests for inspections are received over the counter, by phone to the Environmental Services Clerk or by phone directly to the Building Officials. All requests for inspections are noted on a message note and pinned to a notice board. Building Officials record name and consent numbers details in their individual diaries and report monthly on the number of inspections carried out. Council does not maintain a single register or data base of inspection information.
2. Council does ask that stamped approved plans and consent documents be on site for all inspections. The Building Consents issued have a large bold note advising applicants that approved plans must be on site however, in reality staff think that documents are available about 80% of the time. Council staff continue to educate the builders in this area and advise that builders are making an effort and getting better.

Council staff will still inspect work in the absence of approved documents but only if it is a low risk inspection. For pre-line inspections it is a very clear policy of 'no approved document – no inspection'.
3. Council staff advise that they conduct all inspections we believe to be good practice for non face clad type dwellings, however the post-line inspection is discretionary and is dependant on the type of construction and available resources.
4. For face clad type dwellings Council now conducts all inspections listed in expectation number 4 for monolithic type dwellings. Council staff advise that these inspection are now conducted due to the 'leaky homes problem'. Evidence of these inspections having been conducted was found in the files sampled.

5. A number of building inspection notes were sampled for each Building Official at Council. We are pleased to note that all inspection notes clearly identified what was inspected, indicated whether the inspection had passed or failed, detailed areas of non-compliance where inspections failed and included the date of inspection together with the signature of the Building Official conducting the inspection. In most cases the inspection notes were signed by the building owner, contractor or agent.

The inspection forms provide for a mixture of tick box and commentary. The level of commentary in the inspection notes sampled was reasonably comprehensive.

6. Council advises that if the consent documentation is not on site for the inspection staff will check Council's copy of the documentation on return to the office.
7. Basement retaining walls that also form part of an internal wall are not common in Ashburton District. Staff advise that when this situation does occur they inspect water proofing prior to back filling.
8. Where Building Officials identify that there is a substantial difference between building plans and what is actually built the work will be inspected for compliance with the Code but amended plans may be required.

RECOMMENDATIONS

We recommend that:

- Council develops a system to record and track requests for inspections.
- If amended plans are required due to work being different from that of the original plans we think it is good practice to re process the plans, e.g. circulate to planning to ensure that any changes do not impact on planning issues.

Code Compliance Certificates (CCCs) and Interim CCCs

EXPECTATIONS

We expected that Council would have:

1. Only issued *interim* Code Compliance Certificates for multi unit development type situations as each unit was completed and not merely for incomplete work.
2. Ensured the following tasks were undertaken prior to the issue of a CCC:
 - That all required inspections had been satisfactorily completed and documented
 - A file review had been undertaken which included the review of all documents, specifically relating to conditions of the consent, inspections and Producer Statements
3. Not issued a CCC if Council was in any doubt as to whether or not the Building Code had been fully complied with or had been unable to complete any of the inspections.

FINDINGS

1. Council is aware of the risks surrounding Interim Code Compliance Certificates and rarely issues them. They are issued for multi unit developments or where a bank requires one before further funds will be released.
2. Council does not have a formal review process in place prior to the issue of a Code Compliance Certificate. Staff do not have designated areas and may all inspect the same property, and this does tend to provide an informal peer review on the previous inspectors work.
3. We are pleased to note that Council is cautious in relation to the issue of Code Compliance Certificates and is aware of the risks involved in issuing certificates where inspections have been missed or if there is any doubt as to compliance with the Code.

RECOMMENDATIONS

We have witnessed a number of claims where Code Compliance Certificates have been erroneously issued. Given the potential liability exposure for Councils we recommend that:

- Interim Code Compliance Certificates are carefully managed. An Interim Code Compliance Certificate is a document at large and can be accessed and relied upon by any person therefore the detail contained in the interim needs to be explicit and unambiguous. Council must fully document what the interim covers and what is excluded.
- Council records Interim Code Compliance Certificates in the property file to avoid the potential for a LIM to be issued without full information. It would also be good practice to provide a copy of the Interim CCC with the LIM so that applicants are aware of the extent of non-compliance.
- Large and expensive projects are reviewed; the review should include a site inspection as well as a document review.

Producer Statements

EXPECTATIONS

We expected that Council would have:

1. A policy in place in relation to the acceptance of Producer Statements. The policy should provide guidelines to staff for accepting Producer Statements and should identify:
 - How to satisfy itself with regard to the relevant and appropriate experience and expertise of the author
 - Systems for identifying limited Statements i.e. only dealing with some Building Code clauses or heavily disclaimed Producer Statements
 - Who had the delegated authority within Council to accept or decline a statement
 - When a peer review should be sought
 - How often Council would conduct random audits of design calculations
2. Determined if the Producer Statement related to design or review of design/ construction and required design calculations with a specific design.
3. A process to satisfy itself, on reasonable grounds, that the provisions of the Building Code are met.
4. A review system to ensure that all statements cover all matters intended to be covered.
5. Procedures to deal with negligently issued statements.

FINDINGS

1. Council does not have a formal policy in relation to the acceptance of Producer Statements but will look at who it is from before accepting it. Council considers a number of issues before accepting, including, is the author known to Council and are they qualified engineers and/or experts in their field.
2. Council does not require design calculations with Producer Statements. Council advises that they will usually accept what is sent.
3. Council does not carry out any checks or reviews in relation to the Statement to ensure compliance with the provisions of the Building Code. Council relies on the expertise of the author.
4. Council does not currently have a review system in place that would enable it to identify whether a Producer Statement had been negligently issued. Council advises that the occasional peer review was sought in the past but reviews have not been carried out in recent years. We believe Council would have difficulty identifying any problems in the absence of a review of design calculations. This could expose Council to liability.

RECOMMENDATIONS

We recommend that:

- Council develops a policy in relation to the acceptance of Producer Statements. We recommend Council gives consideration to the points listed in expectation 1 when documenting a policy, specifically with regard to the review of Producer Statements.
- Council requires design calculations to be supplied with Producer Statements where appropriate. This allows Council to see on what basis the Statement was issued and provides Council with a written record.

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- Producer Statements are checked for compliance with the Building Code wherever possible.
 - If Council does not have the in house expertise to review the Statement, it should consider sending it to a person with the appropriate expertise for review. Councils need to check Producer Statements for obvious errors and omissions, it is not acceptable to accept any Producer Statement without checking its content. We are aware of Councils having been exposed in the past when they did not identify a basic error or omission.

Alternative Solutions

EXPECTATIONS

We expected that Council would have:

1. A system in place to enable it to identify if an alternative solution met the requirements of the Building Code.
2. Advised the applicant to seek a determination from the BIA if Council was in any doubt as to whether or not any such method did not comply with the Building Code.
3. Kept all documentation which Council had based its decision upon including a record of all discussions and research undertaken.

FINDINGS

1. Council staff advise that they would generally check that the alternative solution will meet the Building Code by benchmarking against acceptable solutions. If there is any doubt the group will discuss it and refer it back to the applicant if required.
2. Council advises that applicants would generally be referred to the BIA for a determination if Council and the applicant could not agree but this would be a last resort. Staff advise that they can usually persuade applicants to make the required changes.
3. Council does not document discussions or keep a copy of any research data used in the evaluation of an alternative solution.

RECOMMENDATIONS

- Council keeps a comprehensive record of any discussions and research conducted on which it based its decision.

Dealing with Complaints under the Building Act

EXPECTATIONS

We expected that Council would have:

1. Maintained a summary of written complaints received by it during the preceding 5 years concerning alleged breaches of the Building Act and how it dealt with each complaint (section 27(2)(d)).
2. Provided the information above in LIMs with the exception of the identity of the complainant which must be kept confidential.

FINDINGS

1. Council does not maintain a summary of written complaints received by it in the preceding 5 years. If a written complaint is received it is actioned and placed on the property file. If a complaint is received by phone a complaints slip is completed.
2. Written complaints are placed on the building file so they are available for LIM research.

RECOMMENDATIONS

We recommend:

- That a system to record a summary of written complaints be developed and that Council also maintains a record of how it dealt with each complaint, whether written or verbal and any action taken if required.

Staff Skill and Experience

EXPECTATIONS

We expected that Council would have ensured that:

1. An induction process was in place to take new staff through roles and responsibilities. For example, ensuring best practice was followed.
2. Building Inspectors were adequately trained and supervised and that a programme was in place to ensure that staff received ongoing training and support.
3. Staff had access to relevant technical information, for example, Acts, Regulations, Codes and trade publications and that staff were made aware of its availability.
4. Building control policy and procedures manuals were maintained, regularly updated and were readily accessible to all building control staff.

FINDINGS

1. New staff members are 'buddied' with the Senior Building Official for the first few days. There is no written material detailing staff roles, responsibilities or best practice, this information is relayed verbally. Ashburton District Council is a small Council and all Building officials share an office space therefore a formal induction process is not such an issue.
2. The two Building Officials employed in the past 2 years are currently undergoing plumbing and drainage training.
3. We are pleased to note that staff have access to a variety of hard copy and electronic technical information, statutes and trade publications.
4. We were unable to assess the unit policy and procedures manual as it is 'missing in action'.

RECOMMENDATIONS

We recommend that:

- The unit manual be 'located' and updated. It should contain building control policies and procedures together with any good practice. This would be beneficial to all staff, especially new staff.



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