

To: Mr Garry Poole
Chief Executive Officer
Tauranga City Council
TAURANGA

INVESTIGATION AND REVIEW

THE TAURANGA CITY COUNCIL'S INVOLVEMENT

WITH 21 PROPERTIES IN THE BELLA VISTA SUBDIVISION

1 JUNE 2018

REPORT OF HON PAUL HEATH QC

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1. Summary of conclusions and recommendations

[1] By Terms of Reference signed on 24 April 2018,¹ the Chief Executive Officer of the Tauranga City Council (the Council), engaged me to investigate and review the Council's involvement in a subdivision near Pyes' Pa (the Bella Vista subdivision). There are 21 dwellings in all; sixteen are situated on Lakes Boulevard, the other five on Aneta Way. A diagram depicting the location of the properties and an explanation of the annotations on it are set out later in this report.²

[2] For the reasons set out in this report, I have reached the following conclusions:³

- (a) The Council dealt adequately with the resource consent applications made in respect of the Bella Vista subdivision.⁴
- (b) The Council did not perform monitoring and enforcement functions adequately in relation to geotechnical aspects of the intended construction works.⁵
- (c) The Council performed building consent functions adequately for those issued before 23 December 2016 but failed to make appropriate inquiries in respect of those granted on or after that date.⁶
- (d) The Council did not perform its Building Act inspection functions adequately, in respect of both geotechnical⁷ and structural⁸ considerations.
- (e) The Council ought not to have issued code compliance certificates for 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way.⁹

¹ Relevant parts of the Terms of Reference are set out at paras [9]–[13] below.

² See paras [131] and [132] below.

³ In light of my approach to the issues raised by cl 17 of the Terms of Reference, I have addressed the issues by reference to the more refined questions set out at para [128] below.

⁴ See para [152] and [153] below.

⁵ Resource Management Act 1991, s 35(2)(d). See para [209] below.

⁶ See paras [169]–[177] below.

⁷ See para [204] below.

⁸ See para [205] below.

⁹ See para [220] below.

(f) It was appropriate for the Council, on 16 April 2018, to declare all buildings in the Bella Vista subdivision either “dangerous” or “affected” on the basis of the professional advice it received on or about 15 April 2018.¹⁰

[3] There are two discrete parts to my recommendations. They are:

(a) The need to resolve immediate issues that arise as between the Council and the homeowners.

(b) The need to investigate why the Council failed to meet the regulatory obligations that I have identified.

[4] For reasons set out later:¹¹

(a) I recommend the Council takes immediate steps to resolve outstanding differences between the homeowners and itself. As the Council is, in reality, the last target for litigation from which recoveries are likely, the benefits of early resolution far outweigh any desire to have the homeowners’ claims tested in Court.

(b) There is a need for some form of inquiry or investigation to ascertain why the Council failed to perform adequately relevant regulatory functions. There are a variety of options available to conduct that type of review. I favour an approach that avoids the possibility of a “witch hunt” in respect of the actions or omissions of any particular Council officers and focusses on what lessons can be learnt from the failures to minimise the risk of something like this happening again.

[5] This report has been prepared under circumstances of urgency. I have had to review a significant number of important documents within a short time. To give some indication of the volume of documents involved, I received 38 ring-binders on 1 May 2018, and many other documents in electronic form after I commenced my investigation. My findings must be read

¹⁰ See para [227] below.

¹¹ See paras [229]–[234] below.

in that context. It is not inconceivable that other material documentary evidence exists that I have not had an opportunity to review.

[6] I cannot emphasise enough that my findings that the Council did not perform its resource management monitoring and Building Act regulatory functions adequately do not mean that the Council is necessarily legally liable to homeowners who have suffered loss. Deliberately, I have used the word “adequately” in this report so as not to address specifically the elements of relevant legal concepts, such as “negligence”. If legal proceedings were to follow, a number of issues would arise: for example

- (a) What is the nature and extent of the Council’s duty of care to homeowners, in the particular circumstances of this case?
- (b) Is there a sufficient causal connection in law between any actionable acts or omissions on the part of the Council and the loss homeowners have suffered?
- (c) To what extent are losses suffered by homeowners recoverable from the Council? and
- (d) Are there any other parties who should bear responsibility and share the burden of any loss for which the Council could be liable?

[7] Nor can I emphasise enough that this report is not designed to suggest that any person other than the Council has failed to meet standards set by law, or breached any legal duties owed to the homeowners. Although I have set out in some detail the nature of the issues that have arisen between the Council and Mr Cancian, as director of Bella Vista Homes Ltd (the company responsible for development of the subdivision and the construction of dwellings), nothing in my summary should be taken as expressing any view, one way or the other, on the merits of any claims that might be made by one against the other. Some background has been included for the sole purpose of providing the context in which Council performed various regulatory functions after the disputes arose. I cannot on the information presently available to me, resolve those differences.¹²

¹² Generally, see paras [178]–[194] below.

[8] Deliberately, I have not named or attempted to ascribe blame to any particular decision-maker or inspector in respect of those Council functions that I have found were not performed adequately. As I did not have any power to compel any person to answer questions or produce documents, I elected not to talk to any of them. As a result, no adverse inferences should be drawn against any of those people. Similarly, although I am obliged to accept the views of the geotechnical and structural engineers as to defective aspects of the construction work,¹³ I am not endorsing any express or implied criticisms of any particular products used in the building work.

2. Terms of Reference

[9] The scope of my investigation is set out in cl 16 of the Terms of Reference. I am required:

16. ... to investigate, and report on, the Council's involvement in:
 - (a) The handling and assessments of [Bella Vista Homes Ltd's] applications for subdivision and land use resource consents;
 - (b) The decisions to grant the resource consents including the conditions of the resource consents;
 - (c) The monitoring and inspection of the subdivision works to check on compliance with the resource consent conditions;
 - (d) The assessment and issuing of building consents for the 21 Bella Vista properties;
 - (e) The inspections carried out by the Council's building inspectors of the 21 Bella Vista properties and the outcomes of those inspections; and
 - (f) The issuing of code compliance certificates for 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way.

¹³ See para [12] below.

[10] Clause 17 of the Terms of Reference sets out the issues on which I am to report. I am required:

17. ... to address the following issues ...:

- (a) Was the Council's handling of the application for resource consents competent and adequate and, if not, how did it fall short?
- (b) Should the resource consents have been granted and should any different or further conditions have been included in the consents?
- (c) Any other findings which are relevant to the Council's performance in respect of the resource consents.
- (d) Was the Council's handling of the applications for building consents competent and adequate in each case and, if not, how did it fall short?
- (e) Should each of the building consents have been issued and should any different or further terms and conditions have been included in the consents?
- (f) Any other findings which are relevant to the Council's performance in respect of the building consents issued in each case.
- (g) In respect of each property, was the Council's performance in relation to inspections carried out by building inspectors competent and adequate and, if not, how did it fall short?
- (h) In respect of each property, were the outcomes of the inspections appropriate and adequate and, if not, why not?
- (i) Any other findings which are relevant to the Council's performance in respect of the building inspections.

- (j) Should the code compliance certificates have been issued for 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way and, if not, why not?
- (k) Any other findings or comments or recommendations which you consider useful and relevant in relation to the Council's role and actions or omissions in relation to the 21 Bella Vista properties.

[11] Clause 15 of the Terms of Reference requires me to focus "primarily" on any issues arising out of the Council's involvement "which have a causal connection with the defects which have been reported in the Bella Vista properties and/or the reasons why dangerous or affected building notices were issued".

[12] Clause 8 of the Terms of Reference requires me to proceed on the assumption that expert geotechnical and structural engineering reports obtained by Council before 24 April 2018 correctly identify defects in the construction work. Subsequently, I received additional reports. The Council confirmed that I may act on the basis that the opinions expressed in all of the reports are correct, having regard to information available to the report-writers at the time they were prepared.¹⁴ That qualification has particular relevance in the context of expert opinions expressed on the "dangerous buildings" issue.

[13] As the Terms of Reference make clear, this report is concerned only with the Council's performance of regulatory functions involving the processing of subdivision and land use resource consents, its ability to monitor compliance under the Resource Management Act 1991, the processing of building consent applications, inspection of building work, the issue of four code compliance certificates, and the reasons why dangerous (or "affected") building notices were issued on 16 April 2018.

[14] I do not comment on the standard to which others performed obligations in respect of which legal duties may be owed to homeowners. Without being exhaustive, such persons include the developer and those responsible for undertaking construction work. While I have been critical of the way in which the Council performed its regulatory functions, I make no comment about the responsibility of individuals employed by the Council.

¹⁴ See para [21] below.

[15] As required by the Terms of Reference, I provided a draft report to the Council for “fact-checking purposes” on 25 May 2018. At the same time, I sought some specific responses from the Council in relation to issues raised in my draft report. They included not only particular questions of fact but also some wider issues that had emerged from my investigation, including some legal issues I had identified. I received a comprehensive reply on all issues from the Council. I have considered all of the Council’s points when finalising this report. While some of the Council’s responses have been accepted and others rejected, I can say categorically that the Council has co-operated with me throughout my investigation and has gone to great lengths to provide all information I requested.

[16] This is my final report. It was sent to the Council today, 1 June 2018.

3. Preliminary issues

[17] On Sunday 29 April 2018, I made an initial visit to the Bella Vista subdivision. I did so in the company of two Council officials; Mr Garry Poole, and the General Manager: Chief Executive’s Group, Ms Kirsty Downey. At that time, I did not engage in discussions on the substantive issues for my investigation. Rather, Mr Poole and Ms Downey assisted in orienting me to various aspects of the subdivision, which was surrounded by a security fence. During the course of my visit, I met two owners who were carrying out some work on their property, under the eye of security personnel. I introduced myself to them and explained the nature of my investigation and the purpose of a public meeting that was to be held on 8 May 2018.¹⁵

[18] At the commencement of my investigation, the Council provided three expert reports to me, all dated 12 April 2018:

- (a) A report prepared by Ms Morna Nielsen and Mr Colin Jacobson of BCD Group Ltd. This was a review of structural elements of the Bella Vista subdivision dwellings.¹⁶

¹⁵ See para [23] below.

¹⁶ Discussed generally at paras [115]–[124] below.

- (b) A building compliance report prepared by a building consultant, Ms Rose McLaughlan. This report relates only to the dwelling at 311A Lakes Boulevard.¹⁷
- (c) A geotechnical report by AECOM New Zealand Ltd (AECOM) and ICE Geo & Civil Ltd (ICE), in which they provided “an assessment of dangerous buildings” within the subdivision.¹⁸ This report was prepared by Mr Mike Trigger, with internal and external peer review by Mr Ryan Powell and Ms Marianne O’Halloran (from ICE) respectively.

[19] On 1 May 2018, as contemplated by cl 9 of the Terms of Reference, the Council provided to me in both electronic and paper form:

- (a) A statement explaining typical procedures used for dealing with resource consents, building consents, inspections and code compliance certification for dwellings similar to those in the Bella Vista subdivision, attaching a bundle of relevant documents pertaining to each aspect of the regulatory processes.
- (b) A statement from the Council explaining those documents that relate specifically to the Bella Vista subdivision. Those concerned land use and resource consents, building consents, inspections and code compliance certificates. Documents in those categories were provided to me in respect of each of the dwellings.

[20] The resource and building consent documents provided on 1 May 2018 consisted of:

- (a) Resource consent files relating to each of the two subdivision applications, for Lakes Boulevard (RC 24880 and RC 24881) and Aneta Way (RC 24745). At the time the applications for consent were made, the land that became Aneta Way was on Penetaka Heights. I have referred to that subdivision as the Penetaka Heights application.

¹⁷ Discussed generally at paras [76]–[80] below.

¹⁸ Discussed at paras [103]–[113] below. This report must be read in conjunction with an earlier collaborative report dated 9 March 2018.

- (b) Building consent, inspection and (where appropriate) code compliance segments of the building files in respect of all 21 dwellings with which I am concerned.

[21] On 2 May 2018, I received from the Council five further reports, variously dated 30 April and 1 May 2018. Although cl 8 of the Terms of Reference referred to reports available as at 24 April 2018 when that document was signed, the Council confirmed that I was entitled to treat the 30 April and 1 May reports (and, specifically, a summary of defects annexed to one of the reports) as correctly stating the present position.¹⁹ The additional reports were:

- (a) Reports from BCD Group, relating specifically to structural inspections of 297, 299 and 301 Lakes Boulevard. These three reports were prepared by Ms Nielson, and reviewed by Mr Jacobson. I also had access to an earlier report, dated 9 March 2018, from BCD Group on the question whether dwellings at 299–311A Lakes Boulevard were “dangerous”, for the purposes of s 121 of the Building Act 2004.²⁰ Mr Jacobson expressed the view that dwellings situated at 303A, 305 and 305A were “dangerous”, as defined.
- (b) A vehicle safety assessment dated 30 April 2018. This report was prepared by Mr Norm Robins, and reviewed by Mr Shaun Lion-Cachet, both of AECOM. It considered whether various driveways complied with D1 of the Building Code, which in broad terms deals with questions of reasonable and adequate access to ensure safe and easy movement of people.²¹
- (c) A drainage assessment dated 30 April 2018. This report was prepared by Ms Jessica Newlands, and reviewed by Mr Scott King, both of AECOM. The purpose of this report was to assess drainage within the Bella Vista subdivision against E1 (surface water) and G13 (foul water) of the Building Code. All 21 properties were included within the assessment. AECOM concluded that,

¹⁹ Summarised at paras [119] below.

²⁰ Section 121 is set out at para [57] below.

²¹ AECOM concluded that there was non-compliance with D1 in respect of 301, 301A, 303A, 305 and 305A of Lakes Boulevard and 5 Aneta Way because of a “failure to provide appropriate cross falls and slopes in the direction of travel or dimensions appropriate to the intended use”. In addition, 301, 301A, 303A, 305 and 305A Lakes Boulevard were non-compliant because either gradients of the driveway were excessive or there was a lack of space to turn a car around on site.

generally, “the installed on-site drainage does not comply with the layout and capacity requirements” of E1 and as shown on the consented plans”.

(d) A further geotechnical report from AECOM, dated 30 April 2018.²² This report was prepared by Mr Trigger, with internal review by Mr Ryan Powell and external peer review by Ms O’Halloran, of ICE.²³ AECOM attached three appendices to that report. Each of them provided primary data on which AECOM had based its conclusions. The appendices comprised:

(i) A report dated 10 April 2018, by ScanTec Ltd. ScanTec was instructed to carry out a ground penetrating radar survey to investigate the presence of subsurface cavities at selected properties on Lakes Boulevard and Aneta Way. The focus of the testing was on driveways and areas of vehicle traffic.

(ii) A report dated 19 April 2018 by Geotechnics Ltd. That company was engaged to complete window sample and hand auger investigations, shear vane testing at 300mm centres in cohesive soil, and scala penetrometer testing at locations and depths advised by AECOM. The purpose of the scala penetrometer tests was to determine the presence of underground cavities, as opposed to a correlation of strength parameters and over-drilling.

(iii) A report of 24 April 2018 by MG Solutions entitled “*Topographical Survey of 297–311A Lakes Boulevard, 1–6 Aneta Way and 31 Penetaka Heights*”.

[22] AECOM supplied one other report, dated 1 May 2018, in which it summarised the conclusions set out in its other reports. This report was prepared jointly by Mr Trigger, Mr Robins and Mr King.

²² AECOM’s 12 April 2018 report was an updated version of earlier views expressed in a report dated 9 March 2018.

²³ See also, para [18](c) above.

[23] On 2 May 2018, I issued an invitation for homeowners and others directly affected by the development to attend a public meeting in Tauranga on 8 May 2018. An intention to call such a meeting had been signalled by Council around the time of my appointment.

[24] On 3 May 2018, I met Mr Ian Tuke and Ms Lisa Tai, of Deloitte, Auckland. A Wellington partner, Mr Barry Jordan, attended the meeting by video-link. Deloitte had previously been engaged by the Council to secure email and other electronic information provided to it. My purpose in talking to Mr Jordan, Mr Tuke and Ms Tai was to ascertain the information they possessed and to obtain such information as I required. I decided that it would be helpful to my factual investigation to obtain an analysis of building consent and inspection data from two computer programmes that were used by the Council, GoGet and AlphaOne.²⁴ Those systems were used (at different times during the building consent and inspection processes) to record steps taken by Council when performing its statutory functions.

[25] On Saturday 5 May 2018, I received consent from Council to instruct Deloitte to undertake an analysis of the resource consent, building consent, inspection and code certification data. Because the building work straddled the transition period from one computer programme (GoGet) to the other (Alpha One), I had found it difficult to ascertain the precise sequence of relevant events until I received analyses from Ms Tai.

[26] At a meeting held with Mr Poole and Ms Downey on the morning of the 8 May 2018 public meeting, I was given authority to receive and review:

- (a) A draft report from Beca dated 19 December 2017 which had been sent to the solicitors for the Council. I have received confirmation from the Council that I may rely on that report in the form in which it was provided. I bear in mind that more relevant information has come to light since this report was issued.
- (b) A report from Golder Associates (NZ) Ltd of 8 March 2018 which expresses some views about, primarily, geotechnical concerns.

[27] I have placed less weight on the Golder report than those prepared by AECOM because the latter had more time to consider the issues in relation to individual properties. In saying

²⁴ See para [72] below.

that, I am conscious that the principal author of the AECOM reports, Mr Trigger, was involved, on behalf of the Council, in dealings with Bella Vista Homes in 2016 and 2017.²⁵ I am satisfied that the independent peer review by Ms O'Halloran (of ICE) removes any real risk that Mr Trigger's views might be clouded by a conflict of interest.

[28] The public meeting was held on 8 May 2018, at 7.00pm, at ASB Arena, Mt Maunganui. It was attended by 60 people and viewed by a further 85 on a livestream from the Council's Facebook page. A video record of that meeting has been posted on the Council's YouTube channel, and a transcript of what was said is on the Council website: www.tauranga.govt.nz I have received helpful information from a number of people who attended that meeting, or who watched the video-recording contemporaneously, or later. Mr Cancian, who was present, has also supplied information to me. I thank all for their assistance.

[29] Bella Vista Homes had been put into liquidation on 30 November 2017. Following earlier telephone discussions and correspondence, the liquidators of Bella Vista Homes forwarded information to me under cover of a letter dated 10 May 2018. That largely replicated documents I had already received from the Council or Mr Cancian.

[30] The nature and extent of the issues on which I have been asked to report, coupled with the relatively short time available to complete my assignment, means that even fulsome reasons for my conclusions and recommendations will necessarily be incomplete and selective in nature. That said, I consider that what I say in this report is sufficient to explain the basis on which I have made findings of fact and provides reasons for the recommendations I have made.

4. Structure of report

[31] I have structured the balance of this report as follows:

- (a) First, I provide a brief summary of the background to the Bella Vista subdivision, and the construction phase.
- (b) Second, I summarise the legal requirements placed on the Council in relation to the Bella Vista subdivision. They emerge from:

²⁵ See in particular paras [92] and [180]–[194] below.

- (i) The Resource Management Act 1991, in respect of resource consents for the subdivision, together with the allied monitoring and enforcement functions.
 - (ii) The Building Act 2004, in respect of building consent, inspection, code compliance certification, the power to declare a building “dangerous” or “affected”.
- (c) Third, I review the policies and guidelines under which the Council was operating at the relevant time, to meet its regulatory responsibilities under both the Resource Management Act and the Building Act.
- (d) Fourth, I summarise the content of the various engineering reports and explain the nature and extent of the geotechnical and structural defects that have been identified.
- (e) Fifth, I analyse whether the Council performed its regulatory functions adequately.
- (f) Sixth, I set out my recommendations, with supporting reasons for them.

[32] I have relied primarily on contemporary documentary evidence provided by the Council and others. That information, supplemented by explanations on certain issues from the Council’s representatives (and third parties to whom I directed inquiries), has been sufficient for me to express firm views about the way in which various regulatory functions were undertaken.

5. Background

[33] Lakes Boulevard and Aneta Way form part of what is known as the wider Lakes subdivision. The Lakes subdivision comprises over 800 sections. In 2015, Bella Vista Homes acquired 40 of them. The Bella Vista subdivision properties are located within Stages 3A and 3B of The Lakes subdivision. Coffey Geotechnics Ltd provided a report on geotechnical issues for the broader subdivision (the April 2015 Coffey report), on 24 April 2015. Resource consents for Stages 3A and 3B were granted under RC 31332.

[34] The resource consent applications for the Bella Vista subdivision formed part of Stages 3A and 3B of the Lakes development. Bella Vista had acquired all 11 lots, and intended to subdivide them into smaller allotments, so that two dwellings could be built on each section.

[35] The correlation between the lots and the street numbers allocated were:

- (a) 297 and 297A Lakes Boulevard were situated on Lot 9
- (b) 299 and 299A Lakes Boulevard were situated on Lot 10
- (c) 301 and 301A Lakes Boulevard were situated on Lot 11
- (d) 303 and 303A Lakes Boulevard were situated on Lot 12
- (e) 305 and 305A Lakes Boulevard were situated on Lot 13
- (f) 307 and 307A Lakes Boulevard were situated on Lot 14
- (g) 309 and 309A Lakes Boulevard were situated on Lot 15
- (h) 311 and 311A Lakes Boulevard were situated on Lot 16
- (i) 1 and 3 Aneta Way were situated on Lot 114
- (j) 5 and 6 Aneta Way were situated on Lot 115
- (k) 2 and 4 Aneta Way were situated on Lot 116

[36] The Penetaka Heights subdivision consent application, to create six residential lots out of the three sections on Penetaka Heights, was granted on 11 November 2015. 1 Aneta Way is a vacant section, which explains why only 21 dwellings are in issue. The resource consent for this part of the Bella Vista subdivision was granted under RC 24745.

[37] Resource consents for the sixteen residential units on Lakes Boulevard were granted on 11 January 2016, these consents had the effect of doubling the number of dwellings that could

be erected on each parcel of land. Resource consents were granted under RC 24880 and RC 24881, for the Lakes Boulevard properties.

6. Legal requirements

(a) Resource consents

(i) Processing functions

[38] Two types of resource consent were required for the Bella Vista subdivision. The first involved land use; the second was required to subdivide the land. A subdivision consent was required to create the Bella Vista subdivision. The proposed activity was a “subdivision of land”, as that term is defined in s 218(1) of the Resource Management Act.²⁶

[39] A land use consent was required to address the design and location of buildings within the proposed subdivision; for example, yard set-backs. A subdivision consent was required so as not to contravene s 11 of the Resource Management Act. Section 11 restricts the circumstances in which land may be subdivided. Relevantly, s 11(1)(a), read in conjunction with s 11(1A)(a)(ii), permits subdivision if expressly authorised by a resource consent. For the Lakes Boulevard application, subdivision was a discretionary activity under the operative plan because the allotments that the developer intended to create were smaller than those permitted by the Tauranga City Plan (the City Plan). For the purposes of the Penetaka Heights application, subdivision was a controlled activity under the operative plan. Rule 12A2.1 of the City Plan operative plan stated that subdivision for freehold allotments in the Suburban Residential Zone is a controlled activity, provided the subdivision complies with relevant controlled activity standards in terms of r 12B.3 of the plan.

[40] Section 88(2)(c) of the Resource Management Act requires information specified in Schedule 4 to that Act to be provided on an application for resource consent. Clauses 1 and 2 are generic in nature, while cl 4 refers to specific information required for a subdivision consent. Clause 2(1)(f) assumes significance because s 5 of the Resource Management Act (which falls within Part 2 of that statute) refers, as a purpose of the Act, to “avoiding,

²⁶ See also, ss 11 and 87(b) of the Resource Management Act 1991.

remedying, or mitigating any adverse effects of activities on the environment”.²⁷ Likewise, cl 2(1)(g) is important because it requires the Council to consider all aspects of relevant regional and district plans. Relevantly, cls 1, 2 and 4 of Schedule 4 provide:

Schedule 4

Information required in application for resource consent

1 Information must be specified in sufficient detail

Any information required by this schedule, including an assessment under clause 2(1)(f) or (g), must be specified in sufficient detail to satisfy the purpose for which it is required.

2 Information required in all applications

(1) An application for a resource consent for an activity (the **activity**) must include the following:

- (a) a description of the activity;
- (b) a description of the site at which the activity is to occur;
- (c) the full name and address of each owner or occupier of the site;
- (d) a description of any other activities that are part of the proposal to which the application relates;
- (e) a description of any other resource consents required for the proposal to which the application relates;
- (f) an assessment of the activity against the matters set out in Part 2;
- (g) an assessment of the activity against any relevant provisions of a document referred to in section 104(1)(b).

(2) The assessment under subclause (1)(g) must include an assessment of the activity against—

- (a) any relevant objectives, policies, or rules in a document; and
- (b) any relevant requirements, conditions, or permissions in any rules in a document; and
- (c) any other relevant requirements in a document (for example, in a national environmental standard or other regulations).

(3) An application must also include an assessment of the activity’s effects on the environment that—

- (a) includes the information required by clause 6; and
- (b) addresses the matters specified in clause 7; and
- (c) includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment.

...

4 Additional information required in application for subdivision consent

An application for a subdivision consent must also include information that adequately defines the following:

- (a) the position of all new boundaries:

²⁷ Resource Management Act 1991, s 5(2)(c).

- (b) the areas of all new allotments, unless the subdivision involves a cross lease, company lease, or unit plan:
- (c) the locations and areas of new reserves to be created, including any esplanade reserves and esplanade strips:
- (d) the locations and areas of any existing esplanade reserves, esplanade strips, and access strips:
- (e) the locations and areas of any part of the bed of a river or lake to be vested in a territorial authority under section 237A:
- (f) the locations and areas of any land within the coastal marine area (which is to become part of the common marine and coastal area under section 237A):
- (g) the locations and areas of land to be set aside as new roads.

[41] For present purposes, the Council was the “consent authority” to which the applications for land use consent and subdivision consent were made. On making the application Bella Vista Homes was required to provide all information relating to the proposed activity required by Schedule 4 to the Resource Management Act.²⁸

[42] On receipt of the subdivision application, the Council had power to grant or refuse it, or to request further information before making its decision.²⁹ The Council was entitled to commission any person to prepare a report on any matter relating to the application, including information provided by the applicant.³⁰ It was entitled to refuse an application on the grounds that it had inadequate information to determine it.³¹ It was open to the Council to grant a resource consent to subdivide, either conditionally or unconditionally.³²

[43] Sections 104A and 104B of the Resource Management Act governed the way in which the Bella Vista subdivision land use and subdivision consent applications were to be determined.³³ The former is concerned with controlled activities of the type contemplated for the Aneta Way properties, while the latter refers to discretionary activities of the type anticipated for the Lakes Boulevard properties.³⁴

²⁸ Ibid, s 88(2)(c).

²⁹ Ibid, s 92(1).

³⁰ Ibid, s 92(2).

³¹ Ibid, s 104(6) and (7).

³² Ibid, ss 108, 108AA and 220.

³³ Section 104C(1)(b) of the Resource Management Act limits what the Council can consider on an application of this type: see para [42] above.

³⁴ See also para [39] above.

[44] As the proposed Penetaka Heights subdivision was a controlled activity, s 104A required the Council to grant the consent (provided there was sufficient evidence to establish that it was a controlled activity),³⁵ subject to such conditions as might be appropriate.³⁶

[45] As to the discretionary activities involved in the proposed Lakes Boulevard subdivision, ss 104 and 106 of the Resource Management Act set out factors that the Council must consider on the resource consent application. Section 104 is of general application to all forms of resource consents. It is also subject to s 5(2)(c) of the Act, which requires consideration to be given to potential effects on the environment and the provisions of relevant plans. On the other hand, s 106 is directed to additional factors that are directly relevant to subdivisions and might justify refusal of an application.

[46] Relevantly, in the context of this case, s 106 provides:

106 Consent authority may refuse subdivision consent in certain circumstances

- (1) A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—
- (a) *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*
 - (b) *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; or*
 - (c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.
- (2) Conditions under subsection (1) must be—
- (a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1); and
 - (b) of a type that could be imposed under section 108.

(Emphasis added)

³⁵ Resource Management Act 1991, s 104A(a).
³⁶ Ibid, s 104A(b).

(ii) *Monitoring and enforcement functions*

[47] Section 35 of the Resource Management Act 1991 sets out the Council’s obligations to monitor compliance with resource consents.³⁷ Section 35(2)(b) and (d) provides:

35 Duty to gather information, monitor, and keep records

- ...
- (2) Every local authority shall monitor—
- ...
- (b) the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan; and
- ...
- (d) the exercise of the resource consents that have effect in its region or district, as the case may be; and
- ...

and take appropriate action (having regard to the methods available to it under this Act) where this is shown to be necessary.

....

[48] Once an appropriate consent has been granted, an applicant may proceed to create the subdivision. After individual certificates of title have been issued, apart from any continuing conditions attaching to it, the resource consent is spent. So far as conditions are concerned, the Resource Management Act defines the term “resource consent” as including “all conditions to which the consent is subject”.³⁸ Thereafter, any monitoring obligations of the type to which s 35(2) refers are directed towards compliance with the City Plan. In my view, the resource consent monitoring obligation set out in s 35(2)(d) continued to apply (after the ss 223 and 224 certificates had been issued) to the continuing conditions on which the resource consents had been granted.

[49] For present purposes, a registered “consent notice” falls into that category.³⁹ Sections 221(1) and (2) and 224(c)(ii) and (d) of the Resource Management Act provides:

221 Territorial authority to issue a consent notice

(1) *Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.*

³⁷ For a discussion of the means by which the Council undertook this task, see para [157] below.

³⁸ Ibid, s 2(1), definition of “resource consent”.

³⁹ See, generally, paras [142]–[147] below.

(2) Every consent notice must be signed by a person authorised by the territorial authority to sign consent notices.

....

224 Restrictions upon deposit of survey plan

...

(c) there is lodged with the Registrar-General of Land a certificate signed by the chief executive or other authorised officer of the territorial authority stating that it has approved the survey plan under section 223 (which approval states the date of the approval), and all or any of the conditions of the subdivision consent have been complied with to the satisfaction of the territorial authority and that *in respect of such conditions that have not been complied with—*

...

(ii) *a consent notice has been issued in relation to such of the conditions to which section 221 applies:*

...

(d) there is lodged for registration with the Registrar-General of Land a consent notice in respect of any conditions of a kind referred to in paragraph (c)(ii); and

....

(Emphasis added)

[50] The Resource Management Act provides a number of enforcement mechanisms in circumstances where activities are being undertaken in breach of the terms of a resource consent or an operative plan. Two of those mechanisms are abatement notices and enforcement orders.⁴⁰

[51] An abatement notice has been described as a “first aid” measure to enforce compliance with the Resource Management Act, and various planning instruments.⁴¹ A notice may be issued under s 322 of the Resource Management Act:⁴²

322 Scope of abatement notice

(1) An abatement notice may be served on any person by an enforcement officer—

(a) requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, —

⁴⁰ For a more detailed discussion of enforcement measures, see Derek Nolan QC (ed), *Environmental and Resource Management Law* (6th ed LexisNexis NZ, 2018) at Chapter 20.

⁴¹ Grinlinton, *Enforcement Mechanisms under the RMA* (March 1992) PQ 15, at 15. See also Derek Nolan QC (ed), *Environmental and Resource Management Law* (6th ed LexisNexis NZ, 2018) at para 20.7.

⁴² Although reference is made to an authorised “enforcement officer” in the statutory provisions dealing with abatement notices and enforcement orders, I shall refer to the Council as being the potential applicant.

- (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, or a resource consent; or
 - (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
- (b) *requiring that person to do something that, in the opinion of the enforcement officer, is necessary to ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan or a proposed plan, or a resource consent, and also necessary to avoid, remedy, or mitigate any actual or likely adverse effect on the environment —*
- (i) *caused by or on behalf of the person; or*
 - (ii) *relating to any land of which the person is the owner or occupier:*
- (c) requiring that person, being —
- (i) an occupier of any land; or
 - (ii) a person carrying out any activity in, on, under, or over a water body or the water within the coastal marine area, —
- who is contravening section 16 (which relates to unreasonable noise) to adopt the best practicable option of ensuring that the emission of noise from that land or water does not exceed a reasonable level.
- (2) Where any person is under a duty not to contravene a rule in a proposed plan under sections 9, 12(3), 14(2), or 15(2), an abatement notice may be issued to require a person —
- (a) to cease, or prohibit that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer, contravenes or is likely to contravene a rule in a proposed plan; or
 - (b) to do something that, in the opinion of the enforcement officer, is necessary in order to ensure compliance by or on behalf of that person with a rule in a proposed plan.
- (3) An abatement notice may be made subject to such conditions as the enforcement officer serving it thinks fit.
- (4) *An abatement notice shall not be served unless the enforcement officer has reasonable grounds for believing that any of the circumstances in subsection (1) or subsection (2) exist.*

(Emphasis added)

[52] In more serious cases, (or where a person has failed to comply with an abatement notice), the Council may apply to the Environment Court for an enforcement order. The type of orders that can be made are set out in s 314(1):

314 Scope of enforcement order

- (1) *An enforcement order* is an order made under section 319 by the Environment Court that *may do any 1 or more of the following:*
- (a) require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the court, —
 - (i) contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for

- a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); or
 - (ii) is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
 - (b) *require a person to do something that, in the opinion of the court, is necessary in order to—*
 - (i) *ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or*
 - (ii) *avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:*
 - (c) *require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:*
 - (d) require a person to pay money to or reimburse any other person for any actual and reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect on the environment, where the person against whom the order is sought fails to comply with—
 - (i) an order under any other paragraph of this subsection; or
 - (ii) an abatement notice; or
 - (iii) a rule in a plan or a proposed plan or a resource consent; or
 - (iv) any of that person’s other obligations under this Act:
 - (da) *require a person to do something that, in the opinion of the court, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment relating to any land of which the person is the owner or occupier:*
 - (e) change or cancel a resource consent if, in the opinion of the court, the information made available to the consent authority by the applicant contained inaccuracies relevant to the enforcement order sought which materially influenced the decision to grant the consent:
 - (f) where the court determines that any 1 or more of the requirements of Schedule 1 have not been observed in respect of a policy statement or a plan, do any 1 or more of the following:
 - (i) grant a dispensation from the need to comply with those requirements:
 - (ii) direct compliance with any of those requirements:
 - (iii) suspend the whole or any part of the policy statement or plan from a particular date (which may be on or after the date of the order, but no such suspension shall affect any court order made before the date of the suspension order).

(Emphasis added)

(b) *Building Act requirements*

[53] The purposes of the Building Act 2004 are set out in s 3:

3 Purposes

This Act has the following purposes:

- (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

[54] The Building Act 2004 regulates a number of different stages in the building construction process. The provisions are designed (among other things) to “promote the accountability of ... building consent authorities who have responsibilities for ensuring that building work” complies with the Building Code.⁴³ In summary:

- (a) No “building work” may be undertaken except in accordance with “a building consent”.⁴⁴ For the purposes of s 48(1) of the Building Act 2004, the Council, for all practical purposes in the present case, is the relevant “building consent authority”.⁴⁵
- (b) Before construction begins, an owner intending to carry out such work must apply for a building consent for the proposed building work.⁴⁶ An application for building consent must be accompanied by plans and specifications that set out the nature of the work to be undertaken in a manner that meets the requirements of the Building Code.⁴⁷ The Building Code “prescribes functional requirements for buildings and the performance criteria within which buildings must comply in their intended use”.⁴⁸

⁴³ Building Act 2004, s 3(b), set out at para [53] above.

⁴⁴ Building Act 2004, s 40(1).

⁴⁵ The precise position is set out at para [71] below.

⁴⁶ Building Act 2004, s 44. The method by which application should be made is set out in s 45 of the Building Act.

⁴⁷ Ibid, s 17.

⁴⁸ Ibid, ss 17 and 49(1).

(c) Exercising its power as a building consent authority, the Council is required to satisfy itself “on reasonable grounds that the provisions of the Building Code would be met ... [if the building work were] properly completed in accordance with the plans and specifications that accompanied the application”.⁴⁹ If it were so satisfied, the Council is obliged to grant a building consent for the relevant work.⁵⁰

(d) Once a building consent is granted, the entity responsible for carrying out construction work must ensure that it does so in accordance with the Building Code, and the consented plans. Section 14E(1) and (2) of the Building Act 2004 states:

14E Responsibilities of builder

(1) In subsection (2), builder means any person who carries out building work, whether in trade or not.

(2) A builder is responsible for—

- (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:
- (b) ensuring that building work not covered by a building consent complies with the building code.

....

(e) The Council must carry out inspections of the building work and satisfy itself, on reasonable grounds, that the builder has undertaken it in accordance with the relevant building consent, and the Building Code.⁵¹ I emphasise that the Council’s role is *to inspect* the building work. The Council is not a *de facto* project manager. The primary responsibility for ensuring compliance with the building consents and Building Code rests throughout on the builder.⁵²

(f) When the building work has been completed in accordance with the building consent (and the Building Code), and all inspections have been undertaken, the Council must issue a code compliance certificate. That certifies that the building work does comply with the Building Code.⁵³

⁴⁹ Ibid, s 17.

⁵⁰ Ibid, s 49(1).

⁵¹ Ibid, s 90.

⁵² Ibid, s 14E(2), set out at para [54](d) above.

⁵³ Ibid, s 94.

[55] In *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*,⁵⁴ a majority of the Supreme Court expressed the reasons for the Council’s statutory functions and why it was necessary for them to meet them included “but is not limited to, protection of the health and safety of those using the building”. That explains why the Council acts as a check on work undertaken by the builder but is not to be regarded as in a position akin to a project manager.

[56] The Building Code is Schedule 1 to the Building Act 2004. For present purposes, the stability requirements of B1 and B2, and the construction/demolition hazard provisions of F5 assume the most relevance.

(c) *Dangerous buildings*

[57] Section 121 of the Building Act 2004 defines what is meant by the term “dangerous building”:

121 Meaning of dangerous building

- (1) A building is **dangerous** for the purposes of this Act if, —
- (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause —
 - (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - (ii) damage to other property; or
 - (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.
- (2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—
- (a) may seek advice from employees, volunteers, and contractors of Fire and Emergency New Zealand who have been notified to the territorial authority by the board of Fire and Emergency New Zealand as being competent to give advice; and
 - (b) if the advice is sought, must have due regard to the advice.

(Emphasis added)

[58] An allied concept is that of an “affected building”. A building is “affected” if it were “adjacent to, adjoining, or nearby” a “dangerous building,” as defined.⁵⁵

⁵⁴ *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2018] 1 NZLR 278 (SC), at para [60], per Ellen France J delivering the majority judgment of Elias CJ, O’Regan J and herself.

⁵⁵ *Ibid*, s 121A(a).

[59] The powers available to the Council, if a building were “dangerous” or “affected,” are set out in s 124 of the Building Act 2004.⁵⁶

124 Dangerous, affected, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

- (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
- (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
- (c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary:
- (d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

...

7. The Council’s policies

(a) Resource consents

(i) Processing resource consent applications

[60] On 1 May 2018, the Council provided a memorandum in which it explained the resource consent process typically applied for developments akin to the Bella Vista subdivision. Those procedures relate to the type of inquiries and the mode of assessment required to respond to an application for consent to subdivide land.

[61] There is no formal document held by the Council which sets out processes by which those responsible for making consent authority decisions should determine applications for land use or subdivision consent. The delegated decision-makers are obliged to apply relevant provisions of the Resource Management Act, with the assistance of guidelines published on the “Quality Planning” website.⁵⁷ I am told that those involved in the consent processes refer

⁵⁶ Requirements for notices requiring building work or restricting entry are set out in s 125 of the Building Act 2004. Measures available to Council to avoid immediate danger are contained in s 129 of that Act.

⁵⁷ www.qualityplanning.org.nz The Quality Planning website (QP) was launched in 2001 to ‘promote good practice by sharing knowledge about all aspects of practice under the Resource Management Act’ among

frequently to this guidance. In addition, a series of forms and check-lists have been prepared to ensure important elements of the process are addressed when applications are considered.

[62] On an application for subdivision consent of the type made by Bella Vista Homes, advice in relation to engineering considerations is provided by the Council’s Development Engineering team. Team members will (among other things) review engineering material provided with the application and, where necessary, seek further information. They will also make recommendations about specific conditions required to ensure that engineering issues are addressed adequately. In doing so the Development Engineering team use a variety of guidance documents and standard check-lists, the relevant parts of which I outline below.

[63] In making decisions, the Development Engineering team may apply provisions of the Council’s Infrastructure Development Code. That is updated annually. The relevant provisions of the (then operative) Infrastructure Development Code, dealing with design standards, is annexed as Appendix A to AECOM’s report of 30 April 2018. The heading for that part of the Code is:

Design Standard: DS–10 Natural Hazards and Earthworks”.

[64] Clause DS–10.1 explains that this section of the Code is intended to set out “requirements for undertaking the assessment of land suitability and stability and the *design* of earthworks to ensure that the development provides a suitable and safe platform for the construction of buildings, *infrastructure* and other structures in order to comply with the outcome requirements of the *City Plan*.⁵⁸

[65] Both “Landform Development” and “Performance Criteria” are set out in the Infrastructure Development Code. Relevantly, clauses DS–10.2(e)-(h), DS–10.3(a) and (b) and DS–10.5.1 provide:

DS–10.2 Landform Development

...

resource management practitioners, council planners, private practitioners, consultants and environmental managers among others. The partnership includes Ministry for the Environment, New Zealand Planning Institute, Resource Management Law Association, New Zealand Institute of Surveyors, Local Government New Zealand and New Zealand Institute of Architects.

⁵⁸ The italicised words represent portions of clause DS–10.1 that can be accessed by way of hyperlink from the electronic version of the Infrastructure Development Code.

- (e) When applying for Resource Consent, each application shall provide Council with a Development Evaluation Report.
- (f) When applying for final signoff or s 224 [Resource Management Act] each completed development shall provide Council with a Development Completion Report.
- (g) Minimise, isolate or eliminate health and safety hazards during both its construction and its use.
- (h) Minimise, isolate or eliminate any adverse ecological and environmental effects.

DS-10.3 Performance Criteria

Designated safe building platforms shall meet the following criteria:

- (a) The performance and functional requirements of sections B1 and E1 of the New Zealand Building Code.
- (b) Works recommended in the geotechnical and other hazards sections of the Development Evaluation Report have been completed and certified.

DS-10.5.1 Geo-Professional and Geo-Professional Accreditation System

For geotechnical hazards professional opinion is provided by a Geo-Professional.

The Geo-Professional is approved to compile the portion of the Development Evaluation Report and the Development Completion Report relating to geotechnical hazards and undertake the requirements outlined in DS-10 – Appendix C – Geo-Professional Accreditation System on geotechnical issues within the City.

Council maintains a geotechnical classification and accreditation system to ensure the opinion and services provided by Geo-Professionals adequately manage the risks associated with the complex soils in the City.

Council will only accept geotechnical opinion from an accredited Category 1 or 2 Geo-Professional.

DS-10 Appendix C – Geotechnical Classification and Accreditation System outlines the classification and accreditation process and its link with the landform classification system.

[66] Check-list AC-1 is part of the Infrastructure Development Code. It is used on an application for a resource consent. For present purposes, the following aspects are relevant:

- (a) Under the heading “Development Evaluation Report”, an item called “Geotechnical Assessment Report” is listed.
- (b) Under the heading “Drawing Information”, consideration should be given (among other things) to topographical information, structures, contours,

proposed earth and development works, subsoil drains and the position or type of any natural hazard.

[67] A series of “Practice Notes” have been developed to deal with various types of assessment required on a subdivisional consent application. One of those is entitled “Practice Note For: Assessment of Geotechnical and Other Hazard Conditions”. The introductory paragraph to that Practice Note states that its purpose “is to enable the major geotechnical issues that may be present on a site to be assessed and appropriate conditions drafted for a Resource Consent”. In relation to “slope stability”, slopes above 2:1 (26.5 degrees) and 3:1 (18 degrees) must be referred to a specialist geotechnical engineer to report in accordance with specified criteria. The Practice Note informs the reader that “slopes steeper than 3:1 become “at risk” of potential instability,” while above 2:1, “the potential risk is high and careful consideration is required for any development”.

[68] For soils that are “compressible” a Category 1 Geo-Professional is required “to determine appropriate treatment of site, on-going consolidation including secondary consolidation”. Peer reviews are required for structures to be located within the range of 2:1 and 4:1. The 4:1 slope stability reference is to “potential ‘runout’ areas below steep slopes”.

(ii) Monitoring and enforcement functions

[69] In my view, the Council’s relevant monitoring and enforcement obligations under the Resource Management Act consisted of:

- (a) Monitoring the exercise of resource consents (including conditions that continued in effect after deposit of a survey plan under s 224 of the Resource Management Act) within the Council’s district;⁵⁹
- (b) Monitoring compliance with the City Plan, both before and after the subdivision was completed;⁶⁰

⁵⁹ Resource Management Act 1991, s 35(2)(d), set out at para [47] above. See also, paras [48] and [49] above.

⁶⁰ Ibid, s 35(2)(b), set out at para [47] above.

- (c) Monitoring compliance with the consent notice registered against the individual titles in the subdivision,⁶¹ as a continuing condition of the subdivision consents.
- (d) Taking steps to enforce any breaches detected during the monitoring phase.⁶²

[70] The Council’s Environmental Monitoring Office includes “enforcement officers” who have been appointed for the purposes of the Resource Management Act.⁶³ They review notifications from planning personnel and take steps to ensure that plans are approved before the activities begin. In addition, they review registers to identify those consents that require monitoring at a proximate time or establish a future monitoring date. After reviewing the relevant consent, monitoring inspection notes are created, following which a site inspection is held to investigate any concerns. Decisions are then made as to what type of enforcement action should be taken, if any.

(b) Building Act requirements

[71] The Council’s Building Services Department is a registered building consent authority under the Building Act 2004. Such authorities must exercise powers in accordance with the Building Act 2004 and the Building (Accreditation of Building Consent Authorities) Regulations 2006. Regulation 5 requires “policies, procedures, and systems” to be “appropriate for the purposes” and “implemented in a consistent and effective manner”. The Council uses a Quality and Systems’ Manual to comply with those obligations. I am told that is the “cornerstone document” for decision-making by the Building Services Department. The November 2015 version of the Manual applies to the present case.

[72] During the course of the Bella Vista subdivision project, two different computer systems were used to track building consent and inspection processes. Initially, a programme called GoGet was used. From 30 March 2017, the AlphaOne programme became the core system.⁶⁴ Both systems operate on a series of embedded questions and prompts for the building consent processing officer or building inspector to address when undertaking their functions under the

⁶¹ Ibid, s 221(1) and (2), read in conjunction with s 35(1)(d) of the Act. The consent notice is a condition of the “resource consent” which comes within the definition of “resource consent” in s 2(1) of the Act. Section 221(1) and (2) are set out at para [49] above.

⁶² For example, through the use of abatement notices and enforcement orders: see paras [50]–[52] above.

⁶³ Resource Management Act 1991, s 38.

⁶⁴ However, some entries were made through the AlphaOne system from 13 March 2017.

Building Act. Before the transition date, building consent processing prompts were in GoGet. After the transition date, they remained available to inspectors but were not, in fact, embedded in the new AlphaOne system.⁶⁵ The latter is held remotely “in the cloud”.

[73] Council staff can access the AlphaOne system through desktop computers or tablets. The latter are used for field work. The AlphaOne system identifies inspections to be conducted at particular stages of construction. The building inspector enters data to record his or her findings. Photographs may also be taken and attached to the relevant file. For relatively simple inspections, an inspector may often make only a “pass/fail” decision and record it on the AlphaOne system as such. For more complicated inspections, the inspector’s views are usually completed when back in his or her office. At the time of a final site visit, a decision is made whether to issue a code compliance certificate.⁶⁶

[74] Because the AlphaOne regime does not include embedded prompts for development engineering activities, members of the Development Engineering Team have crafted a set of questions and prompts for assessing building consent applications. The answers are cut and pasted into the “filenote” tab on the AlphaOne system, to ensure relevant information is recorded.

[75] The engineering prompts used for the AlphaOne system are designed to assist the development engineering team members to discharge their relevant regulatory responsibilities. The prompts include a segment dealing with “ground and geotechnical”:

B. Ground and Geotechnical

- (i) 3604 foundations or evidence of poor capacities.
- (ii) Specific design – Commercial PS1, ground investigations.
- (iii) Is a ground confirmation required?
- (iv) Check land gradients, is site located within 2:1, 3:1 or 4:1 slope zones?
- (v) Relic slips.
- (vi) Peat or other unsuitable materials.
- (vii) Min BPL requires m.
- (viii) Cat 1 review required, review DS10, (liquefiable soils, slope stability, peat etc.)

⁶⁵ See para [74] below.

⁶⁶ At this stage, the Council is also undertaking continuing functions to monitor compliance with resource consent conditions granted under the Resource Management Act 1991.

7. The defects

(a) Overview

[76] The various geotechnical and structural engineering reports have identified a number of serious deficiencies in the construction of the dwellings. The most significant are:

- (a) The earthworks undertaken by Bella Vista Homes to construct the dwellings on the subdivided sections; in particular, the absence of necessary retaining walls.
- (b) Structural defects in the construction of the dwellings themselves.

[77] Ms Rose McLaughlan, (a consultant with almost 30 years' experience in the building control and regulatory environment; including time spent as a building inspector, building certifier, building consultant and technical expert) commented on the nature of the problems in her report of 12 April 2018. I start by summarising, in my own words, the defects identified by Ms McLaughlan:

- (a) An absence of retaining walls that has led to erosion of the slopes that sit between the Lakes Boulevard and Aneta Way properties. None of the four properties in respect of which code compliance certificates were issued (namely 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way) are affected by this defect.
- (b) An absence of engineering inspection reports dealing with ground conditions, footings and block walls. These defects apply to all of the Lakes Boulevard properties.
- (c) Failure to provide a building platform to Raft slabs, and undermining of footings.
- (d) Failure of the tanking membrane, and inadequate drainage behind block walls.
- (e) General construction defects, such as cladding, drainage and structural connections.

(f) Vehicle access and manoeuvring.

[78] The defect identified in (a) is a specific geotechnical problem. The generic defects listed in (b)–(e) are relevant to the question whether the inspections undertaken were adequate. The final problem, vehicle access, arises from particular provisions of the City Plan which require vehicles to be manoeuvred in such a way that they can exit the driveways by turning left into Lakes Boulevard. The steepness of the driveways causes that problem.⁶⁷ I see no need to discuss this issue further. While important, it does not impact on the conclusions I have reached, or the recommendations I make.

[79] Ms McLaughlan was commissioned in early February 2018 to undertake an independent investigation into the Bella Vista subdivision to ascertain what work was required on uncompleted buildings, so that the Council could issue code compliance certificates. Her brief required a review only of the properties that had not received a code compliance certificate. However, Ms McLaughlan's engagement was later extended to include the dwellings at 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way, for which code compliance certificates had been issued.

[80] Ms McLaughlan considered that the identified defects were common to most of the dwellings, although some had particular problems of their own. In a report dealing specifically with 311A Lakes Boulevard,⁶⁸ she said:

1.13 For the most part, the issues I have found are common across the entire site although some buildings have their own unique problems. The reason that I am comfortably able to reach a decision as to compliance is I have been able to view construction of both unfinished and finished homes. The fact that work was carried out by the same tradesmen also confirms that any problems identified on one building is likely to be systemic. Further to this, Council have engaged structural engineers who have opened several of the completed building and identified the same construction defects that I identified in the three buildings still under construction.

1.14 I have had full access to Councils records, including inspection reports and photos where these are available. It is from this investigation that I believe I have confidently reached a conclusion on the status of compliance for each building.

⁶⁷ Generally, see para [21](b) above.

⁶⁸ See also comments made by the authors of the BCD Group report of 12 April 2018 in respect of 311A Lakes Boulevard, summarised at paras [117]–[119] below.

- 1.15 This report will discuss at a high level the issues I have discovered across the various sites, which I have already explained are systemic. Within this report are site-wide photos which are indicative of the problems I have observed. Also included in this report are photos that are unique to this building and describe the defects that I have noted.

(b) The geotechnical reports

[81] The Lakes subdivision had its origins in (what was called) the “Pyes Pa west urbanisation development” for which a geotechnical assessment report was prepared in October 2003 by S & L Consultants Ltd. Coffey Geotechnics prepared its first report in March 2013, as part of a site investigation for Stage 3 of the Lakes subdivision.

[82] The April 2015 Coffey report was provided to Council on or about 24 April 2015. It was prepared in relation to the Lakes subdivision, following completion of earthworks for Stages 3A and 3B of the Lakes subdivision. Collectively, those phases were known as Stage 3AB. That part of the subdivision is located near the intersection of Takitimu Drive (SH 36) and Pyes’ Pa Road. Before work began, “the majority of the site consisted of an elevated, flat or gently rolling north-south oriented plateau”.

[83] The April 2015 Coffey report referred to earlier conclusions drawn by S & L Consultants Ltd with regard to the whole of the Stage 3 area. The author stated:

The [S & L] report concluded that the site was generally suitable for subdivision and residential development, subject to appropriate design and construction. With regard to the Stage 3 area, S & L determined that the slopes to the west and south-west of the site had been affected by previous instability. The report recommended that future buildings be set back from the crest of these slopes or that the slope profiles should be modified by earthworks to improve their stability.

[84] Figure 7 to the April 2015 Coffey report shows the sections that make up the Bella Vista subdivision as being at the western end of the wider Lakes subdivision. The April 2015 report adopted what Coffey had said in an earlier report provided in April 2013. In that report, Coffey had said that the slope to the east of Stage 3 had also been affected by past instability and that buildings adjacent to that slope within Stage 3 should also be set back from the crest.

[85] Figure 7 refers specifically to building restriction lines. In para 8.6.1 of the April 2015 Coffey report⁶⁹ Lots 1 to 13 and 115 to 124 are identified as being “located adjacent to the 35 metre high Western Batter, which has been formed at a gradient of 1V:2.5H”. The report adds that, to the north, “this batter merges with a very steep natural slope that extends below Lots 50, 51 and 125 to 131”. The report continues:

The natural slope shows visible evidence of recent and historic instability. Stability analyses described in the April 2013 Coffey Geotechnical Investigation Report also indicate that this slope has a relatively low factor of safety ... against slope movement, particularly under elevated groundwater or extreme storm conditions. To reduce the risk to dwellings above this slope, a Building Restriction Line (BRL) has been placed on the affected lots as shown on Figure 7.

...

Development beyond (west of) the BR line will require specific input and design by a Category 1 geo-professional. ...

....

[86] The April 2015 Coffey report contains a discussion of earthworks and drainage features for Stages 3A and 3B of the Lakes subdivision. The Summary of Conclusions and Recommendations refers specifically to the lots to be comprised in the Bella Vista subdivision. The report focussed on broader aspects of Stages 3A and 3B of the Lakes subdivision, of which the land comprised in the Bella Vista subdivision represented a minor part. That is an important consideration when assessing whether those responsible for processing the subdivision consent applications ought to have made further inquiries into geotechnical aspects of the proposed new subdivisions.

[87] The April 2015 Coffey report did signal some potential problems of relevance to the Bella Vista subdivision application:

- (a) Testing undertaken by Coffey had indicated that the depth of topsoil on some of the Stage 3AB lots may exceed 300mm, as opposed to the nominal thickness of 100mm to 300mm. The author stated that “it was important that future owners or builders confirm the depth of topsoil when preparing site development plans”. The report added that “localised scouring occurred within [a layer of 300mm topsoil placed over the Western Batter] in 2014 during a heavy rainfall event”.

⁶⁹ See para [142] below.

That area had been excavated and reinstated in early 2015, with no further erosion or scouring having been identified.

- (b) Reference was made to “static settlements” that had occurred in areas where earlier earthworks had not been monitored adequately. The possibility of “long term secondary or ‘creep’ settlement might occur on lots which were “partially underlain by fill and partially by natural ground”. In giving examples of lots that might be affected, the report referred to Lot 16, which is one of those comprised in the Bella Vista subdivision.
- (c) With reference to slope stability and building restriction lines, reference was made to Lots 1 to 13 and 115 to 124, all located adjacent to the 35 metre high Western Batter. Lots 9 to 13 (inclusive) and 115 and 116 fall within the Bella Vista subdivision.

[88] In January and February 2017, having been engaged by Bella Vista Homes to undertake some geotechnical work, Mr Matt Packard, of CMW Geosciences Ltd, reviewed geotechnical information for Stages 3A and 3B of the Lakes subdivision, with which the April 2015 Coffey report had dealt.⁷⁰ He also investigated subsoils in the vicinity of building platforms near 5 and 6 Aneta Way.

[89] Mr Packard set out his views in emails sent to the Council on 10, 17 and 18 February 2017. The content of his email of 10 February 2017 was largely replicated in another that was sent to Bella Vista Homes on 14 February 2017. Because it was sent to the Council, I quote from the email of 10 February 2017:⁷¹

No’s 5 & 6 Aneta Way: The Coffey GCR shows around 13m of excavation was completed across these lots during bulk subdivision earthworks between 2007 and 2015. This has resulted in significant unloading of the ground, and therefore the effect of the new filling placed as part of the residential builds within these lots is considered to be negligible. This was supported also by hand auger boreholes we recently drilled to 5m depth around and below these lots, which showed the natural subsoils typically comprised of medium dense sands and very stiff sandy silts. The quality of the recently filling within these lots is beyond the scope of our assessment as it has been previously assessed by others.

⁷⁰ For more detail about the circumstances in which Mr Packard became involved, see paras [178]–[194] below.

⁷¹ See also, the photographs reproduced at paras [158] and [159] below.

Our main concern with these two lots is the steep slope below on account of the excavations completed. We understand these will be supported by future building development later on but are currently unsupported at present and there is a risk of ongoing scour and slumping which may impact the dwellings above. We recommend that a fill buttress is constructed in a similar manner as that recommended for No 3 Aneta Way to provide interim support until the build below is commenced. The bund would be located across 307A and 309A Lakes Boulevard. Once built, slope stability concerns for these two lots would be resolved.

We understand that underpinning within No 6 Aneta Way hasn't yet been completed and Bella Vista Homes should refer to their structural engineer to confirm if this is required or not.

For Lots Accessed from Lakes Boulevard: It is understood that building platforms for these are all in cut. *Provided cuts are no steeper than 1:2 (vertical to horizontal) then the risk of large scale slumping is minor, though it must still be accepted that ongoing piping and scour can still occur on account of the presence of pumiceous sands and gravels.* For these lots, filling over 600mm (should there be any) will still require assessment by a CPEng on account of settlement considerations. Walls to support cuts along driveways will also need CPEng design. *Site safety during dwelling construction will need to be considered by the structural engineer and a written methodology provided – in particular safe construction sequencing and the safety of those working between block walls and the rear excavations.*

...

(Emphasis added)

[90] On 17 February 2017, Mr Packard wrote to an inspector (the designated inspector) who had been designated to liaise with Bella Vista Homes about construction issues. The topic of the email was 4 Aneta Way.⁷² Mr Packard said:

Our main concern with No. 4 Aneta Way is the proximity of the dwelling to [Council] service trenches, in particular the risk of lateral movement of the dwelling should the trench backfill be substandard. We therefore visited the site on 16 February 2017 and drilled several hand augers through the trench backfill along the pipe alignment. The hand augers encountered predominantly stiff sandy silts with an undrained shear strength greater than 120kPa and medium dense silty sands with dynamic cone penetrometer readings of no less than 4 blows per 100mm of penetration.

[91] On 18 February 2017, Mr Packard answered a query about a request made during a site meeting at which the Council had requested a review of any fill remaining on the site at 4 Aneta Way in light of the building restriction line. It had asked for a Category 1 geotechnic engineer either to conduct that review or to provide a PS 2. Mr Packard is a Category 1 engineer, but

⁷²

See para [194] below.

because he had not been engaged to review or inspect the pile, design and construction, he did not provide any peer review or PS 2.

[92] Later in 2017, Bella Vista Homes obtained further reports from Coffey Geotechnics to deal with earthworks and retaining wall issues. It seems that the Council knew that these existed; reference is made to them in the April 2018 AECOM report. Mr Trigger, one of the authors of that report, was engaged by the Council as a consultant in 2017 and was dealing with Mr Cancian and others at Bella Vista Homes in relation to the construction work.⁷³

[93] I refer to two examples of “site-specific” reports, were prepared by the Tauranga and Auckland offices of Coffey Geotechnics respectively. The Council has confirmed that while it received a copy of the second report to which I refer, there is nothing to suggest that it was provided with the first.⁷⁴

- (a) On 28 June 2017, Coffey (Tauranga) reported to Bella Vista Homes on Lot 15 (now 309 and 309A Lakes Boulevard, situated directly under 3 and 5 Aneta Way) to observe earthworks and to carry out tests, by drilling three hand-auger bore holes and undertaking two Dynamic Cone Penetration tests. That report concluded with the following comments:

We note that the proposed retaining walls on this site are being designed by others and were not included in our construction observations. We have also not reviewed the retaining wall design calculations.

Furthermore, Coffey recommends that construction of retaining walls surrounding the building platform be undertaken before construction of the building foundations, to lower the risk of instability within the building platform.

(Emphasis added)

- (b) On 19 July 2017, Coffey (Auckland office) reported to Bella Vista Homes in the form of a “Producer Statement – Design Review (PS2) for Main Retaining Wall at 303A (Lot 7 [one of the subdivided lots of what was Lot 12] Lakes Boulevard”. 303A Lakes Boulevard is below an area of reserve, as opposed to being in proximity to buildings on Aneta Way that are on higher ground.

⁷³ See para [180]–[194] below.

⁷⁴ However, see a reference to a similar report in relation to Lot 13, dated 27 July 2017, discussed at para [175] below.

Coffey’s scope of review was “limited to the information supplied to [it] by the project structural engineer (Manktelow Consulting Engineers Ltd ...) in terms of design of the wall and the soil parameters selected for design purposes”. The author of the PS2 stated that he believed “on reasonable grounds” that 303A Lakes Boulevard, “if constructed in accordance with the drawings, specifications, and other documents provided or listed in [an] attached schedule” would comply with relevant provisions of the Building Code.

[94] The 28 June 2017 report is important. It demonstrates that Bella Vista Homes knew, on its receipt in June 2017, that the sequence in which the foundations and retaining walls was critical to minimising the risk of instability within the building platform. I have seen no evidence to suggest this report was provided to the Council. Having said that, a similar report dated 27 July 2017 appears on the building consent file for 309A Lakes Boulevard, and expresses the same conclusions.⁷⁵

[95] On 14 December 2017, Beca was engaged by the Council’s solicitors to provide a professional opinion in relation to a “slope hazard” that had been identified. Figure 1 to the Beca report is a Site Layout Plan which highlights “slopes of interest”. They cover the entire boundary to the rear of the Lakes Boulevard properties, on which 3, 5 and 6 Aneta Way stand, in proximity to a reserve. What are described as Slopes 2, 3, 4 and 5 consist of the area between 3, 5 and 6 Aneta Way and 311A, 309A and 307A Lakes Boulevard respectively, as well as a slope that runs parallel with the public walkway leading from Lakes Boulevard to Penetaka Heights, adjacent to 1 and 3 Aneta Way and 311 and 311A Lakes Boulevard respectively. Beca reported that the aerial photograph contained in Figure 1 “pre-dates excavation for building platforms for 303A, 305, 307A, 309A and 311A Lakes Boulevard”.

[96] The Council commissioned Beca after Bella Vista Homes had been put into liquidation (on 30 November 2017) and work on the subdivision site had ceased. Beca described the area of interest as “part of the development building platforms [that had] been cut into the existing sloping terrain – ... – resulting in steep unsupported cuts which have been subjected to significant rilling erosion”. Beca considered 13 of the dwellings were potentially affected by the hazard. They were 303, 303A, 305, 305A, 307, 307A, 309, 309A, 311 and 311A Lakes

⁷⁵ See para [175] below.

Boulevard, as well as 3, 5 and 6 Aneta Way. A draft report was provided to the Council's solicitors on or about 19 December 2017. It was based on a visual site inspection and a desktop review of information provided by the Council. Understandably, Beca made it clear that it had had limited opportunity to review all relevant information at the time the draft report was presented.

[97] The two significant issues on which Beca was asked to advise were whether any of the buildings in question could be considered "dangerous" for the purposes of the Building Act 2004 and whether the "slope hazard" raised concerns under cl F5 of the Building Code, which deals with construction and demolition hazards. Beca did not undertake any independent geotechnical investigation; nor was it asked to do so. For the same reason, no quantitative analysis for slope stability was carried out.

[98] In addressing the development history, Beca observed:

- (a) The wider Lakes subdivision had been prepared by excavating down by approximately 12–13 metres to a competent ignimbrite, as part of Stages 3A and 3B. Those earthworks were undertaken by The Lakes (2012) Ltd.
- (b) Bella Vista purchased lots on Lakes Boulevard and Aneta Way for its own development.⁷⁶
- (c) Bella Vista Homes completed construction of 3, 5 and 6 Aneta Way between 2016 and 2017.
- (d) The sections on Lakes Boulevard were each subdivided into two. Construction work took place in 2016 and 2017. This "involved creating two terraces within the lots, with houses cut into the sloping terrain and the construction of partial basements". Beca added:

It appears that steep (near vertical) cut slopes were used to form the terraces. No retaining walls have been constructed to stabilise slopes between adjacent properties [as at 19 December 2017].

⁷⁶ See also para [33] above.

- (e) Worksafe New Zealand visited the Lakes subdivision site in early October 2017, and issued a prohibition notice on 13 October 2017 in relation to work adjacent to “the steep unsupported cut slopes”. As a result of that decision, limited work was undertaken from that point.
- (f) At the time Beca inspected the Lakes development, of the properties with which it was concerned,⁷⁷ 307A Lakes Boulevard and 3, 5 and 6 Aneta Way were occupied.

[99] Addressing the dwellings at 3, 5 and 6 Aneta Way, Beca expressed the following views:

- Slope failure is likely if a heavy rain event occurs, but not otherwise
- Varying degrees of damage to the buildings on 3, 5 and 6 Aneta Way is likely if a heavy rain event occurs, but not otherwise.
- Immediate injury to persons as a result of damage to the buildings (due to slope failure) is **not likely** at 3, 5 and 6 Aneta Way.
- The likelihood of injury to persons in the event the damage remains unremediated will need to be assessed at the time to determine ongoing risk of injury to occupants.
- Damage to other property resulting from damage to 3, 5 and 6 Aneta Way (due to slope failure) is **not likely**.

[100] Based on the information available to it in late December 2017, Beca did not consider that any of the dwellings were “dangerous” for the purposes of s 121 of the Building Act 2004.⁷⁸ Nevertheless, the situation was dire. While opining that the buildings at 303A, 305, 307A, 309A and 311A Lakes Boulevard were “likely to suffer damage from slope failure of the type” previously described, Beca did not consider that the type of risk of imminent injury or other property damage was present at that time. All of those properties are situated in the area of the slope hazard, at the rear of the subdivided sections as viewed from Lakes Boulevard.⁷⁹ In particular, Beca said, as at 19 December 2017:

The buildings are at risk of being struck by slope debris from any slumping failure of the cut slopes to the rear of the buildings. If the debris is not cleared promptly then the timber would likely deteriorate through contact with damp soils. The slumped mass and

⁷⁷ See para [88] above.

⁷⁸ Set out at para [57] above.

⁷⁹ For no apparent reason, 305 Lakes Boulevard is the only one of the properties at the rear of the sections that does not have an “A” added as a suffix. 305A Lakes Boulevard is situated on the road front.

weight would apply a surcharge on the basement walls which is likely to exceed any surcharge assumed in design. In this instance some building damage is likely, however, the buildings are unlikely to collapse.

(Emphasis added)

[101] Beca did not consider it was likely that the dwellings on the Lakes Boulevard road front were at risk through movement of cut slopes, but did say that “the existing structures may be affected by erosion which could require remedial works and repairs”.

[102] In addressing F5 of the Building Code, Beca considered that “the temporary (ie incompleting construction stage) slopes at the rear of the Lakes Boulevard sections represent a safety hazard” and that “there is a likelihood of objects falling onto people or property, on or off the site”. A strong recommendation was made that the Council’s “safety specialists visit the site to carry out an assessment of the safety measures currently in place and specify corrective action if and where considered necessary”.

[103] In early 2018, the Council engaged AECOM to undertake an evaluation of whether the dwellings in the Bella Vista development were “dangerous buildings”. By this time, AECOM had significantly more information available to it than did Beca. The 12 April 2018 AECOM report was the result of those investigations.⁸⁰

[104] For present purposes, the question whether the Bella Vista subdivision dwellings were “dangerous” assumes the most significance. AECOM was asked to assess whether dwellings on Lakes Boulevard and Aneta Way were “dangerous” for the purposes of s 121 of the Building Act 2004.⁸¹ In an executive summary at the start of its 12 April 2018 report, the authors said:

The geotechnical engineering assessment is primarily required due to the unretained slopes (up to approximately 6.0m high) at the rear of the Lakes Boulevard buildings. It is considered that in heavy or prolonged rainfall it is likely that instability will occur in the slopes which could result in destabilisation of 5 and 6 Aneta Way, and the potential collision of debris with the buildings below on Lakes Boulevard. Secondly, ongoing erosion and lack of support to parts of the foundations of 301A and 307A Lakes Boulevard is likely to cause partial collapse of the masonry walls in these buildings.

It is our expert opinion that the buildings at 301A, 305, 305A, 307, 307A, 309A Lakes Boulevard and 5, 6 Aneta Way are dangerous for the purposes of Section 121 of the

⁸⁰ While of less significance for present purposes, the Council also received reports, in March 2018, from AECOM and Golder that are relevant to the “dangerous buildings” issue”: see paras [21](d) and [26](b).

⁸¹ Set out at para [57] above.

Building Act 2004, and should not be occupied until work is carried out to reduce or remove the danger. ...

(Emphasis added)

[105] The 12 April 2018 AECOM report focussed on the unretained slopes at the rear of the Lakes Boulevard buildings, and the lack of support to parts of the foundations of dwellings at 301A and 307A Lakes Boulevard which, with continuing erosion, had the potential to cause partial collapse of masonry walls.

[106] For present purposes, I focus only on those geotechnical deficiencies that AECOM considered brought relevant dwellings within the definition of “dangerous building”. In forming their opinions, the geotechnical engineers did not consider specifically the effect of an earthquake or the possibility of soil liquefaction. The views were formed against the background of information gathered from earlier site inspections by AECOM in which “the possible presence of underground voids, such as pipes and tombs formed by subsurface waterflow” were identified.

[107] In carrying out their assessment, AECOM:

- (a) Observed the unretained slope heights and the materials within the unretained slopes along the rear of the Lakes Boulevard sites.
- (b) Identified materials at the western end of the subdivision as being “predominantly un-welded ignimbrite”, a fine-grained pumice sand.
- (c) Identified that, at the eastern end of the subdivision, “the ignimbrite cutting is overlain by a silty/clayey fill”. The authors add that this “fill is not identified in the geotechnical completion report for the Lakes development and appears to have been undertaken as part of the site works that were undertaken by Bella Vista Homes”.
- (d) Did not locate any documents to demonstrate whether the fill has been placed and compacted in accordance with relevant engineering standards.

[108] The 12 April 2018 AECOM report refers to a “well-documented history of landslides” in Tauranga. It records “a history of flow failures, which means displaced soil behaves like a liquid slurry that can result in significant building damage, injury or death”. Contributing factors to the increase of likelihood of instability are “over-steep cuttings, poorly compacted fills and poor storm-water controls”.

[109] While the April 2015 Coffey report addressed the topic of earthworks for the wider Lakes subdivision (in the form of cutting of slopes and subsequent filling), it did not discuss the type of earthworks that might be required in the future for developments of particular parts of the wider subdivision. That work was undertaken after the April 2015 Coffey report was prepared.

[110] On 14 February 2017, Mr Packard recommended that the slopes be buttressed with rockfill until the walls were constructed.⁸² He also recommended that cut slopes at the rear of Lakes Boulevard sites be no steeper than one vertical to two horizontal, to prevent slope instability during construction. AECOM expressed the view that the recommendations for the stability of the slopes were “not followed by the developer”. While I do not express any comment on the accuracy of the statement, I note that the issue identified by AECOM was not dissimilar to that raised by Coffey Geotechnics in its report to Bella Vista Homes of 28 June 2017⁸³ in relation to the sequence of work to be undertaken. There is no evidence to suggest that sequencing recommendation was followed.

[111] In determining whether erosion and/or instability is likely to occur in the “ordinary course of events” AECOM referred to annual rainfall figures for Tauranga, as captured in Council records. AECOM recorded that the “rainfall depth estimates, particularly from two hours onwards, have the potential to cause significant erosion when concentrated in an uncontrolled manner in erodible soils such as those at the site”. In prolonged rainfall, for example over two or more weeks, soil water content increases, putting increased water pressure in the soils due to elevated ground water levels and possibly perched water table.

⁸² See para [89] above.

⁸³ See para [93](a) above. See also the report of 27 July 2017, to which reference is made at para [175] below.

[112] On 30 April 2018, AECOM provided its further geotechnical assessment of all of the properties on the Bella Vista subdivision. It concluded:

- (a) Bella Vista Homes had provided insufficient detail in its resource consent applications to show that the development could be undertaken in accordance with regulatory requirements.⁸⁴
- (b) No contemporary geotechnical report appeared to have been made available to (or requested by) the Council, in a manner that conforms with relevant provisions of the Infrastructure Development Code.⁸⁵
- (c) The September 2015 Coffey report was used out of context, with the consequence that the application was based on recommendations made in that report which were not directed to the land comprised in the Bella Vista subdivision.
- (d) There was “widespread non-compliance” with the stability requirements of cls B1 and B2 of the Building Code. AECOM stated that “in many cases as built site works are not in accordance with the approved plans” something that was exacerbated by “insufficient inspections by engineers”. These arose out of the need for Bella Vista Homes to undertake earthworks in order to construct the 21 dwellings over the two subdivided sites.
- (e) Stability concerns included:
 - (i) The stability of site works with respect to unretained slopes and erosion
 - (ii) The absence of a specification, inspection and testing records to check compliance with relevant standards for earth fills
 - (iii) The use of assumed soil bearing capacity for the design of foundations without supporting ground investigations to a suitable depth

⁸⁴ See paras [63]–[65] above.

⁸⁵ See para [65] above.

- (iv) Masonry retaining wall drainage not being in accordance with the engineer's designs
- (v) The presence of poor quality back-fill behind the retaining walls.

[113] Dealing with the first of those points (and by implication the second), AECOM stated:

Had a review by a geotechnical engineer been undertaken [prior to the resource consent application] it is likely that the complexity of constructing large timber pole retaining walls with masonry block walls in close proximity down slope would have been identified, particularly when both are cut below the existing ground surface. If the timber walls were constructed first then they would need to be under-mined to construct the masonry walls. Construction of any retaining walls below a large cut also needs to consider health and safety, and stability of other property. It is also likely that stormwater controls during construction and for the completed developments would have been addressed.

Potential outcomes from a geotechnical review prior to lodging the [resource consent] application may have included changes to the development layouts, controls on sequencing and staging of works and/or changes to the proposed construction methods.

(Emphasis added)

[114] Although the various opinions and conclusions I have set out have not been robustly tested, as required by cl 6 of the Terms of Reference I take them as correct for the purposes of this report.

(c) *The structural concerns*

[115] The Council engaged BCD Group to undertake a review of structural aspects of the Bella Vista subdivision dwellings. On 12 April 2018, BCD Group provided a report directed specifically to an inspection of 311A Lakes Boulevard, on the basis that it would not be possible “without destructive investigation, to reach an informed opinion on the balance of the Bella Vista dwellings”. Subsequently, on or about 1 May 2018, site-specific reports were prepared for the remaining dwellings.

[116] A review of the four reports provided by BCD Group supports the proposition that the principal structural defects are systemic across the Bella Vista subdivision. In those circumstances, I provide a summary of the problems identified by BCD Group's engineers, Mr Colin Jacobson and Ms Morna Nielsen, in relation to its 12 April 2018 report about 311A

Lakes Boulevard. A schedule attached to the BCD Group report of 1 May 2018 in relation to 301 Lakes Boulevard confirms that the identified defects existed in all dwellings.

[117] BCD Group reviewed approved building consent drawings for 311A Lakes Boulevard. They revealed that:

- (a) The two-storey house was to be supported on a Ribraft foundation slab.
- (b) The ground level walls were to consist of a mixture of 20 Series concrete block walls and 90x45mm timber framing supporting the timber floor.
- (c) The garage lintel beam was to be a 230PFC portal frame, with a 250UB 31 beam spanning across the middle of the garage to support the timber higher level.

[118] Ms Nielsen undertook destructive testing by cutting out 450mm square pieces of the plaster board lining at other locations (303A, 305 and 309A Lakes Boulevard) where structural issues had previously been identified in partially completed/unlined dwellings. Inspection and testing was carried out in the downstairs store area, garage, upstairs lounge, upstairs bedroom and the roof space.

[119] As a result of her inspections, Ms Nielsen reported:

- (a) No lintel fixings were observed at the first-floor level. Lintel uplift fixings are metal strapped ties that are fixed from the lintel back to the supporting stud. It is a requirement for all timber frame buildings to have lintel uplift fixings to prevent uplift in the ultimate limit, a one in 500-year wind event.
- (b) Roof bracing fittings had not been installed correctly. The bracing was fixed to the girder truss and over the top chord of the trusses. No bracing was observed at the vertical bulk head between the two split roof planes. That mode of construction did not comply with the building consent because NZS 3604 requires an approved proprietary product to be used as an acceptable solution in this regard.

- (c) Bottom plate fixings were incorrectly installed under load-bearing walls at the first-floor level. Two holes were cut in the plaster board lining to confirm the lack of fixings. NZS 3604 notes the hold downs are to be installed at 800mm centres.
- (d) There were no installed fixings between timber packing and steel beams at the 250 UB31 floor beam, located in the middle of the garage. Fixings were observed between the bottom plate and the 230 PFC garage door lintel steel beam. Fixings of both characters are required to tie the bottom plate or timber packer to the horizontal steel floor beams, and to provide a suitable load path for every day gravity loads and to protect during seismic events.
- (e) Fixings were missing from the bottom plate to the top of masonry block walls in the store area downstairs. A thick concrete block wall on two sides measuring 190mm was exposed. That supports the timber first floor joists. The consented plans show that the intended floor joists were to span over the block wall and cantilever approximately 600mm past the outside edge of the wall. Nor was there any evidence of fixings between the top plate and the top of the masonry block wall.
- (f) No fixings were observed between the floor joists and the top plate at a timber wall location in the garage. No fixings were observed between the floor joists and the bottom plate at the garage door location. No fixings were observed between the floor joists and the bottom plate at the block wall location.
- (g) Joist hangers connect a floor joist to a floor beam and provide continuity of load paths to external walls. NZS 3604 requires timber frame buildings to have joists fixed to beams or an approved proprietary joist hanger product used as an acceptable solution. Joist hangers which had been correctly installed in terms of the manufacturer's installation requirements in two locations where the plaster board ceiling lining were removed to inspect. Either, incorrectly installed or no joist hangers (sometimes both) were observed at the location where the floor joists connect to the 250UB beam in the middle of the garage.

- (h) “Hold down” bolts connect the steel frame to the concrete ground floor slab and transfer forces from the steel post down into the foundations. A different construction detail was used at 311A Lakes Boulevard to what appeared on the detailed approved plans. Two M12 bolts were supposed to have been fixed inside the web of the 230PFC post at the garage door location. Instead, only one M20 bolt was installed in that area.
- (i) Floor diaphragm fixings transfer seismic loads from the first-floor sheets to the supporting floor joists, and from the joists to supporting walls. The fixing requirement of NZS 30604 is to fix floor sheet material at 150mm centres around the edge of the sheet, and 300mm centres to intermediate support. While nails at 150mm centres were fixed along the line of the floor joists, there were none around the outside edges of the floor sheeting where the solid block is located.

[120] In an appendix to BCD Group’s report to the Council of 1 May 2018, in respect of 297 Lakes Boulevard (a property in respect of which a code compliance certificate has been issued), the authors set out a helpful table of defects in relation to all of the subject properties, including those on Aneta Way.⁸⁶ With the exception of those dwellings that remained unlined, all had been subjected to destructive testing. BCD Group opined that:

- (a) Of the dwellings it inspected, only five were safe to occupy on an unconditional basis. They are 2–5 Aneta Way and 303 Lakes Boulevard.
- (b) One other property, 6 Aneta Way, was safe to occupy, subject to checks on the block wall reinforcing bar size being completed.
- (c) Even those properties identified as safe to occupy required significant remedial work.

[121] Ms Nielsen opined that 311A Lakes Boulevard was a “dangerous” building, for the purposes of s 121 of the Building Act 2004.⁸⁷ She formed that opinion due to the lack of bolts

⁸⁶ The five properties at Aneta Way had all been subjected to destructive testing: 2–6 Aneta Way were tested on 18 April, 27 March, 16 March, 18 April and 27 March 2017 respectively.

⁸⁷ Set out at para [57] above.

connecting the timber floor and associated packing to the structural steel work. As a result, there was no reliable load path for floor gravity loads to transfer from the floor joists to the steel work and then to the walls and foundation. Ms Nielsen considered that it was possible that the first floor could detach from the steel and fall to the ground floor. In terms of s 121 of the Building Act, Ms Nielsen opined that defect was likely to cause injury or death. She also expressed the view that the dwelling was “dangerous,” because of the lack of joist hangers installed to connect the joists to the beams.

[122] Of the additional reports of 1 May 2018, I mention only one that dealt with issues arising from construction of the dwelling at 297 Lakes Boulevard. I do so because that was a property in respect of which a code compliance certificate was issued.

[123] Ms Nielsen re-visited 297 Lakes Boulevard on 27 April 2018 to conduct, with the permission of the owners, destructive testing of the completed dwelling. She described the building as “a two-storey structure, with the garage and bedrooms on the lower level and the lounge, kitchen and dining rooms on the upper level”. The purpose of the inspection was to ascertain whether structural issues identified in the three unlined dwellings at 303A, 305 and 309A Lakes Boulevard (all rear sections) were present in the completed dwelling at 297 Lakes Boulevard (which has road frontage).

[124] Ms Nielsen observed defects in the installation of lintel uplift fixings, roof bracing fixtures, bottom plate fixings under load-bearing walls, steel beam over the garage supporting the first floor above, fixings from timber top plate to the top of the masonry block walls, missing fixings between floor joists and the timber top plate, joist hangers supporting floor joists over the garage, steel hold-down bolts and the block wall. She considered that the dwelling was “dangerous,” for the purposes of s 121 of the Building Act, and that all defects outlined in the report required “the plaster board lining to be removed from the walls and ceilings” in order to quantify the full extent of missing timber and steel fixings, before attempts could be made to remediate. Significant remediation work is, in Ms Nielsen’s opinion, required.

[125] Although BCD Group’s opinions and conclusions on structural issues have not been tested robustly, I take those conclusions as correct, as required by cl 6 of the Terms of Reference.

8. Analysis

(a) *Introductory comments*

[126] Clauses 16 and 17 of the Terms of Reference⁸⁸ identify the questions I have been asked to address. Having reviewed the information available to me, I have formed the view that little will be gained by undertaking a minute analysis of what was done by the Council under each of the headings set out in cl 17. Rather, my approach has been to link particular concerns I have about major aspects of the Council's performance of its functions with the difficulties under which the homeowners now labour, because of their exclusion from the properties that they have purchased.

[127] Clause 15 of the Terms of Reference⁸⁹ requires me to focus "primarily" on issues arising out of the Council's involvement which have a "causal connection" with either the reported defects (both structural and geotechnical) in the Bella Vista properties and/or the reasons why dangerous or affected building notices were issued. Having regard to my approach to the questions posed in the Terms of Reference, I am satisfied that all of my findings have such a "causal connection".

[128] I endeavour to explain *what* happened and *how* that brought about the present situation. Any wider inquiry into the reasons *why* the problems reached a level that required all 21 dwellings to be declared dangerous or affected buildings must be deferred. I shall respond under five headings to the issues raised in cl 16 and 17 of the Terms of Reference:

- (a) Did the Council process the resource consent applications for the Bella Vista subdivision adequately?⁹⁰
- (b) Did the Council monitor compliance with the resource consents (including the conditions attaching to them) and the terms of the City Plan adequately?

⁸⁸ Set out at paras [9] and [10] above.

⁸⁹ See para [11] above.

⁹⁰ Clause 17(a)–(c) of the Terms of Reference.

- (c) Did the Council process the building consent applications for each of the dwellings contained in the Bella Vista subdivision adequately?⁹¹
- (d) Did the Council undertake its Building Act inspection functions adequately?⁹²
- (e) Was it appropriate for the Council to issue code compliance certificates in respect of 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way?⁹³

[129] Although this question was not specifically asked, I intend to express a view on whether it was appropriate, on 16 April 2018, for the Council to declare all 21 dwellings either “dangerous” or “affected” buildings.

(b) Resource consent issues

(i) Background

[130] Two separate applications were made, for land use and subdivision consents respectively. Both were made by Harrison Grierson, engineers, Tauranga who had been engaged by Bella Vista Homes for that purpose:

- (a) The first application was lodged on 4 September 2015 and referred to the proposal to subdivide three properties at Penetaka Heights into six residential allotments. Subsequently, this application was supplemented by additional (undated) information provided by Bella Vista Homes itself.
- (b) The second related to the proposal to subdivide the Lakes Boulevard sections into 16 residential allotments. That application was lodged on 23 November 2015.

[131] With the exception of 305A, all of the dwellings to be built on Lakes Boulevard which were given the suffix “A” were situated at the rear of the lots on which they were being built. 307A, 309A and 311A were adjacent to 6, 5 and 3 Aneta Way respectively. Aneta Way abuts

⁹¹ Clause 17(d)–(f) of the Terms of Reference.

⁹² Clause 17(g)–(i) of the Terms of Reference.

⁹³ Clause 17(j) of the Terms of Reference.

Penetaka Heights.⁹⁴ The properties on Aneta Way are built on higher ground than those on Lakes Boulevard. I reproduce below a diagram that shows the location of the various dwellings:



[132] To explain some of the annotations on the diagram:

- (a) The letters “CCC” on numbers 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way represent those properties for which code compliance certificates were issued.
- (b) The properties that are marked “STR” are those which were declared dangerous for structural reasons only.
- (c) The properties that are marked “GEO” are those which were declared dangerous on geotechnical grounds alone.
- (d) The properties that are marked “STR/GEO” are those which were declared dangerous for both structural and geotechnical reasons.

⁹⁴ See the photographs at para [160] below.

- (e) Those properties with a blue outline were declared “affected” buildings by reason of their proximity to buildings that had been declared “dangerous”.
- (f) Those properties with a red outline were declared dangerous following invasive testing.
- (g) Those buildings with an orange outline were declared dangerous by reasonable assumption, on the basis of their proximity to dangerous buildings.

[133] Geotechnical issues were addressed in both of the Harrison Grierson applications in the following way:⁹⁵

2.3.6 GEOTECHNICAL ISSUES

Geotechnical conditions for the lots were addressed through the recent [Lakes] subdivision, this proposal does not seek to change those conditions. The existing consent notice on the lots should be retained.

[134] With regard to earthworks, Harrison Grierson stated:

(a) *Lakes Boulevard*

No earthworks are proposed as part of the subdivision consent, excluding the minor earthworks required for the installation of services.

(b) *Penetaka Heights*

No earthworks are proposed as part of the subdivision consent.

[135] I accept that Harrison Grierson was addressing the position it believed would pertain in the period leading up to completion of the subdivision. I also accept that those responsible for processing the resource consent applications were entitled to rely on Harrison Grierson’s representations. I am mindful that a distinction must be drawn between earthworks required to complete the subdivision, and those subsequently required to erect a dwelling under a building consent. Harrison Grierson appears to be saying that there would be no material change to the landform in the period leading up to physical completion of the subdivision.

⁹⁵ That statement also appears in the supplementary information provided by Bella Vista Homes.

[136] A report on the application for subdivision consents in respect of the Lakes Boulevard sections was prepared for consideration by the relevant decision-makers. In dealing with the topography and landform component of the consent application the authors of the report said:

The subject site consists of eight vacant allotments that have been subject to preliminary bulk earthworks. These lots incorporate the base and side of a hill. As a result of the localised topography all the lots within the subject site are required to comply with the geotechnical conditions of Consent Notice 10071347.1. Although this consent notice will be cancelled the relevant conditions will be reapplied to the lots created through this proposal. *Because earthworks will be required to create suitable building platforms for these lots a condition is proposed requiring confirmation of finished ground levels to ensure height and overshadowing requirements can be benchmarked for future interpretation.*

(Emphasis added)

[137] There is no specific discussion of geotechnical considerations in the planning report. Ultimately, as contemplated by the planning report, they were addressed by way of a condition to the resource consent granted on 11 January 2016:

Lots 1 to 16 (inclusive)

- (a) All development within these lots shall be undertaken in accordance with the Geotechnical [Completion] Report for The Lakes Subdivision – 3AB prepared by Coffey Geotechnics (NZ) Ltd ... dated 24 April 2015. The design and construction of any building or structure requiring a Building Consent in accordance with the Building Act 2004 shall comply with the Statement of Professional Opinion as to the requirements and recommendations contained within the Geotechnical [Completion] Report for the Lakes Subdivision – 3AB [being the Coffey report of 24 April 2015].

[138] In its supplementary document, in support of the Harrison Grierson application to subdivide the three titles for 19, 23 and 27 Penetaka Heights (Lots 114, 115 and 116) into six residential lots,⁹⁶ Bella Vista Homes added:

Council is currently processing an application to cancel consent notice conditions registered on the three underlying titles ... Where relevant the applicant is proposing to re-impose the consent notice conditions being cancelled on the titles of the new lots being created by this subdivision.

Condition a) of the consent notice relates to all three underlying titles and requires development and buildings or structures that require building consent to comply with the Coffey Geotechnics report ... dated 24 April 2015. This consent notice condition is proposed to be imposed on all new lots being created.

⁹⁶ The subdivision was based on The Scheme Plan prepared by Harrison Grierson Consultants Ltd entitled 6 Lot Subdivision of Lots 114–116 DP486181 dated 3 November 2015. See para [141] below.

Condition J) of the consent notice relates to Lots 115 and 116 and refers to Building Line Restriction (BLR) areas and that development within these areas would need to be design[ed] by a Category 1 geo-professional. The consent notice condition is proposed to be imposed on proposed Lots 2 and 3 of which the BLR relates.

Condition k) of the consent notice advises of the cost to property owners of fencing along shared boundaries with Council reserves. This condition will be imposed on lots 1 to 3, and lots 5 and 6 all of which adjoin Council reserve.

[139] Under the heading “Topography and Landform”, Bella Vista Homes reinforced its reference to the minimal amount of earthworks required, and added:

For the reasons above, having regard to the minimal extent of earthworks proposed, that Council’s Engineer has raised no concerns with the development subject to conditions. I consider any adverse effects in relation [to] earthworks, landform, drainage and stability will be less than minor with no persons considered affected.

[140] After consideration by the Council, land use and subdivision consents were issued:⁹⁷

- (a) On 11 November 2015, in respect of the Penetaka Heights properties, under RC 24745
- (b) On 11 January 2016, in respect of the Lakes Boulevard properties, under RC 24880 and 24881.

[141] The Council granted the Penetaka Heights application subject to conditions.⁹⁸ The Penetaka Heights conditions were based on Harrison Grierson’s Assessment of Environmental Effects of September 2015 and an email from Ms Miller of Harrison Grierson to Council on 3 November 2015 which was said to confirm “design assessment compliance and site building areas”. Clause 1 of the conditions made it clear that the subdivision was to be completed on the basis of:

The Scheme Plan prepared by Harrison Grierson Consultants Ltd entitled “6 Lot Subdivision of Lots 114–116 DP486181” ... dated 3 November 2015.

[142] The Lakes Boulevard application imposed conditions based on the subdivision and land use application submitted by Harrison Grierson in November 2015. Clause 1 of the conditions for the Lakes Boulevard subdivision application stated:

⁹⁷ All three consents were issued under s 104A of the Resource Management Act 1991.
⁹⁸ Resource Management Act 1991, ss 108 and 220.

The proposal shall proceed in accordance with the Subdivision and Land Use Application submitted by Harrison Grierson Consultants Ltd ... dated November 2015 including:

- Harrison Grierson Consultants Ltd Subdivision Scheme Plan, Dwg. No 138756 – SC101, Rev .4, dated 20 November 2015; and
- Bella Vista Homes Ltd Subdivision Preliminary Scheme Plans, Revision, dated 20 November 2015 Sheet #102 to #107 (inclusive)

Subject to any changes required through compliance [with listed further conditions].

[143] Consent notices were to be registered against each of the new certificates of title. Each made it clear that reliance was placed on the Coffey report of 24 April 2015.⁹⁹ Another condition, referring only to lots 2 and 3 (in Aneta Way) arose out of the building restriction line.¹⁰⁰ It stated:¹⁰¹

For Lots 2 and 3

- b) “These lots are located above a significant slope and are subject to a Building Restriction Line (BRL) as discussed in the [Coffey] report of 24 April 2015. Development including construction or filling beyond (west of) the BRL shown on figure 7 of the report will require specific geotechnical input from a category 1 geo-professional. Recommendations regarding development on these lots are given in Section 8.6.1 [of the Coffey report] dated 24 April 2015.

[144] The “Statement of Professional Opinion”, given by Mr Kori Lentfer, to which the consent conditions in both the Lakes Boulevard and Aneta Way parts of the subdivision refer,¹⁰² is dated 1 May 2015, and is attached as part of Appendix B to the April 2015 Coffey report. Appendix B is entitled “Geotechnical Suitability Statement & Geotechnical Data Summary Table”. While I recognise that this opinion was referable to the wider subdivision, it remains relevant. Mr Lentfer said:

...

2. An appropriate level of site investigation and construction supervision has been carried out under my direction and is described in my development evaluation report dated 29 April 2013.
3. In my professional opinion, not to be construed as a guarantee, I consider that:

⁹⁹ The identical wording is set out at para [137] above.

¹⁰⁰ See para [138] above.

¹⁰¹ Relevant parts of Section 8.6.1 of the Coffey report, to which this condition refers, are set out at para [85] above.

¹⁰² See paras [137] and [142] above.

- (a) The areas shown in my report dated 9 June 2014 of each new allotment are suitable for the erection thereon of the building types appropriate to the zoning of the land, provided that reference is made to my Geotechnical Completion Report ... dated 24 April 2015.
 - (b) The earth fills shown on the attached Plans ref Figure 02 & Figure 04 have been placed in accordance with the requirements of the Infrastructure Development Code.
 - (c) The completed works give due regard to all land slope and foundation stability considerations.
 - (d) The filled ground is suitable for the erection thereon of residential buildings requiring specific design subject to the recommendations presented in my Geotechnical Completion Report ... dated 24 April 2015.
 - (e) The original ground not affected by filling is suitable for the erection thereon of residential buildings requiring specific design subject to the recommendations presented in my Geotechnical Completion Report ... dated 24 April 2015.
4. This professional opinion is furnished to the Council and the owner for their purposes alone, on the express condition that it will not be relied upon by any other person and does not remove the necessity for the normal inspection of foundation conditions at the time of erection for any dwelling.

[145] On 2 March and 7 June 2016 respectively, Harrison Grierson applied for certification under ss 223 and 224 of the Resource Management Act for the Penetaka Heights and Lakes Boulevard properties. They warranted that each proposal had proceeded in accordance with the application submitted and that all servicing and driveway construction had been carried out in accordance with the Infrastructure Development Code. A draft consent notice was provided for the new allotments. The Council acted on Harrison Grierson's representations in issuing certificates for each subdivision.

[146] In summary:

- (a) Certificates under ss 223 and 224 of the Resource Management Act were provided for the Penetaka Heights properties on 27 April 2016, with certificates of title issued for the six allotments in Aneta Way on 9 May 2016.
- (b) Certificates under ss 223 and 224 of the Resource Management Act were provided for the Lakes Boulevard properties on 20 July 2016, with certificates of title issued for the 16 allotments in Lakes Boulevard on 28 July 2016.

[147] Once the certificates of title had been issued, the respective subdivisions were completed. At that point, there was nothing further for Council to monitor in relation to compliance with the resource consents themselves. But, there was a continuing need to monitor compliance with the consent notices that were registered against each individual title. That follows from the definition of resource consent, set out in s 2(1) of the Resource Management Act which includes all conditions attaching to the resource consent within its scope.¹⁰³

[148] On 23 September 2016, Harrison Grierson made a further application on behalf of Bella Vista Homes to vary conditions of the land use consent issued for the Lakes Boulevard subdivision on 11 January 2016. At the same time, an application was made to amend the consent notice conditions to facilitate that change.¹⁰⁴

[149] The Council sought further information on 6 October 2016. That request was made under s 92 of the Resource Management Act. Among other things, the Council sought confirmation of continued compliance with the Geotechnical Completion report provided by Coffey Geotechnics on 24 April 2015. Harrison Grierson complied with that request on 22 November 2016, and both of the applications of 23 September 2016 were granted on 7 December 2016, on a non-notified basis. While the terms of the consent notice were changed, they continued to refer, in the same terms as the original, to the Coffey report of 24 April 2015.¹⁰⁵

(ii) *Did the Council process the applications adequately?*

[150] It is arguable that the Council did not deal adequately with geotechnical aspects of the two applications that sought consent for the Bella Vista subdivision. The point that has concerned me is whether the Council ought to have made further inquiries to determine whether the April 2015 Coffey report could be treated as providing a reliable foundation to answer safety stability concerns that might otherwise arise out of the proposed subdivision. For example, the Council could have sought an updated geotechnical report from Coffey

¹⁰³ See paras [47] and [48] above. See also paras [141] and [142] above.

¹⁰⁴ In addition to the resource consents to which I have referred, others were granted to deal with streetscape encroachment and side-yard/overshadow encroachments during the subdivision process. No further reference to these is required.

¹⁰⁵ See para [137] below.

Geotechnics to confirm that its existing report provided enough information for the purposes of the subdivision consent applications.

[151] My concerns are based on the type of information that those responsible for processing the applications needed to possess in order to determine whether there were any grounds on which they should be refused. In particular:

- (a) Section 106(1)(a) and (b) of the Resource Management Act¹⁰⁶ emphasises the importance of inquiries into site-specific geotechnical considerations in circumstances where material damage by erosion, falling debris, subsidence or slippage might occur or be worsened. By s 106(1), the Council was required to consider specifically whether there were any aspects of the applications that might justify refusal of a subdivision consent, or a grant subject to conditions.
- (b) The Council had to consider whether conditions were required to avoid, remedy or mitigate the risks to which s 106(1)(a) and (b) of the Resource Management Act refers. Such conditions could have been imposed under s 108(1) of the Act. This is linked to the statutory emphasis (set out in s 5 of the Act) on avoiding, remedying or mitigating adverse effects; particularly, those that impact on health and safety considerations.¹⁰⁷
- (c) Material parts of the (then applicable) Council's Infrastructure Development Code emphasised the need for an assessment of land suitability, stability and design of earthworks to ensure (among other things) "a suitable and safe platform for the construction of buildings".¹⁰⁸ In addition, a Practice Note dealing with geotechnical and other hazards reinforced the need for site-specific assessments of slope stability and the need to frame any conditions to meet the needs of the particular development.¹⁰⁹

¹⁰⁶ Section 106 of the Resource Management Act 1991 is set out at para [43] above.

¹⁰⁷ Section 5(2)(c) of the Resource Management Act 1991. See also s 104.

¹⁰⁸ See cl DS-10 of the Infrastructure Development Code, the relevant parts of which are set out at paras [63]–[66] above.

¹⁰⁹ See para [67] above.

- (d) The April 2015 Coffey report, while dated between five and seven months before the Harrison Grierson applications of September 2015 (Penetaka Heights) and November 2015 (Lakes Boulevard) respectively, covered a much broader range of land that was to be developed as part of the Lakes subdivision. It is clear from Figure 7 of that report that the Bella Vista subdivision land made up a very small part of the area to which the April 2015 Coffey report was directed. And, there were warning signs about the potential instability of land to the west of the Lakes subdivision, in which the Bella Vista subdivision properties were situated.¹¹⁰

[152] However, on balance, I am not prepared to say that the Council failed to process the resource consent applications adequately. Without having had the benefit of exploring (with the respective authors) the nuances of various geotechnical engineering opinions expressed in the reports I have seen, I have concluded that the Council was entitled to rely on opinions expressed by experienced subdivision engineers, Harrison Grierson, that the proposed earthworks were “minimal”,¹¹¹ and subsequent information that confirmed work had been undertaken in accordance with the resource consents.¹¹²

[153] While I believe it would have been prudent to make further inquiries of Coffey Geotechnics before granting the resource consents, I acknowledge that might properly be viewed as a counsel of perfection. I find that the Council did perform resource consent application functions adequately.

(iii) Did the Council monitor compliance adequately?

[154] The next question is whether, once granted, compliance with the resource consents was monitored adequately.

[155] There are two relevant aspects to the monitoring function under the Resource Management Act. The first involves the monitoring of resource consents and the conditions attaching to them. The second concerns monitoring compliance with those provisions of the City Plan that specify the extent of permitted earthworks.

¹¹⁰ See paras [82]–[87] above.

¹¹¹ See para [134] above.

¹¹² See para [145] above.

[156] Rule 4C.2.2(c) of the City Plan states:¹¹³

4C.2.2 All Zones

In addition to *Rule 4C.2.3 – Tauriko Business Estate* through *Rule 4C.2.9 – High-Voltage Transmission Plan Area*, earthworks are a Permitted Activity providing:

...

- b) They use a combination of erosion and sediment control measures that are consistent with Appendix 4N: *Erosion and Sediment Control Measures* where *earthworks* on a *site* expose more than 100m² of area. For the avoidance of doubt this rule shall not apply to *approved earthworks* or *earthworks* ancillary to *primary production*;
- c) Any single cut on a site 1.5 metres in height or higher (either as a single cut or combination of cuts) where the angle of cut is 45° or greater is retained either before *construction* of any building foundations or retained no later than 3 months after that cut being created. This rule shall not apply to earthworks in the Rural Zone unless those *earthworks* are associated with *construction* of a *building*;

[157] The Council has advised me that its Environmental Monitoring Office did not visit the Bella Vista subdivision sites until after certificates had been issued under ss 223 and 224 of the Resource Management Act. They did, however, visit the sites as part of their responsibilities to monitor compliance with the City Plan. It appears that the first visit took place on 5 September 2016, following concerns being expressed about sediment controls on the construction site.¹¹⁴

[158] While significant earthworks commenced in June 2016, it is not possible to specify the date with any greater particularity. I was supplied with a photograph showing the nature and extent of earthworks, taken some time in June 2016:

¹¹³ Clause 4C.2.3 refers specifically to the Tauriko Business Estate. Clause 4C.2.2 is stated to be “in addition to” that clause. Accordingly, earthworks are a permitted activity if (for present purposes) they fall within Clause 4C.2.2(c) of the City Plan. Clause 4C.2.2(b), relating to erosion and sediment control, features in relation to an abatement notice issued in November 2016 in respect of 305A Lakes Boulevard: see para [209] below.

¹¹⁴ See also, paras [209] and [210] below.



[159] In addition, the Council has provided to me some aerial photographs that depict the extent of earthworks undertaken during 2016. Because Tauranga City is expanding rapidly, aerial photographs are taken regularly to ensure geographical information systems are robust for both internal and external purposes. I refer to three photographs, taken on 6 April, 9 August and 22 November 2016. The photographs taken on 6 April and 22 November depict the construction site at the top left-hand side. The 9 August photograph shows the site more directly. The public access-way running from Lakes Boulevard to Penetaka Heights can be seen in each photograph, as can the new Aneta Way, running off Penetaka Heights. The locations can be better understood by reference to the diagram at para [131] above. Taken together with the June 2016 photograph that I have already reproduced,¹¹⁵ they depict various stages of development of the subdivided lots. In date order, they show:

¹¹⁵ See para [158] above.

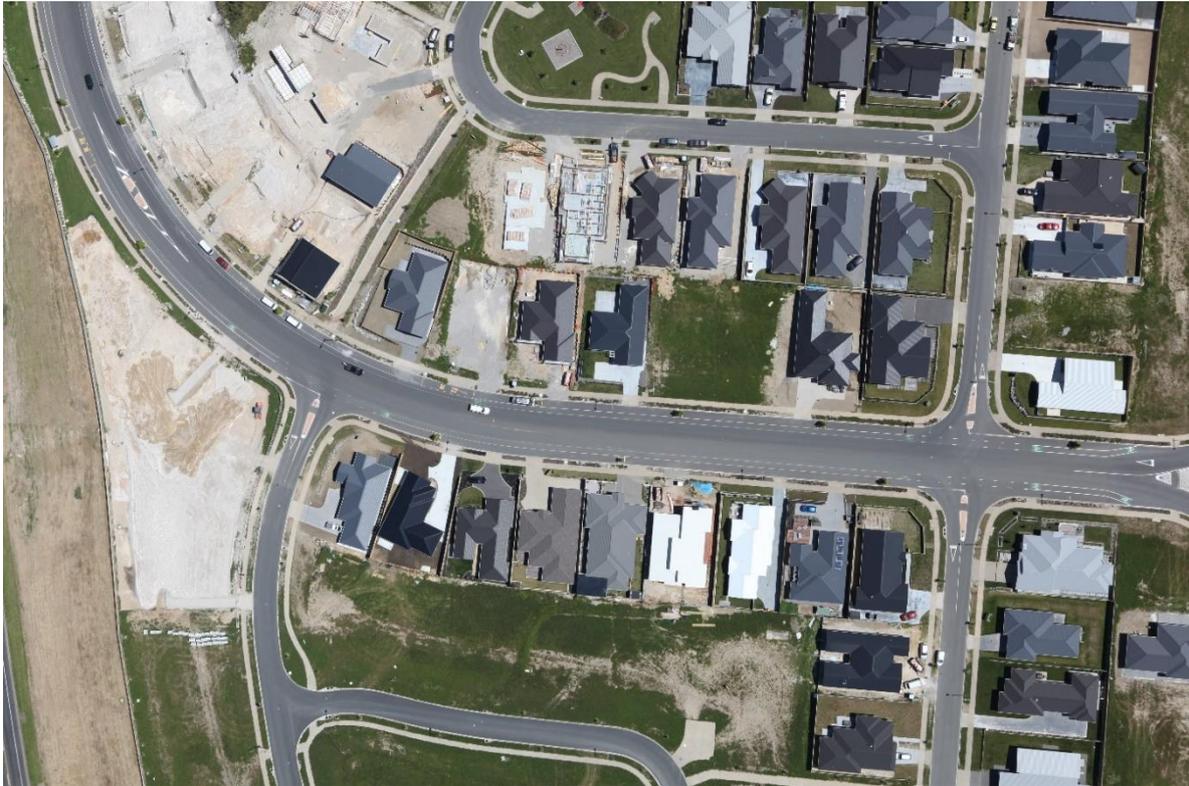
(a) 6 April 2016



(b) 9 August 2016



(c) 22 November 2016



[160] Those photographs reveal:

- (a) The absence of any significant earthworks on the properties as at 6 April 2016.
- (b) Building platforms were being created, as at 9 August 2016, at three of the Aneta Way sites and 311 Lakes Boulevard. Machinery can also be seen at 309 Lakes Boulevard¹¹⁶ as at 9 August 2016.
- (c) The partial erection of two dwellings, and other building works, as at 22 November 2016.

[161] By 26 August 2016,¹¹⁷ earthworks had been undertaken near 4 Aneta Way that exceeded those permitted by r 4C.2.2(c) of the City Plan.¹¹⁸ From a resource management perspective,

¹¹⁶ Compare with the position as at 26 August 2016 when a site meeting was held at 4 Aneta Way: para [179] below.

¹¹⁷ See para [179] below.

¹¹⁸ Set out at para [156] above.

it is arguable that enforcement action should have been taken to mitigate relevant risks at that time.

[162] A difficulty in determining what (if any) enforcement actions ought to have been taken by that (or some later) time (and by whom) lies in the overlapping functions carried out by members of the Environmental Monitoring Office when assessing compliance with the City Plan (on the one hand) and the inspection regime for the building consents that had been granted by August 2016 (on the other).¹¹⁹ I prefer to deal with questions of enforcement together. Accordingly, I defer consideration of that issue until I discuss corresponding Building Act inspection issues.¹²⁰

(c) *Building consent, inspection and code certification*

(i) *Building consents*

[163] Building consents were granted for each property, in the following sequence:

311 Lakes Boulevard	BC55362	9 June 2016
4 Aneta Way	BC55323	29 July 2016
5 Aneta Way	BC55348	29 July 2016
2 Aneta Way	BC55387	29 July 2016
3 Aneta Way	BC55958	17 August 2016
6 Aneta Way	BC55979	17 August 2016
301 Lakes Boulevard	BC56204	23 December 2016
297 Lakes Boulevard	BC56531	24 February 2017

¹¹⁹ Six building consents had been granted by 26 August 2016: see para [163] below.

¹²⁰ Questions of enforcement are considered at paras [209]–[218] below.

309 Lakes Boulevard	BC56530	24 February 2017
303 Lakes Boulevard	BC56575	27 February 2017
307 Lakes Boulevard	BC56947	3 March 2017
297A Lakes Boulevard	BC57049	10 March 2017
307A Lakes Boulevard	BC58170	11 April 2017
301A Lakes Boulevard	BC58171	2 May 2017
311A Lakes Boulevard	BC58353	2 May 2017
299 Lakes Boulevard	BC56134	7 June 2017
305A Lakes Boulevard	BC58391	14 June 2017
299A Lakes Boulevard	BC58476	3 July 2017
305 Lakes Boulevard	BC58475	31 July 2017
309A Lakes Boulevard	BC58352	2 August 2017
303A Lakes Boulevard	BC58392	2 August 2017

[164] I consider the way in which the Council determined whether to grant building consent applications in two stages:

- (a) The first concerns the six that were granted before the site meeting of 26 August 2016, to which I have already referred.¹²¹
- (b) The second concerns those issued on or after 23 December 2016. The information available to Council in relation to geotechnical issues was

¹²¹ The context in which that meeting was held is discussed at paras [179]–[188] below.

considerably greater by December 2016 to that possessed prior to the 26 August meeting.

[165] In relation to the six consents processed prior to 26 August 2016, the Council was aware of the terms on which the resource consent applications had been granted, and the need for continuing compliance with the points raised in the April 2015 Coffey report. But, the Council's task, in relation to the building consent applications, was broader than that with which those responsible for processing (or monitoring) the resource consent applications were concerned. The latter had to consider the extent of earthworks to be conducted during the time the subdivision was physically completed, whereas, for building consent purposes, the Council was concerned with the extent of earthworks required to enable all of the dwellings and retaining walls to be built in accordance with the Building Code.¹²²

[166] On the information available to me, I am not prepared to second-guess the Council's decisions to grant building consents for the properties at 311 Lakes Boulevard and 2–6 Aneta Way, between 9 June 2016 and 17 August 2016.¹²³ I have insufficient information to gainsay the decision of those responsible for granting building consents that the plans and specifications submitted for 311 Lakes Boulevard and 2–6 Aneta Way would meet Building Code requirements.

[167] The position was different after 17 August 2016. From 23 December 2016 until the last consent was granted on 2 August 2017,¹²⁴ the Council possessed much greater information about geotechnical problems surrounding the erection of necessary retaining walls on the construction sites.

[168] Although more relevant to the inspection issues, the events that occurred between 17 August 2016 and 27 February 2017 indicate why what was happening on the ground ought to have had more impact on the decisions whether to grant or refuse the building consents for the remaining properties. The gap between 17 August 2016 and 23 December 2016 is explained largely by disputes that had arisen between the Council and Bella Vista Homes about

¹²² The building consents were referable to building work for both the dwellings and retaining walls.

¹²³ See para [159](a) and (b) above, being the photographs taken on 6 April and 9 August 2016. The latter shows that some construction of building platforms had been commenced in the vicinity of all of those properties by 9 August 2016.

¹²⁴ See para [163] above.

geotechnical considerations.¹²⁵ There is no doubt that, by December 2016, the relationship between the Council and Bella Vista Homes had soured significantly.

[169] A building consent was issued for 301 Lakes Boulevard on 23 December 2016. That section is on the roadside and was not directly affected by the geotechnical issues being discussed in the period up to late December 2016. With the benefit of hindsight, the fact that the rear section, 301A Lakes Boulevard, has been diagnosed with geotechnical, as well as structural, deficiencies it was unwise for Council to issue any further building consents during 2016. I consider that the question whether a building consent ought to have issued for 301 Lakes Boulevard should have been deferred until the new year.

[170] As late as 20 January 2017, the designated inspector was writing to other Council employees to advise that Mr Packard was still to undertake his “geotechnical assessment of the sites,” with his main areas of concern being 307, 307A, 309 and 309A Lakes Boulevard. The inspector recorded that Mr Packard had told him that “if these [sites] pass there should be no geotechnical issues affecting the other Lakes Boulevard sites [other than] construction issues relating to stability during construction, safety, sediment, etc”. The possibility of geotechnical problems at 301A Lakes Boulevard had not been excluded by 23 December 2016, when the building consent was granted.

[171] Having reviewed the building consent files for the consents granted between 24 February 2017 and 2 August 2017, I conclude that consents were granted based on insufficiently robust plans and specifications. As a result, the risk of safety concerns of the type discussed in the expert reports was not minimised satisfactorily. The consents that were granted included all eight properties in close proximity to the Aneta Way sections, for which the retaining wall was required; 305, 305A, 307A, 307, 309A, 309 and 311A Lakes Boulevard.¹²⁶

[172] To illustrate what happened in the building consent process after February 2017, I discuss two properties; 307 Lakes Boulevard, for which consent was granted on 3 March 2017 and 309A Lakes Boulevard, for which consent was granted on 2 August 2017.

¹²⁵ See paras [178]–[194] below.

¹²⁶ For the dates on which consents were issued, see para [163] above.

[173] For 307 Lakes Boulevard, a Project Information Memorandum was prepared by a Building Consent technician and dated 24 February 2017. The project was described as “erect dwelling and retaining walls”, with an intended life of 50 years. Among other things, the memorandum identified non-compliant aspects of the site with the conditions of the existing resource consent and consent notice, the need to form and seal areas to be used for vehicle access and manoeuvring. The author stated that, for earthworks that would expose more than 100 square metres, a combination of erosion and sediment control measures would be required, in a manner that complied with the City Plan.

[174] With reference to the exchanges between Council and Mr Packard in January and February 2017,¹²⁷ I have identified (in the building consent file for 307 Lakes Boulevard) an email from the designated inspector to a representative of Bella Vista Homes, dated 16 February 2017. He said:

It is my intention to issue the consents for the properties [which includes 307 Lakes Boulevard] and as long as you agree any changes to the retaining walls will be designed by a [CPEng registered engineer] and council will inspect these walls or you may seek council approval to have your engineer inspect on a case by case basis.

If this is agreeable I will process these retaining wall changes on site under our minor variation process, noting this is required to be done before the work is undertaken.

(Emphasis added)

The designated inspector’s approach meant that an opportunity to impose a condition requiring the building work to be undertaken in a particular sequence was lost.

[175] The building consent for 309A Lakes Boulevard was granted on 2 August 2017, following a Project Information Memorandum dated 31 July 2017. Among the documents on the building consent file is a copy of a letter from Coffey Geotechnics to Bella Vista Homes dated 27 July 2017, for what is called Lot 13 Lakes Boulevard.¹²⁸ Coffey Geotechnics identified that “Lot 13 and neighbouring lots within the Bella Vista Lakes Boulevard subdivision were affected by significant erosion and scour damage during storms in May and

¹²⁷ See paras [88]–[91] above.

¹²⁸ On the information available Lot 13 comprised 305 and 305A Lakes Boulevard: see para [35] above. I do not know if this report were intended to refer to Lot 15 (on which 309 Lakes Boulevard stood) or the report was put on the wrong file. For a similar letter in respect of Lot 15, see para [93](a) above. It may be that there is simply some confusion over the earlier lot numbers. The reference to “neighbouring lots” in the letter suggests that no material issue arises.

June 2017". Coffey Geotechnics had been engaged to observe and test remediation of affected building platforms. However, the report states, in relation to retaining walls:

We note that the proposed retaining walls on this site are being designed by others and were not included in our construction observations. We have also not reviewed the retaining wall design calculations.

Furthermore, Coffey recommends that construction of retaining walls surrounding the building platform be undertaken before construction of the building foundations, to lower the risk of instability within the building platform.

(Emphasis added)

[176] 307 Lakes Boulevard is situated on road frontage with the rear dwelling, 307A, directly beneath 5 and 6 Aneta Way. 309A is directly beneath 3 and 5 Aneta Way, at the rear of the property shared with 309 Lakes Boulevard. Both were affected by the concerns identified in the email exchanges between Mr Packard and Council officials in January and February 2017.¹²⁹

[177] In my view, the Council did not process adequately those building consent applications granted on or after 23 December 2016. Responsible officers were on inquiry about the geotechnical problems surrounding the necessary retaining walls and did not have enough information at the dates on which those consents were granted to be satisfied on reasonable grounds that the building work required to erect the dwellings and retaining walls could be undertaken in a manner that enabled all building work to comply with the Building Code.¹³⁰

(ii) *Inspection issues*

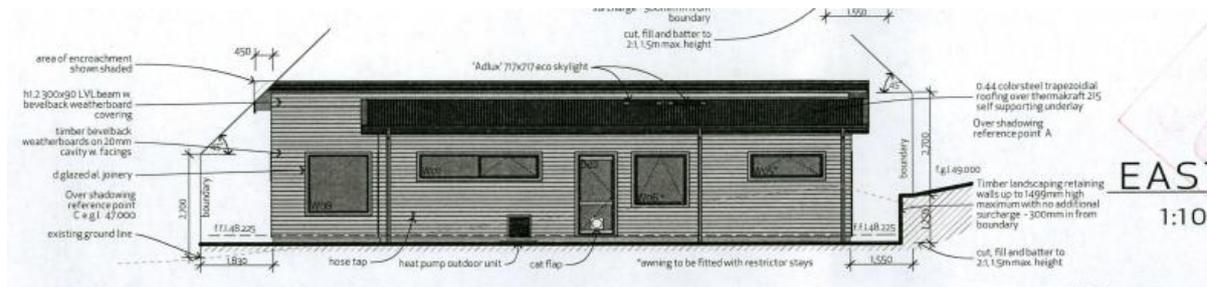
[178] On 26 August 2016, Mr Nigel Mogford, who at the time was the Team Manager Inspections for the Council, called a site meeting at 4 Aneta Way. He was concerned about steep unretained fill placed on the crest of the steep slope down to Lakes Boulevard, and the proximity of the dwelling to the edge of the fill. That meeting was attended by Mr Mogford, Ms Laurie Hubbard (then Senior Building Officer, Inspections/Code Compliance for the Council), Mr Trigger (at that time on part-time secondment to the Council as a Development Engineer responsible for reviewing building consent applications), Mr Cancian and

¹²⁹ Ibid.

¹³⁰ Building Act 2004, ss 17 and 49(1).

Mr Ian Minnell, on behalf of Bella Vista Homes and a representative of the architects, Coalesce Architecture Ltd, Tauranga, Mr Dylan Battensburg.

[179] I have been provided with a copy of the approved plans for 4 Aneta Way, that show the east elevation. This drawing, taken from the original building consent application, shows limited fill being required on the left-hand side. I compare that drawing with photographic evidence that depicts the extent of the earthworks around the time of the 26 August 2016 meeting. The drawing and the photograph are set out below:



[180] There is a dispute, which I cannot resolve without proper testing of the available evidence, as to why the 26 August 2016 meeting was needed. Mr Trigger has told me that he was requested to attend a site meeting by Mr Mogford, in the circumstances I have described.¹³¹ Mr Cancian has a different perspective, which is set out in an affidavit sworn by a former building inspector who was engaged in the early stages of the Bella Vista subdivision

¹³¹ See para [178] below.

inspections, Mr Brouwer; a good deal of which is confirmed in a separate affidavit sworn by Mr Cancian. Mr Cancian asserts that the Council's approach to its regulatory functions is responsible for the problems that have befallen the homeowners. Some explanation of the differences between the Council and Mr Cancian is required, if only to give context to the way in which its remaining Building Act responsibilities were discharged by the Council.

[181] Mr Brouwer commenced full-time employment with the Council in November 2015. He had experience as a building inspector in Canada, and more recently in Christchurch. He asserts (and the Council denies) that he was subjected to bullying and harassment from early to mid-December 2015, referring to Mr Mogford as his supervisor. Mr Brouwer goes on to express some concern about his perception that Council inspectors were not recording adequate information in (at that time) the GoGet system. The Council denies those allegations.

[182] Mr Brouwer refers to inspections of properties at 50 and 52 Penetaka Heights on 26 January 2016. Those properties are not part of the Bella Vista subdivision. He complains that he was accused of being "too thorough, wrote too much and was passing minor deficiencies [but] requesting [photos] to be provided to the next inspector". The Council denies his allegations.

[183] Mr Brouwer refers to an inspection that was scheduled for 24 August 2016. On that occasion, he says, he was to conduct a "Raft Slab/SOG" inspection, at 4 Aneta Way. Mr Brouwer says that the site was on a hill and the grading non-compliant with approved consented documents.

[184] The GoGet system records two inspections by Mr Brouwer of 4 Aneta Way. One, on 19 August 2016 and one on 24 August 2016. According to those records, on 24 August 2016, Mr Brouwer:

- (a) passed a "Ground Check" inspection
- (b) failed the "Raft Slab/Slab on Grade" inspection
- (c) passed "Underfloor Plumbing" inspection.

[185] It appears to have been agreed, at the 26 August 2016 meeting, that if the fill were to remain in place, a Category 1 geotechnical engineer would need to assess how that should be done. Mr Trigger's primary concern with 4 Aneta Way was the proximity of the dwelling to Council "service trenches". However, the more fundamental problem appears to be that earthworks identified at the 26 August meeting had not been approved under the relevant building consent.

[186] Mr Trigger states that three points were made by the Council:

- (a) The extent of the earthworks and fill was not raised in the April 2015 Coffey report,
- (b) There was a building restriction line in place, and
- (c) If the plans provided for the resource and building consent processes had revealed what was to occur, these questions would have been asked during one or other of those consent processes.

[187] Those observations seem to conform with an email chain that followed the 26 August 2016 meeting. While I intend to refer to some of that trail, in order to provide a flavour of the disputes, I acknowledge that they represent an incomplete record of the exchanges. Nothing turns on that for the purpose of this report.

[188] On 16 September 2016, Mr Cancian sent an email to Mr Mogford referring to discussions with an engineer, Mr Bruce Cameron, who had been providing producer statements for some of the building work being undertaken on the Bella Vista subdivision. Mr Cancian advised that a Category 1 geotechnical engineer was to be engaged "to oversee all ground works on these sites". Mr Cancian indicated that Mr Cameron and the geotechnical engineer would report to Council after inspecting engineering work. Mr Packard was to be engaged by Bella Vista Homes as its Category 1 geotechnical engineer. During this time, Mr Cancian expressed concerns that the Council was treating his company unfairly.

[189] Mr Mogford replied on 20 September 2016. He observed that Bella Vista Homes seemed to be acting in two capacities; one as agent of homeowners, and the other as building

contractor. He pointed out the distinct obligations of builders under s 14E of the Building Act, and owners, under s 14B.¹³² Section 14B states that an owner is responsible for obtaining any necessary consents, approvals, and certificates; ensuring that building work carried out by the owner complies with the building consent; and ensuring compliance with any notices to fix.

[190] In his 20 September 2016 email, Mr Mogford pointed out that the building work in issue did not conform to the approved plans and elevations.¹³³ Particular concern was expressed about compliance with B1.3.1 of the Building Code, which states:

B1.3.1 Buildings, building elements and sitework shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.

[191] Mr Mogford continued:

In summary no further council inspections will be carried out until we are sure that all site and building work will meet the performance criteria of B1 and the following issues resolved:

- 1) Due to the nature of these site and the significant cut and fills that have been made the site work and engineered design solutions for the projects will need guidance from a suitably qualified geotechnical engineer. A methodology of construction and a design solution for the building platforms and foundations will need to be provided to council.
- 2) The building consents for the projects will need to be amended to properly reflect the actual situation on site.
- 3) A suitably qualified cadastral surveyor will need to provide evidence that the building work is located as per the building consents for each site. The survey will also need to confirm both the floor and site levels are as per the building consent.

I can assure you there is no hidden agenda. I did not have any knowledge of any previous issues raised by you to council. We just need to get the terms I have listed resolved, to ensure you are able to continue with work on site. It sounds like you are on the right track and I look forward to receiving the information from you. Once we have the recommendations of the engineers and the information from the surveyor we will still need to carry out the required inspections to ensure the work on site is both as per engineer's recommendations, and per the consented plans.

I will do all I can to ensure the restrictions are lifted to enable you to continue with construction of your projects as soon as we have the requested information.

...

¹³² Section 14E of the Building Act 2004, is set out at para [54](d) above.

¹³³ Section 40(1) of the Building Act 2004 states a "person must not carry out any building work except in accordance with a building consent".

[192] On 22 September 2016, Mr Cameron wrote to Mr Mogford in response:

...

I understand you have issued a stop works notice on the sites pending assurance the performance criteria of B1 is being met, which in your opinion can be achieved with guidance from a suitably qualified geotechnical engineer. Any prevention to the timely completion of the stabilizing structures proposed for the sites, is considered contrary to ... B1.3.1 [of the Building Code].

As proposed by [Mr Cancian] ... we have met with Matt Packard (Accredited Geo-Professional Category 1) and subject to agreement will engage CMW to provide the oversight and guidance on the site works that following inspection, he has suggested and considers appropriate. [reference is made to an attached email from Mr Packard]

It would be appropriate you lift the stop works notice which is causing delay to the completion of the stabilizing works on site, and confirm that the competent and qualified personnel together can now proceed in the timely construction of the building works.

[193] Mr Mogford replied on 23 September 2016. In order to understand the Council's position, it is necessary to quote in full from Mr Mogford's reply:

Thank you for your email. It appears that there has been some misinterpretation along the line. Matt has stated that as these sections already have consent then the geotechnical requirements should have been addressed.

*However, the problem is that the dwellings have not been constructed as per plan as the existing contours and the amount of cut and fill has been inaccurately reflected. Therefore, the current geotechnical requirements **have not** been [assessed]. We are also concerned about the build path and the fact that excavations and cut and fill has taken place all at once instead of in a staged manner. Hence the requirement for geotechnical input.* In addition, the siting and floor levels also appears to be not in accordance with the consented plans. This may now require a resource consent and or amendment to the design of each lot. It would be remiss of council to allow work to continue which may result in significant rework costs for Bellavista as the developer. We completely understand the drivers for ensuring a swift resolution to the issues raised but these need to be addressed in their entirety and the geotechnical aspects are not the only concern. We still have no evidence of any commitment by Bellavista to instruct CMW formally. It would be council's preference that a review of both the sections on Lakes Boulevard and Aneta Way are provided as a one off report with reference to the future dwellings which are not yet in for consent. This may preclude the ongoing monitoring unless the report requires it.

Until council removes the stop on inspections (which may be on a case by case basis) the site owner is required to maintain the stability of the slope. This will include regular inspections by a geotechnical engineer and any temporary works recommended as the result of an inspection.

Until documentation has been received from a Cat One Engineer and the siting issues have been resolved the holds will remain. If you wish to discuss this further, please do not hesitate to contact me.

(Emphasis in italics added; original emphasis in bold)

[194] By December 2016, relations between Council and Bella Vista Homes had become increasingly strained. Indeed, it was on 1 December 2016 that Mr Brouwer swore the affidavit to which I have referred.¹³⁴ At a meeting held in late December 2016, in an endeavour to expedite completion of the build, the Council agreed to appoint a single inspector as the point of contact in relation to the properties. The designated inspector was to have responsibility for outstanding requests for information and liaison with Bella Vista Homes in respect of any issues that may arise in the future. In coming to that arrangement, both Bella Vista Homes and the Council were aware that a house was being constructed by Bella Vista for this inspector, but neither party regarded that as something that should disqualify him from his intended role. As it happened, the designated inspector did not carry out all of the inspections that occurred from the date he was allocated for that purpose.

[195] In general terms, inspections are undertaken sequentially in order to ensure the work that is being inspected is visible at the relevant time. Each inspector worked on the basis of the embedded questions and prompts contained in (up to 30 March 2017) the GoGet system and (thereafter) on the AlphaOne programme. The inspector's conclusions are generally entered from the field into the relevant computer programme. A "pass" would be issued if the building inspector were satisfied on reasonable grounds that the works had been carried out in accordance with the consents. If the work were failed, the inspector would generally make a notation to explain why, so that information was available to subsequent inspectors. Not infrequently, inspections in respect of a single property are carried out by more than one inspector. In making their determinations, inspectors are entitled to rely upon producer statements from accredited persons to confirm that completed work, not visible to the inspector at the time of his or her visit, has been undertaken in accordance with the Building Code.

[196] I have experienced some difficulty in identifying the precise number of inspections carried out on each property by reason of the transition from the GoGet to AlphaOne. In response to a question that I raised in a letter that accompanied my draft report, I was advised that there was "a significant degree of double-counting" in my calculation of inspections. Apparently, that arose out of inspections undertaken while the GoGet system was in place which were not "closed out," but nevertheless were "migrated into the AlphaOne system". That, in effect, created a duplicate record of the same inspections.

¹³⁴ See para [180] above.

[197] I was also told that discrepancies may exist between individual “inspection slots” that had been booked and “individual inspections undertaken”. A discrepancy can occur when, for example, two inspections take place within a single slot of where two slots are required for a single inspection.

[198] With those considerations in mind, I propose to rely on calculations provided to me in response to my query. Nothing turns on the analysis. By adopting the Council’s approach, there is no risk that I will consider its position in an unfairly prejudicial way.

[199] The schedule provided by Council reveals:

	GoGet		AlphaOne		Total	
	Inspec-tions	Slots	Inspec-tions	Slots	Inspec-tions	Slots
2 Aneta Way	10	12	8	5	18	17
3 Aneta Way	12	12	3	4	15	16
4 Aneta Way	7	6	14	12	21	18
5 Aneta Way	10	8	6	5	16	13
6 Aneta Way	8	7	9	7	17	14
297 Lakes Boulevard	-	-	16	18	16	18
297A Lakes Boulevard	-	-	11	11	11	11
299 Lakes Boulevard	8	8	3	2	11	10
299A Lakes Boulevard	-	-	13	10	13	10
301 Lakes Boulevard	2	2	9	8	11	10
301A Lakes Boulevard	-	-	15	12	15	12
303 Lakes Boulevard	-	-	21	14	21	14
303A Lakes Boulevard	-	-	8	8	8	8
305 Lakes Boulevard	-	-	11	9	11	9
305A Lakes Boulevard	-	-	15	11	15	11
307 Lakes Boulevard	-	-	17	13	17	13
307A Lakes Boulevard	-	-	14	13	14	13
309 Lakes Boulevard	-	-	19	14	19	14
309A Lakes Boulevard	-	-	8	8	8	8
311 Lakes Boulevard	22	21	-	-	22	21
311A Lakes Boulevard	-	-	11	11	11	11

[200] On the basis of that table:

- (a) A total number of 310 inspections were undertaken for the entire Bella Vista subdivision.
- (b) There were 271 “inspection slots”.

[201] Leaving aside any other deficiencies in inspection processes that might have less serious causal connections with the current state of the buildings, I am satisfied that the inspections were not performed adequately, for both geotechnical and structural reasons. I deal with each in turn.

[202] It is obvious from viewing the development in its current state (surrounded by a perimeter fence required as a result of the dangerous building notices) that there is inadequate retention between the buildings at the higher level, 5 and 6 Aneta Way and those below (305, 307A and 309A Lakes Boulevard). At the time I commenced my investigation, those dwellings had all been declared dangerous on both geotechnical and structural grounds.¹³⁵

[203] When AECOM provided a further assessment on 30 April 2018, it referred to “widespread non-compliance” with stability requirements of B1 and B2 of the Building Code, and identified five factors that caused concern under the head of “stability”.¹³⁶ In referring to “widespread non-compliance” AECOM cited both a failure to build in accordance with approved plans and insufficient inspections by engineers.¹³⁷ Concerns about insufficient inspections” seem to be directed at engineers engaged to act on behalf of Bella Vista Homes. I infer that the author of the report was referring to the need for specialist assistance to assess compliance with geotechnical aspects of the building consents, as opposed to the more general knowledge possessed by the broad range of inspectors.

[204] I consider the Council’s performance of the inspection roles was inadequate in relation to the geotechnical considerations to which AECOM has referred, in particular:

- (a) Had a full review for the entire Bella Vista subdivision been undertaken by a geotechnical engineer after 26 August 2016, it is likely that the complexity of constructing large timber pole retaining walls with masonry block walls in close

¹³⁵ As to geotechnical considerations, see paras [99]–[102], and [106]–[108] above.

¹³⁶ See para [112](d) and (e) above.

¹³⁷ See para [112](d) above.

proximity down-slope would have been identified and could have been the subject of a requirement for redesign.¹³⁸ The report provided by Coffey Geotechnics to Bella Vista on 28 June 2017 supports this view,¹³⁹ as do the observations made by Beca in its 19 December 2017 report.¹⁴⁰

(b) The email reports prepared by Mr Packard on 10 and 14 February 2017, supplemented by a further email of 17 February 2017, were not a sufficient review:

(i) In his email of 14 February 2017, Mr Packard made it clear that the quality of recent filling for 5 and 6 Aneta Way had not been assessed by him. He relied on the assessment of others. With regard to lots accessed from Lakes Boulevard, Mr Packard commented in general terms, and made it clear that the filling he suggested would still require assessment by a “CPEng” on account of settlement considerations and the need for “appropriate compaction”.¹⁴¹

(ii) In relation to his email of 17 February 2017, Mr Packard was relying on other information provided by third parties. In particular, he noted that “the quality of the [recent] filling within No 4 Aneta Way, as well as the foundation suitability is beyond the scope of our assessment as it is understood that these aspects have been designed, inspected and certified by others”. Mr Packard had previously stated, in his 10 and 14 February 2017 emails, that he had not completed an investigation into 4 Aneta Way.¹⁴²

(c) The absence of an appropriate retaining wall is obvious, even to a non-professional. It is difficult to understand how a building inspector could not have realised that stability concerns existed, and had to be addressed. The fact

¹³⁸ See paras [112](e)(i) and (ii) and [113] above.

¹³⁹ See para [93](a) above. As does the extract from its 27 July 2017 report, set out at para [175] above.

¹⁴⁰ See paras [98] and [99] above.

¹⁴¹ The relevant extract from Mr Packard’s email of 17 February 2017 is set out at para [89] above.

¹⁴² See para [89] above.

that it was ultimately necessary to declare the dwellings “dangerous buildings” underscores the seriousness of the problems.

[205] Similarly, I conclude that the Council’s inspectors ought to have observed the structural defects identified by Ms McLaughlan and BCD Group. The major defects are summarised by BCD Group in its report of 12 April 2018.¹⁴³ Without repeating the whole of that summary, its essence is reproduced below:

- (a) No lintel fixings were observed at the first floor level.
- (b) Roof bracing fittings had not been installed correctly.
- (c) Bottom plate fixings were incorrectly installed under load-bearing walls at the first-floor level.
- (d) There were no installed fixings between timber packing and steel beams at the 250 UB31 floor beam, located in the middle of the garage.
- (e) Fixings were missing from the bottom plate to the top of masonry block walls in the store area downstairs and a thick concrete block wall on two sides measuring 190mm was exposed.
- (f) No fixings were observed between the floor joists and the top plate at a timber wall location in the garage. No fixings were observed between the floor joists and the bottom plate at the garage door location. No fixings were observed between the floor joists and the bottom plate at the block wall location.
- (g) Joist hangers which had been correctly installed in terms of the manufacturer’s installation requirements in two locations where the plaster board ceiling lining were removed to inspect. Either, incorrectly installed or no joist hangers (sometimes both) were observed at the location where the floor joists connect to the 250UB beam in the middle of the garage.

¹⁴³ See para [119] above.

- (h) Two M12 bolts were supposed to have been fixed inside the web of the 230PFC post at the garage door location. Instead, only one M20 bolt was installed in that area.
- (i) Floor diaphragm fixings transfer seismic loads from the first-floor sheets to the supporting floor joists, and from the joists to supporting walls. Floor diaphragm fixings had been installed incorrectly.

[206] All of the structural aspects to which Ms Nielsen referred were there to be seen during the course of a framing and pre wrap inspection. The defects were not identified at that time. They ought to have been identified.

[207] Clause 15 of the Terms of Reference requires me to focus “primarily” on issues arising out of the Council’s involvement that have “a causal connection to either the defective construction or the reasons why dangerous or affected building notices were issued.”¹⁴⁴ Although I am satisfied that such a connection exists, for completeness I should identify the steps I consider could have been taken to prevent some of the loss suffered by homeowners.

[208] As indicated earlier, the geotechnical concerns were ones that fell within the scope of authority of both the Environmental Monitoring Office and the building inspectors. So far as the former is concerned, I have expressed the view that enforcement issues turned primarily on breaches of r 4C.2.2(c) of the City Plan.¹⁴⁵ The building inspection issues arise both in respect of geotechnical and structural concerns I have identified.¹⁴⁶

[209] Treating the geotechnical problem as one involving breach of the City Plan, I consider that the Council ought to have issued abatement notices to require the breaches to be rectified. Indeed, that is what happened in relation to 305A Lakes Boulevard, *but* in respect of an alleged breach of r 4C.2.2(b), which deals with erosion and sediment.¹⁴⁷ That notice was dated 25 November 2016. That demonstrates that the Council was alive to the possibility of using the abatement notice procedure to ensure compliance with r 4C.2.2 of the City Plan at that time.

¹⁴⁴ See para [11] above.
¹⁴⁵ Set out at para [156] above.
¹⁴⁶ See also para [162] above.
¹⁴⁷ See para [156] above.

[210] I have checked to see whether the abatement notice (or any information about it) was included in the building consent file for 305A Lakes Boulevard, in respect of which consent was granted on 14 June 2017. I have not been able to locate a copy on the file. This may illustrate a potential problem involving the need for good communication between those parts of the Council that undertake Resource Management Act and Building Act functions respectively.

[211] Under s 12(1)(c) of the Building Act, in its capacity as a building consent authority, the Council has power to issue notices to fix, in the context of its responsibilities around the issue of building consents, inspections and code compliance certificates.¹⁴⁸ An owner has a corresponding obligation to ensure compliance with any notice to fix.¹⁴⁹

[212] The “notice to fix” regime is set out in Subpart 8 of Part 2 of the Building Act 2004. Section 164 of the Building Act deals with circumstances in which a notice to fix may be issued. It provides:

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a **notice to fix**) requiring the person—
- (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.
- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
- (a) notify the other authority that it holds that view; and
 - (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

¹⁴⁸ Building Act 2004, s 12(1)(c). For the purposes of the “notice to fix” regime, a “building consent authority” is included within the definition of a “responsible authority”: see s 163 of the Act.

¹⁴⁹ Ibid, s 14D(c).

[213] Section 166 of the Building Act addresses the particular situation that arises where a notice to fix is required due to building work that is non-compliant with a building consent. Section 166 provides:

166 Special provisions for notices to fix from building consent authority

- (1) If section 164 applies because a building consent authority that granted a building consent for building work considers that the building work has not been, or is not being, carried out in accordance with this Act or the building consent, a notice to fix applies only—
 - (a) to building work required during the period in which a building consent is operative; or
 - (b) in respect of building work for which a building consent should have been obtained; or
 - (c) in respect of building work for which a building consent was not required but where there was a requirement that the work meet the building code.
- (2) A building consent authority that is not a territorial authority or a regional authority that issues a notice to fix must, within 5 working days after issuing it, give a copy of it to—
 - (a) the territorial authority; or
 - (b) if the territorial authority has transferred, under section 233, any of its functions, duties, or powers under this Act to another territorial authority, the territorial authority to whom the functions, duties, or powers have been transferred.

[214] Section 167 of the Building Act creates a separate inspection regime to ensure building work required under a notice to fix is undertaken to the required standard. Section 167 provides:

167 Inspection of building work under notice to fix

- (1) If a specified person to whom a notice to fix was issued is required to notify a territorial authority or, as the case may be, a regional authority that the relevant building work has been completed, the territorial authority or regional authority must, on receipt of the notice from the specified person concerned, inspect, or arrange for its authorised agent to inspect, the building work to which the notice to fix relates.
- (2) After the building work has been inspected under subsection (1), the territorial authority or regional authority must, by written notice to the specified person concerned, either—
 - (a) confirm that the notice to fix has been complied with; or
 - (b) refuse to confirm that the notice to fix has been complied with.
- (3) The territorial authority or regional authority must, on giving the confirmation under subsection (2)(a), forward a copy of the confirmation to the responsible authority that issued the notice to fix (if that responsible authority is different from the territorial authority or regional authority).
- (4) If the territorial authority or regional authority refuses, under subsection (2)(b), to confirm that a notice to fix has been complied with, the territorial authority or regional authority must—
 - (a) give the specified person concerned written notice of—
 - (i) the refusal; and
 - (ii) the reasons for the refusal; and
 - (b) issue a further notice to fix in respect of the building work.
- (5) Section 164 applies to a notice to fix issued under subsection (4)(b).

[215] I have been made aware of a potential legal problem with the notice to fix regime. A particular issue that arises in the present case is the sequencing of work. The geotechnical experts all agree that there was a need for retaining walls to be established before foundations were created at a lower level. On the structural aspects, there was a need to undertake that work before the building was wrapped. But, there is no specific provision for work required by a building consent to be undertaken in any particular order. In those circumstances, can a Council issue a notice to fix?

[216] I can understand the Council's reluctance to use the notice to fix procedure in a case that primarily involves sequencing of work. On a literal interpretation of the statutory provisions to which I have referred, a conclusion that the procedure is unavailable could reasonably be reached. However, I tend to the view that a Court would be likely to interpret the power to issue a notice to fix in a manner that would best meet the purposes of the Building Act. All questions of statutory interpretation must be addressed by reference to the text of a particular provision, in light of the purpose of the particular legislation that is being considered.¹⁵⁰

[217] In the present case, the problem was capable of being resolved through the abatement notice procedure. But, in another case, the amount of earthworks being undertaken may not have breached the terms of an operative plan, leaving only the Building Act as a means of addressing the safety concerns. In that situation, the notice to fix procedure appears to be the only mechanism by which that could be done.

[218] I am sure any Court would strive to ensure the legislation could be interpreted in a manner that enabled safety concerns of the type that exist as a result of the absence of an appropriate retaining wall to be met through regulatory action.¹⁵¹ The alternative would be a lacuna in the legislation that could put people's personal safety at risk.

¹⁵⁰ Interpretation Act 1999, s 5(1).

¹⁵¹ See, as an example of a case in which that type of purposive approach was adopted, the decision of the Court of Appeal in *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604, at paras [21], [27] and [28] (Thomas and Blanchard JJ). In the context of the Building Act 2004, see, in particular, s 3(a)(i); set out at para [53] above.

(iii) *Code certification*

[219] 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way had all received code compliance certificates at the time they were declared dangerous buildings. Subsequently, the notices declaring buildings to be dangerous or affected have been removed in respect of 2, 3 and 4 Aneta Way.¹⁵² The remaining dwellings continue to be subject to the notices. According to Ms McLaughlan, AECOM and BCD Group, there were material defects in all four properties at the time inspections were completed.¹⁵³ All require significant remediation work.

[220] For the reasons I have given for my conclusions that there were deficiencies in the inspection process for both geotechnical and structural defects, I take the view that it was not reasonable for the Council to issue code compliance certificates in respect of 297 and 311 Lakes Boulevard and 2 and 4 Aneta Way.¹⁵⁴ In my view, the Council ought not to have issued code compliance certificates until all of the geotechnical and structural defects had been remedied. In short, for the purposes of s 94(1)(a) of the Building Act 2004, the Council could not have been satisfied on reasonable grounds that the relevant building work complied with the building consent, or Building Code.

(d) *Dangerous building issues*

[221] In its “draft” report of 19 December 2017, Beca took the view that none of the 13 dwellings they considered could be characterised as “dangerous” for the purposes of ss 121 and 121A of the Building Act 2004.¹⁵⁵ No steps were taken to declare the buildings dangerous at that time.

[222] Following receipt of the 12 April 2018 reports from Ms McLaughlan, BCD Group and AECOM,¹⁵⁶ the Council reconsidered whether to issue dangerous or affected building notices

¹⁵² See para [226] below.

¹⁵³ For example, see the geotechnical conclusions set out in AECOM’s 30 April 2018 report at para [112] above and the structural defects identified by BCD Group, summarised at para [119] above.

¹⁵⁴ See paras [204]–[206] above.

¹⁵⁵ See paras [96] and [97] above. Section 121 of the Building Act 2001 is set out at para [57] above. See also para [58] above, in relation to s 121A(a), dealing with the concept of an “affected building”.

¹⁵⁶ Ms McLaughlan’s report is discussed at paras [76]–[80] above; BCD Group’s report of 12 April 2018 is discussed at paras [115]–[120] above; and the AECOM/ICE report is discussed at paras [103]–[111] above.

under s 121 of the Building Act 2004.¹⁵⁷ After receiving legal advice as to the appropriate test to apply, the Council made a decision to do so on 16 April 2018.

[223] I am required to assume the correctness of the conclusions reached in the three 12 April 2018 reports. I do not take into account those reports that were provided on 30 April or 1 May 2018, because they were issued after the decision was made to declare the buildings dangerous. The Council's decision must stand or fall on the basis of the 12 April 2018 reports, and the legal advice it received. All legal advice that the Council has received in relation to the issues with which I deal in this report remain privileged.

[224] The notices fell into three categories:

- (a) 14 notices were issued which, following invasive testing, characterised 297A, 299A, 301A, 303A, 305, 305A, 307, 307A, 309, 309A, 311 and 311A Lakes Boulevard and 5 and 6 Aneta Way as dangerous buildings.
- (b) Four notices were issued that characterised 297, 299 and 301 Lakes Boulevard and 2 Aneta Way as dangerous buildings. These notices were issued on the basis that there were reasonable grounds to believe that these dwellings were infected by the same problems that had been established in respect of other properties following invasive testing. As at 16 April 2018, no consent had been given by the relevant homeowners to allow invasive testing on these four dwellings.
- (c) Four notices were issued characterising 303 Lakes Boulevard and 3 and 4 Aneta Way as "affected" buildings, by reason of their proximity to dangerous buildings.

[225] Of those buildings that were characterised as dangerous:

- (a) 301A, 305, 305A, 307 and 309A Lakes Boulevard were declared dangerous on the basis of both structural and geotechnical defects. All of these properties are to the rear of the subdivided sections and in close proximity to the non-retained boundary between the Aneta Way and Lakes Boulevard properties.

¹⁵⁷ Set out at para [57] above.

- (b) 307A Lakes Boulevard and 5 and 6 Aneta Way were declared dangerous buildings based on geotechnical considerations alone. 5 and 6 Aneta Way are on higher ground, immediately above 307A Lakes Boulevard, with only the unretained slope between them.
- (c) 297A, 299A and 309 Lakes Boulevard were declared dangerous buildings based on structural considerations alone.
- (d) No structural or geotechnical considerations were found to apply in respect of 297, 299, 301 and 303 Lakes Boulevard and 2, 3 and 4 Aneta Way.

[226] On 20 April 2018, the Council received additional advice from BCD Group, as a result of which the “dangerous building” notices for 2, 3 and 4 Aneta Way were lifted.

[227] On the basis that the opinions expressed in the three 12 April 2018 reports are correct, I consider that the Council was correct to declare the buildings “dangerous”. The Council was confronted with a situation in which it had received advice that those entering the buildings could be at risk of injury or death. In those circumstances, I am not prepared to find the Council acted other than in good faith and for proper purposes in making its decision.

10. Recommendations

[228] In my view, two distinct issues arise that demand separate responses. They are:

- (a) Immediate resolution of any claims made by homeowners in respect of alleged defective work on the part of Council, and
- (b) An inquiry into *why* the deficiencies in the performance of the Council’s regulatory functions occurred.

[229] I deal first with immediate questions involving losses suffered by the homeowners. They are entirely innocent. They bought properties in good faith, and had an expectation that the dwellings to be erected on them would be built to the standards required by the Building Code and, immediately upon completion, be habitable.

[230] As Bella Vista Homes has been placed in liquidation, the Council is effectively the last available target for legal action. For reasons that follow, I consider that this is a case in which the Council should not put homeowners to the cost and expense (both financial and emotional) of issuing proceedings in Court to recover the losses they have suffered. Although the Council would be legally entitled to have any homeowners' claims tested in Court, my recommendation is that the Council take immediate steps to resolve the homeowners' claims.

[231] There are good legal, economic and humanitarian reasons for the Council to act with the intention of attempting to settle by reference to the need to restore homeowners to the position they ought to have been in had the development been successfully completed. The risks and costs of litigation are at the forefront of my reference to legal and economic reasons to resolve the issues promptly. While I have identified a number of legal questions that would need to be resolved in favour of the homeowners if their claims were to succeed,¹⁵⁸ I assess the Council's risks of unsuccessfully defending proceedings brought on the basis of its (various) inadequate performance of regulatory functions as significant. Leaving aside the potential for innocent homeowners to be liable for crippling legal costs, the actual amount likely to be payable by the Council, the indirect cost of continuing involvement of senior Council personnel while proceedings were resolved, and the risk of being ordered to pay a significant amount of costs if the homeowners were successful after a contested hearing justifies an early resolution. While I have left political considerations to one side, they will inevitably have some impact on the Council's decisions about how to respond to this report.

[232] I have no doubt that a further investigation is required into why the Council fell so short of complying adequately with a number of the Resource Management Act and Building Act requirements. I am anxious that any investigation into why the failings occurred not be conducted in a manner akin to a "witch hunt". That would be counter-productive to my main objective in recommending that some form of early resolution of homeowners' claims be reached.

[233] Unfortunately, there does not appear to be any suitable mechanism available by which a particular investigation into what happened in the Bella Vista subdivision could be undertaken by a person with power to compel persons to give evidence and to produce documents. I

¹⁵⁸ See para [6] above.

consider that the best approach would be for Council to appoint an independent person to conduct such an investigation, perhaps with assistance from a respected expert (or experts) in relevant Resource Management Act and Building Act processes. One of the issues that would need to be addressed is the question of communication among the different regulatory arms within Council, with a view to ensuring that relevant information is shared.

[234] An investigation of that type would ensure all Council related aspects of the Bella Vista subdivision problems were investigated appropriately, and measures put in place to minimise the prospects of something similar happening again. I recommend that be done as soon as practicable after resolution of the homeowners' claims.

[235] However, if the Council were not to accept my recommendation to engage with homeowners promptly, I recommend that an independent investigation into why this occurred be established immediately.

DATED at Auckland this 1st day of June 2018

Hon Paul Heath QC