

22 February 2024

**To**

Vanessa Mitchell  
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Selwyn District Council

**From**

Anna Wishart  
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**By Email**

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Dear Vanessa and Sean

**Selwyn Huts Duty of Care**

1. We refer to your request for advice regarding:
  - (a) your duty of care as landowner of Upper Selwyn Huts/Springston South Reserve in respect of the deed of licence for the Upper Selwyn Huts (**Huts**) to ensure that the Council is fulfilling its responsibilities and duties appropriately before taking action under other legislation; and
  - (b) the risks associated with the Council not fulfilling its duty of care under the deed of licence.

**Duty of Care**

2. We set out below a brief summary of the key areas of risk we believe the Council faces in relation to its duty of care as the landowner/licensor.<sup>1</sup> Please note that:
  - (a) our advice is not an exhaustive list of all possible areas of liability for the Council, but rather the key areas we have identified. We would be happy to provide further advice on any of the areas of risk identified as required; and
  - (b) we have not considered the Council's function as a regulatory/consenting authority in any detail.

*Building Act 2004*

3. While liabilities can arise for a landowner under the Building Act 2004 (**Building Act**), in our view this is unlikely to occur in relation to the Huts, given that the Council would not in the ordinary course of events either own the Huts structures themselves or be undertaking building work in relation to them. Such liability would primarily arise either in relation to:
  - (a) the owner of the relevant building, as opposed to the owner of the land; and/or

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<sup>1</sup> We note that we have considered "duty of care" here in its wider sense (i.e. beyond its narrow meaning in relation to the law of torts).

(b) a person undertaking building work,

and so is unlikely to be an issue, in these circumstances.

4. It is an offence under the Building Act to *knowingly permit another person to use a building either for a use for which the building is not safe or not sanitary or that has inadequate means of escape from fire.*<sup>2</sup> It is arguable the extent to which the Council is permitting Hut owners to "use a building" for these purposes, given that it is not the owner of the building itself. This is, however, further reason for the Council to continue to enforce the relevant provisions of the Hut owner's deed of licence in relation to such matters.
5. As you are aware, the Council has the primary enforcement role as building consent authority and territorial authority under the Building Act. Accordingly, the Council will need to exercise particular care in undertaking those roles as well as its role as landowner/licensor. For example, the Council should be clear in its communications what capacity it is acting, and should be sensitive to the potential for a perceived conflict of interest. That said, we anticipate that an actual conflict is unlikely to arise in the usual course of events, as the Council will be concerned in both capacities with ensuring compliance.

#### *Resource Management Act 1991*

6. It is an offence under the Resource Management Act 1991 (**RMA**) to contravene or to permit a contravention of a District Plan, Regional Plan and/or the RMA.<sup>3</sup> An offence under the RMA can occur by an act(s) and/or by an omission(s). In short, there is a risk that the Council, as landowner, could commit an offence under the RMA by permitting something to occur on the Huts land that breaches the District Plan, a Regional Plan or the RMA, or by failing to take action to prevent a breach of the RMA on the Huts land. The key risk area relates to breaches of Regional Planning documents which would be enforced by Canterbury Regional Council (**ECan**). The Council and ECan both have regulatory and enforcement roles, responsibilities and obligations under the RMA. The line between the respective Councils' obligations can cross and is also impacted by the resource consents that may have been issued, or be required, in relation to activities on the Huts land. As we have not enquired into the particular circumstances of the resource consents and/or provision of services for the Huts at this stage, our advice below addresses the typical division of responsibilities for RMA matters. We can address specific scenarios if you have any specific questions and/or concerns. We also note that the Council has not sought advice from us regarding whether there are or could be any breaches of the RMA, again we are happy to assist as needed.
7. RMA offences are strict liability offences,<sup>4</sup> meaning that it is not necessary to prove that the Council (in its capacity as landowner) intended to commit an offence. The RMA provides for statutory defences,<sup>5</sup> however these are generally difficult to establish.

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<sup>2</sup> Section 11B of the Building Act.

<sup>3</sup> Section 338 of the RMA.

<sup>4</sup> Section 340(1) of the RMA.

<sup>5</sup> Section 340 of the RMA.

8. We understand that the deed of licence may contain clauses that require the Licensee to apply for necessary consents and permits.<sup>6</sup> While these provisions may be helpful, they will not, by themselves, be sufficient to eliminate liability under the RMA if an offence is committed on the Council's land. We suspect that ECan may be more inclined to pursue the Council as land owner rather than a Hut owner and/or occupier for the breach. In the Selwyn huts context, contractual arrangements between the Council and the Hut owner / occupier as to responsibility for compliance under the RMA are unlikely to be particularly persuasive as means to either redirect enforcement action towards the Hut owners / occupiers or to defend any enforcement action commenced against the Council.
9. We also note that the deed of licence may also provide for some element of shared responsibility between the Council and the licensee, particularly in relation to water, sewer and sanitary services. While RMA compliance associated with these services is, generally speaking, within ECan's jurisdiction, the shared responsibility increases the Council's RMA regulatory risk because it will be taken to have an increased level of knowledge and therefore responsibility / liability with respect to those services.
10. The Council also has obligations and responsibilities with respect to enforcement under the RMA in respect of the District Plan. Consideration should be given to whether there are breaches of the District Plan and, if so, what action (if any) should be taken with respect to those breaches.
11. These RMA regulatory risks further reinforce the importance of the Council continuing to take reasonable care to enforce relevant provisions of the deed of licence if the Council becomes aware that relevant consents and/or permissions have not been obtained and/or issues arise with the water, sewer or sanitary services (for example). Again, we acknowledge the difficulties this presents given the Council's role as a regulatory and consenting authority under the RMA, particularly because licensees will not necessarily distinguish between:
  - (a) the Council in its capacity as landowner / licensor and its capacity as a regulatory and consent authority under the RMA; and
  - (b) the roles, powers, responsibilities and obligations of the Council and ECan.
12. While the deed of licence contains an acknowledgement that the Council (as licensor) is required to carry out statutory functions under the RMA and seeks to separate the consents and approvals required under statute and the obligations and responsibilities under the deed of licence,<sup>7</sup> there remains a risk that licensees will not distinguish the Council's different roles / capacities or between the Council's and ECan's functions and rely on actions taken by the Council for different purposes than the Council intended.

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<sup>6</sup> See for example clauses 10.1(b), 20.2 and, to some extent, clause 11 of the version of the deed of licence dated 1 July 2015. Please note that our clause references in this letter are to clauses within that 2015 deed of licence, however we understand that there are various versions of the deed.

<sup>7</sup> See clause 34.

*Reserves Act 1977*

13. The Council's responsibilities under the Reserves Act 1977 in this particular context are relatively limited, being to administer the reserve land in accordance with the provisions of that Act.

*Health Act 1956*

14. Similarly with the Building Act, while liabilities can arise for a landowner under the Health Act 1956 (**Health Act**), this is in our view unlikely to occur in relation to the Huts, given that the Council would not in the ordinary course of events own the Huts or be in occupation of the relevant land. Such liability would primarily arise in relation to the occupier (i.e. licensee / Hut owner).
15. While there are circumstances under which liability could theoretically arise under the Health Act (e.g. where the Council suffers the licensee to perpetrate a nuisance,<sup>8</sup> or permits the licensee to occupy in insanitary conditions<sup>9</sup>), these would again be limited (to the extent they apply) by continuing oversight and enforcement of the terms of the deed of licence. Care is required in this area, given the Council's enforcement role under the Health Act (and our comments in paragraph 5 above in relation to the Building Act would apply equally in this context).

*Property Law Act 2007*

16. The Council would, in looking to terminate a deed of licence in accordance with its terms, need to comply with the applicable formal requirements of the Property Law Act 2007 relating to cancellation.

*Health and Safety at Work Act 2015*

17. The duties under the Health and Safety at Work Act 2015 (**HSWA**) will apply to at least some extent to the activities of the Council as a landowner / licensor in relation to the Huts. While the Council will almost certainly be a person conducting a business or undertaking for the purposes of the HSWA in this context, the Council's actual duties will, however, be qualified by the overlapping duties of the licensee / hut owner. Given that the Council has a relatively limited role in respect of the Huts themselves under the deed of licence (in contrast to the licensee), its potential exposure would also likely be limited.
18. That said, there are activities which the Council should be cautious about in order to limit any potential liability under the HSWA including:
- (a) any future decisions to allow the land to continue to be used for occupation and to issue further licences - for example, the Council should be cautious in issuing further licences if it became apparent the land was likely to be unsafe to occupy during the term due to sea level rise;
  - (b) the drafting of, or amendment to, the terms of the deed of licence, to ensure a clear and workable allocation of relevant responsibilities as between licensor and licensee is maintained;

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<sup>8</sup> Section 30 of the Health Act.

<sup>9</sup> Section 39 of the Health Act.

- (c) continuing oversight and enforcement of the terms of the deed of licence, to appropriately ensure the anticipated allocation of responsibilities occurs (e.g. ensuring that any building work by the licensee is approved and undertaken in accordance with the law); and
- (d) undertaking other activities on or in relation to land (e.g. maintenance work) – the Council should obviously exercise the usual care in relation to such activities.

**Risks associated with not fulfilling duty of care**

19. If the Council does breach any of its duties and responsibilities as outlined above, the key risks to the Council are (with our general assessment of relative likelihood):
- (a) criticism in various forms (e.g. from the public and their legal representatives, and the media) (**high likelihood**);
  - (b) prosecution by external agency (i.e. under the RMA) (**moderate likelihood**);
  - (c) judicial review, or similar, of the Council's decision making (**low likelihood**); and
  - (d) private prosecution of the Council by some interested third party (**very low likelihood**).
20. We would be happy to provide further advice on any of the areas of risk as required.

**Conclusion**

21. Please do not hesitate to contact us if you have any questions about the information in this letter or would like further advice on any of these matters.

Yours sincerely



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