Determination 2007/110

Building consent for a house on land subject to coastal hazards at 35 Clifton Road, Haumoana, Hawkes Bay

1 The parties and the matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing ("the Department"), for and on behalf of the Chief Executive of the Department. In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (the First Schedule to the Building Regulations 1992).

1.2 The parties are:

(a) Storm Limited, the owner of 35 Clifton Road, Haumoana ("the owner") acting through its solicitors;

(b) The Hastings District Council ("the territorial authority") acting through its solicitors.

1.3 The application from the owner is in respect of a decision by the territorial authority to refuse to grant a building consent for the construction of a proposed house with an attached carport ("the house") on the seafront on the grounds that the house does not comply with the provisions of the Act in respect of building on land subject to natural hazards.

1.4 I take the view that I must decide:

(a) Whether the proposed building work complies with the provisions of the Building Code in respect of coastal erosion and inundation.

(b) Whether to confirm, reverse, or modify the territorial authority's decision to refuse to grant the building consent.

2 The building work and the sequence of events

2.1 The building work

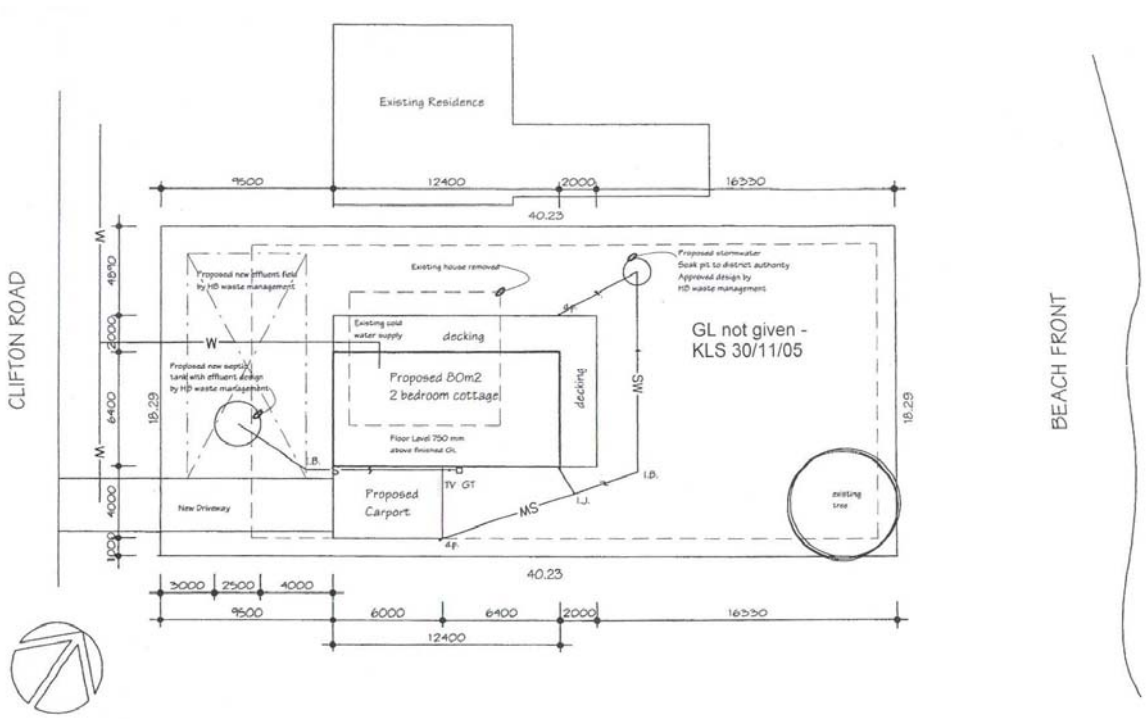
2.1.1 The house is on a 736 m^2 allotment extending from the road to the beach front. Many of the allotments along the seaward side of the road contain houses. It is not disputed that the allotments are subject to coastal erosion and inundation.

2.1.2 The proposed house is 9.5 m from the road boundary and 16.33 m from the seaward boundary.

2.1.3 The application for building consent covers the demolition of an existing cottage and storage shed and the construction of a 79.4 m^2 single-storey house with a 24 m^2 attached carport on one side and a 42.2 m^2 roofed deck around two other sides. In applying for a building consent, the owner said that the new building work had a specified intended life of 40 years in terms of section 113 and in addition the owner was:

> . . . prepared for the conditions imposed under Section 113 to require that the building be removed in the event of continual inundation, or mean high water springs being within 10 metres of the house, for a period of 6 months or more.

2.1.4 The house, as specified in the application for building consent, is of conventional timber-frame construction on timber piles except that the carport has a concrete slab-on-ground floor. The house, excluding the carport, has a finished floor level of RL 14.94 m, or 0.75 m above the current ground level, which in turn is 2.68 m above mean high water spring tides ("MHWS"). Wall cladding is plywood board-and-batten, roof cladding is corrugated steel. Disposal of surface water is to soakage on the seaward side of the house some 14 m from the seaward property boundary. Although the application included plans and specifications for the on-site foul water disposal system, the owner stated in a covering letter that a separate application would be made for a building consent in respect of the replacement of the current provisions for disposal of foul water, see 5.6 below.



Site plan of the house from the application for building consent

2.2 The events prior to the application for a determination

2.2.1 There had been two previous applications for a building consent in respect of erecting a new dwelling on the allotment. Those applications had been made under the Building Act 1991 ("the former Act") and the territorial authority had rejected them because it was not satisfied that the proposals met the requirements of section 36(2) of the former Act relating to building on land subject to natural hazards (corresponding to sections 71 to 74 and 392(2) to (4)). This determination is in respect of a third application, dated 9 November 2005, this time under the Act.

2.2.2 Prior to the third application for a building consent, apparently in response to a proposal that the new dwelling would be protected by a seawall, the territorial authority had advised the owner, in a letter dated 21 September 2005, that:

> . . . we agree that if you are able to meet all three tests under section 72, then consent may be able to be granted. Until we have a complete proposal, we will be unable to determine whether that will be the case and it seems to me that a critical component of any proposal will be whether the land is able to be protected from inundation . . .

2.2.3 As to the specified intended life of the house, in a letter attached to the application for building consent, the builder said:

> [Our buildings] are built for transportation and easy delivery. This new cottage will be delivered to the site complete with side decks attached and placed on timber foundations. Should the mean high water spring rise to put the dwelling at risk and a decision is made to remove the house a building removal company would be commissioned to remove the carport, extended front deck and the cottage released from its existing foundation and substructure. On completion of this work the building could be picked up and relocated to a new site.

2.2.4 Also attached to the application for building consent was a letter from the owner's solicitors which discussed the territorial authority's letter of 21 September 2005 mentioned in 2.2.2 above, and said:

> . . . we understand that the proposal . . . will not alter the current effects of erosion or inundation of the subject property or the adjacent properties . . . .

2.2.5 The owner's solicitors also discussed the interpretation and application of the relevant provisions of the Act.

2.2.6 On 13 March 2006 the territorial authority advised the owner that the application for building consent had been refused and giving reasons for that refusal.

2.3 The application for a determination

2.3.1 The application for this determination was dated 7 November 2006. It said:

> [The owner] seeks a decision that [the territorial authority's] interpretation of the effects of sections 71 and 72 is incorrect; reversing [the territorial authority's decision to refuse to issue a building consent]; and issuing consent under section 72 to construct a dwelling with a specified 40 year life in accordance with the plans lodged.

2.3.2 The application included the plans and specifications submitted for building consent, an account of events to date, relevant correspondence between the parties, legal arguments as to the interpretation of relevant provisions of the Act, and technical arguments largely based on two reports that accompanied the application:

(a) A report ("the report") dated 25 November 2003 prepared for the owner by a member of a firm of consulting engineers ("the owner's coastal expert"), and

(b) A review of that report ("the review") dated 12 January 2004 prepared for the territorial authority by a member of another firm of consulting engineers ("the territorial authority's coastal expert").

2.3.3 In response to that application, on 5 December 2006 the territorial authority asked the Department about the likely time-line for processing the application and said that it would make substantive submissions in due course but meanwhile raised three preliminary matters:

(a) The omission from the application of certain legal opinions that it had sent to the owner and which it now copied to me.

(b) The consequences of the eight month delay between the territorial authority's decision to refuse to grant the building consent and the owner's application for a determination, during which period the regional council has publicly notified a proposed coastal plan under the Resource Management Act 1991 which would make the construction of the house a non-complying activity in terms of that Act.

(c) Legal argument to the effect that the application should be refused because the Chief Executive had no jurisdiction over the matter.

2.3.4 The owner responded on 12 December 2006 to the effect that the proposed coastal plan was irrelevant to the matter for determination and disputing the argument that the Chief Executive had no jurisdiction.

2.3.5 On 13 December 2006 the Department replied to the parties to the effect that, under section 179, there appeared to be no basis on which the application for determination could be refused (without at that time addressing the question as to whether the Chief Executive did in fact have jurisdiction), and asking for the parties' agreement to an extension of time under section 185(2)(b).

2.3.6 On 21 December 2006 the territorial authority made its substantive submissions in response to the application for determination. Those submissions:

(a) Discussed various legal issues.

(b) Discussed the natural hazards to which the allotment is subject, with attached incident logs and photographs in respect of damage to other houses in the general vicinity during previous storms.

(c) Discussed an attached coastal impact assessment of the house ("the assessment") dated 15 December 2006 prepared for the territorial authority by the territorial authority's coastal expert.

2.3.7 On 23 January 2007 the owner requested further time to consider the new information submitted by the territorial authority, and on 29 January 2007 I asked the territorial authority for clarification of its position as to:

- Whether there is more than a low probability that coastal hazards will damage the building before it is removed at the end of its specified life, and
- Whether the undamaged building will worsen the coastal hazards before it is removed at the end of its specified life.

I also drew attention to Determination 2004/08 as regards the time needed to remove a building in accordance with a section 113 condition.

2.3.8 On 22 February 2007 the territorial authority responded by:

(a) Drawing my attention to and elaborating on various passages in the documents previously provided to the effect that the application for building consent did not demonstrate that the building work would comply with the Building Code.

(b) Saying:

> . . . In summary, there is not . . . a low . . . but a high probability ("high risk") that coastal hazards will damage the building before it is removed at the end of its specified life.
>
> . . . The Council considers that applicant has yet to demonstrate that the building will not accelerate or worsen the natural hazard either on the land, or any other property (sections 71(1)(b) or 72(a)) or that adequate provision has been made under section 71(2)(a).

> . . . The practical realities of the situation where storm damage is occurring [is such that] the Council is not satisfied that any removal vehicle could necessarily be obtained at short notice, that a removal vehicle could gain safe access to the site and building, or that the building could be removed in time to avoid damage to other property and to avoid worsening coastal hazards.

2.4 The first draft determination

2.4.1 I prepared a draft determination ("the first draft") in the light of the documents mentioned above and copied it to the parties under a covering letter to the effect that if it was not accepted (subject only to non-controversial amendments) there would need to be a formal hearing.

2.4.2 The first draft was to the effect that:

(a) The territorial authority's decision to refuse to issue the building consent was confirmed on the grounds that the application for that consent did not establish that the house would comply with the Building Code in respect of coastal hazards throughout its specified intended life of 40 years.

(b) Although it was not for the Chief Executive to say how the owner might amend the application in order to obtain a building consent, the draft offered some comments on that matter.

2.4.3 The territorial authority did not accept the first draft for various reasons that are taken into account below.

2.4.4 The owner accepted the first draft and disputed the territorial authority's reasons for not doing so.

2.4.5 A letter from the owner's coastal expert dated 20 April 2007 and a response dated 21 May 2007 from the territorial authority's coastal expert were also submitted and discussed at the hearing.

2.5 The hearing

2.5.1 The hearing was held on 24 May 2007 before me, accompanied by Barry Brown, Determinations Referee. The owner was represented by its counsel from Simpson Grierson, who was accompanied by the owner, the owner's coastal expert, and a planning consultant. The territorial authority was represented by its counsel from Bannister & von Dadelszen, who was accompanied by the territorial authority's coastal expert; the territorial authority's Manager, Resource Management; and Deputy Chief Executive (for part of the hearing only); the territorial authority's Team Leader, Building; and its Community Safety Manager. Also present were Hawke's Bay Regional Council, Team Leader Consents; at the invitation of the territorial authority, and a solicitor from Buddle Findlay, at my invitation. Three other officers of the Department were in attendance.

2.5.2 At the hearing, the territorial authority's deputy chief executive opened by emphasising the need for territorial authority building officials to understand the relevant provisions of the Act, particularly sections 71 and 72.

2.5.3 The owner's coastal expert spoke to his letter of 20 April 2007 in which he had set out an analysis of the most likely period before a dwelling constructed at the site would have to be removed.

2.5.4 Counsel for the owner said that the owner generally accepted the reasoning and conclusions of the first draft and did not accept the territorial authority's criticisms of it, which appeared to raise no new issues of substance.

2.5.5 The territorial authority's coastal expert spoke to his letter of 21 May 2007 in which he commented on the letter of 20 April 2007 from the owner's coastal expert.

2.5.6 Counsel for the territorial authority did not comment on the first draft's decision but strongly disputed various passages relating to the interpretation and application of the provisions of the Act and comments as to what might be done to bring the proposed building work to compliance with the Building Code.

2.5.7 Counsel for the territorial authority, and its deputy chief executive, said that situations such as those that gave rise to this determination were becoming increasingly frequent and were of great concern to territorial authorities so that building officials in particular needed to have a practical understanding of the relevant requirements of the Act and how they were to be applied in such situations.

2.5.8 Those were essentially questions of law, which were discussed at some length at the hearing.

2.6 The second draft determination

2.6.1 Following the hearing, I prepared a further draft determination ("the second draft"), which I copied to the parties.

2.6.2 The owner accepted the second draft and pointed out an editorial error, which has been corrected.

2.6.3 The territorial authority did not accept the second draft and said:

(a) That it remained of the view that it had taken "a legally appropriate and commonsense approach to this matter" and that it remained the territorial authority's view that "it is not appropriate to grant the building consent sought".

In fact, this determination confirms the territorial authority's decision to refuse to issue the building consent for which the owner applied, so that the territorial authority's real concern is that I have come to that conclusion for reasons different from those of the territorial authority, and that it does not agree with my comments below as to how the plans and specifications submitted for building consent might be amended to comply with the Building Code.

(b) That the territorial authority requested "that the determination acknowledge and take account of the attached comments and those previously made in writing and at the 24 May 2007 hearing".

The territorial authority did not identify which of its previous comments (other than "the attached comments") it considered had not been taken into account in the second draft. I have reviewed the second draft and am satisfied that all of the territorial authority's comments and submissions have been taken into account, and that any of them that are not specifically discussed did not affect my decision.

(c) The "attached comments":

(i) Emphasised the importance of the determination, saying:

> The Council does not believe that the Determination in its present format will assist building consent authorities in dealing with the legal issues arising in future applications. . . .

(ii) Made specific comments on passages in the second draft. Those comments are discussed below.

(iii) Pointed out editorial errors, which have been corrected.

2.6.4 Except as mentioned in 2.6.2 and 2.6.3(c) above, this determination corresponds to the second draft. It:

(a) Sets out relevant provisions of the Act and the Building Code, see 3 below.

(b) Sets out and discusses the evidence and submissions relating to coastal hazards and building technology ("the technical issues"), see 4 and 5 below.

(c) Sets out and discusses the submissions relating to the interpretation and application of the Act ("the legal issues"), see 6 below.

(d) Comments on, but does not determine, how the plans and specifications submitted for building consent might be amended to comply with the Building Code, see 7 below.

2.6.5 This determination includes brief accounts and discussions of the evidence at the hearing, the legal submissions, and the numerous and detailed documents mentioned above. However, various matters which were mentioned at the hearing or in the documents are not discussed below because after full consideration of all the circumstances those matters did not affect my decision.

3 The relevant provisions of the Act and the Building Code

3.1 Relevant provisions of the Act include:

3 Purpose

The purpose of this Act is 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—

(a) people who use buildings can do so safely and without endangering their health; and

(b) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(c) people who use a building can escape from the building if it is on fire; and

(d) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

4 Principles to be applied in performing functions or duties, or exercising powers, under this Act

(1) This section applies to . . .

(a) the Minister; and

(b) the chief executive; and

(c) a territorial authority or regional authority (but only to the extent that the territorial authority or regional authority is performing functions or duties, or exercising powers, in relation to the grant of waivers or modifications of the building code and the adoption and review of policy on dangerous, earthquake-prone, and insanitary buildings or, as the case may be, dangerous dams).

(2) In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:

(a) when dealing with any matter relating to 1 or more household units,—

(i) the role that household units play in the lives of the people who use them, and the importance of—

(A) the building code as it relates to household units; and

(B) the need to ensure that household units comply with the building code:

(ii) the need to ensure that maintenance requirements of household units are reasonable . . .

(c) the importance of ensuring that each building is durable for its intended use . . .

(e) the costs of a building (including maintenance) over the whole of its life:

(f) the importance of standards of building design and construction in achieving compliance with the building code . . .

(j) the need to provide for the protection of other property from physical damage resulting from the construction, use, and demolition of a building . . .

(m) the need to facilitate the efficient use of energy and energy conservation and the use of renewable sources of energy in buildings:

(n) the need to facilitate the efficient and sustainable use in buildings of—

(i) materials (including materials that promote or support human health); and

(ii) material conservation . . .

(o) the need to facilitate the efficient use of water and water conservation in buildings:

(p) the need to facilitate the reduction in the generation of waste during the construction process.

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

18 Building work not required to achieve performance criteria additional to or more restrictive than building code

(1) A person who carries out any building work is not required by this Act to—

(a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or

(b) take any action in respect of that building work if it complies with the building code. . . .

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent. . . .

49 Grant of building consent

(1) A building consent authority must grant a building consent if it is satisfied 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. . . .

71 Building on land subject to natural hazards

(1) A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if—

(a) the land on which the building work is to be carried out is subject or is likely to be subject to 1 or more natural hazards; or

(b) the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.

(2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—

(a) protect the land, building work, or other property referred to in that subsection from the natural hazard or hazards; or

(b) restore any damage to that land or other property as a result of the building work.

(3) In this section and sections 72 to 74, natural hazard means any of the following:

(a) erosion (including coastal erosion, bank erosion, and sheet erosion) . . .

(d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding) . . .

72 Building consent for building on land subject to natural hazards must be granted in certain cases

Despite section 71, a building consent authority must grant a building consent if the building consent authority considers that—

(a) the building work to which an application for a building consent relates will not accelerate, worsen, or result in a natural hazard on the land on which the building work is to be carried out or any other property; and

(b) the land is subject or is likely to be subject to 1 or more natural hazards; and

(c) it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned.

73 Conditions on building consents granted under section 72

(1) A building consent authority that grants a building consent under section 72 must include, as a condition of the consent, that the building consent authority will, on issuing the consent, notify the consent to,—

. . . the Registrar-General of Land.

74 Steps after notification

(1) On receiving a notification under section 73 . . .

(b) the Registrar-General of Land must record, as an entry on the certificate of title to the land on which the building work is carried out,—

(i) that a building consent has been granted under section 72; and

(ii) particulars that identify the natural hazard concerned.

113 Buildings with specified intended lives

(1) This section applies if a proposed building, or an existing building proposed to be altered, is intended to have a life of 50 years or less.

(2) A territorial authority may grant a building consent only if the consent is subject to—

(a) the condition that the building must be altered, removed, or demolished on or before the end of the specified intended life; and

(b) any other conditions that the territorial authority considers necessary.

(3) In subsection (2), specified intended life, in relation to a building, means the period of time, as stated in an application for a building consent or in the consent itself, for which the building is proposed to be used for its intended use.

392 Building consent authority not liable

(2) Subsection (3) applies if—

(a) a building consent has been issued under section 72; and

(b) the building consent authority has given a notification under section 73 . . . and

(d) the building to which the building consent relates suffers damage arising directly or indirectly from a natural hazard.

(3) The persons specified in subsection (4) are not liable in any civil proceedings brought by any person who has an interest in the building referred to in subsection (2) on the grounds that the building consent authority issued a building consent for the building in the knowledge that the building for which the consent was issued, or the land on which the building was situated, was, or was likely to be, subject to damage arising, directly or indirectly, from a natural hazard.

(4) The persons are—

(a) the building consent authority concerned; and

(b) every member, employee, or agent of that building consent authority.

3.2 Relevant provisions of the Building Code include:

Clause A2 INTERPERATION

Surface water All naturally occurring water, other than sub-surface water, which results from rainfall on the site or water flowing onto the site, including that flowing from a drain, stream, river, lake or sea.

Clause B1 STRUCTURE

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.

> **B1.3.3** Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:
>
> (e) Water and other liquids,
>
> (r) Removal of support.
>
> **B1.3.4** Due allowance shall be made for:
>
> (a) The consequences of failure,
>
> (e) Accuracy limitations inherent in the methods used to predict the stability of buildings.
>
> **B1.3.6** Sitework, where necessary, shall be carried out to:
>
> (a) Provide stability for construction on the site, and
>
> (b) Avoid the likelihood of damage to other property.
>
> **Clause E1 SURFACE WATER**
>
> **E1.3.1** Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water, resulting from an event having a 10 percent probability of occurring annually and which is collected or concentrated by buildings or sitework, shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.
>
> **E1.3.2** Surface water, resulting from an event having a 2 percent probability of occurring annually, shall not enter buildings. [Performance E1.3.2 applies to housing but not to certain other specified uses.]

3.3 In the discussion below, the term "10% AEP storm" means a storm event having a 10 percent probability of occurring annually (sometimes referred to as "a storm having a return period of 10 years" or "a 10 year storm"), "2% AEP" corresponds to a 50 year storm, and so on. The smaller the AEP, the larger the storm.

4 The technical submissions

The technical submissions use the terms "dune crest", "crest of the beach", "foredune", and, perhaps most often, "beach crest", all of which I take to mean the same thing. Determination 2004/08 used the term "foredune", but in this determination I have chosen to use "beach crest" because that was the term which the parties generally used at the hearing.

4.1 The report

4.1.1 In the report the owners' coastal expert said:

> The coast is eroding along the front of Haumoana, and the shoreline is very active around the average line of recession.
>
> [A survey profile on the owner's boundary that is monitored by the regional council] shows a long-term recession on the coastline averaging 0.418 metres/year. At any

time the coast can move within a band 3 m shoreward and 4 m seaward of this line. At infrequent times higher movements have been recorded (more than 8 m of recession on one occasion – this was subsequently recovered at a rate of at least 1.3 m a month). . . .

Survey at 19 Clifton Road shows the line of Mean High Water Springs to be just under 3 m seawards of the property boundary.

Survey plans and aerial photographs and current survey all show that there is a greater distance at 35 Clifton Road between the property boundary and the sea than at 19 Clifton Road. Aerial photographs in 1936 and 1948 show a constant difference between the two properties of 16 m. That being the case, it could be said that statistically the property at 35 Clifton Road has 16/0.418 years i.e. 38 years before the situation reaches that now experienced at 19 Clifton Road. At this time, again on a statistical basis, the line of MHWS should be just outside the property boundary.

The proposed building is set back a further 13 m [now 16.33 m as shown in the plans and specifications attached to the application for a determination] from the boundary, and it is likely to be more than 70 years before MHWS reaches this line.

[There are various uncertainties but nevertheless] it can be said that it is likely to be a considerable period before the building itself will interact with the sea.

Therefore for some time the proposed works will have no effect at all on the site or on adjacent properties. . . .

The proposed building at 35 Clifton Road will not have [any effect on erosion on the property itself or on other property] until the time that it projects into the active surf zone [and] at that time it would be prudent to remove the building altogether.

Conclusions

The property is likely to be subject to erosion.

There is a considerable period of time before the proposed building is itself likely to be damaged by sea action.

The proposed building will not worsen erosion in front, nor affect the adjacent properties until all the buildings in the area are in an equally dangerous situation and are due to be abandoned.

It is evident from the analysis that the further the building is located from the seaward boundary of the property, the longer time it will have before affected by erosion.

Before the building is significantly affected, there will be times when wave action/swash affect the surrounds. Some minor works may be required to stabilise the grounds in front of the building prior to the time periods discussed above.

4.2 The review

4.2.1 In the review the territorial authority's coastal expert said:

[It is proposed that the seaward face of the building will be] some 13 m [now 16.33 m] back from the back from the seaward property boundary. [We assume] that the building will be around 250 mm above existing ground levels [and] that a standard concrete slab or piled foundation will be constructed. . .

Examining the most recent aerial photographs from LINZ it is apparent that the shoreline fronting the collection of houses seaward of Clifton Road in this area is seaward of the unprotected shoreline to the north-west and south-east. This suggests that the shoreline in this position is artificially held by both protection works and by works to replace the upper beach area after storm events. . .

. . . Figure 1 shows the latest beach profile survey [at 35 Clifton Road] (9 April 2002), the location of the property boundary, and the proposed building. RL 11.0 m is taken to be the approximate location of MHWS.

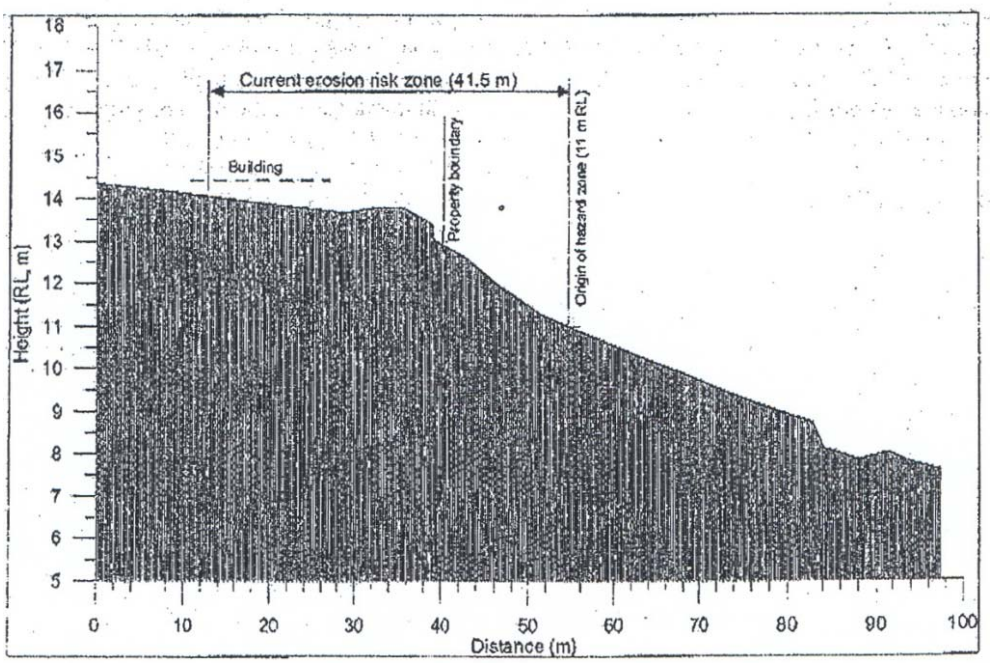


Figure 1 of the review: Beach profile at 35 Clifton Road (9 April 2002)

The beach profile in Figure 1 shows the beach slope extending up to and into the property boundary, with a scarp and raised berm just inside the property boundary. This suggests that there is regular wave action above MHWS at least during periods of large southerly swell combining with high tides. Wave hindcasting . . . indicates that while typical wave heights are less than 1.0 m, nearshore wave heights in excess of 2 m can occur for 2 to 3 days per year. . . .

[The report] assesses a maximum shoreline fluctuation from the long-term trend line of 3 m. . . . ..Shoreline movement due to storm events and seasonal trends can significantly affect the shoreline position derived from linear extrapolation of the long-term trend.

Our evaluation of coastal hazard for this location identifies a zone extending back 41.5 m from RL 11 m that is currently at risk from erosion. This width comprises an allowance for 10 years of erosion at 0.42 m/yr (4.2 m), storm erosion for an extreme storm event, cut and shoreline fluctuations of 11.2 m (compared to 3 m by [the report]), a safety factor of 1.25 and the distance from MHWS to the dune crest (22 m) to represent the landward translation of the existing beach profile. The resulting current erosion risk zone is shown in Figure 1. Note this distance does not allow for sea level rise effects that would locate the hazard zone landward of the property boundary.

. . . Therefore, while [the report] may be correct in concluding that [it] may be more than 70 years before MHWS reaches the seaward extent of the building, it will be a

considerably shorter period of time when wave action during storms will impact on the dwelling.

[The report] does not provide an estimate of flood levels for establishing a safe building platform level. . . . Our assessment . . . provides a flood level (excluding Sea Level Rise) of 14.4 m RL and a level of 14.9 m RL inclusive of SLR to 2100. . . .

In addition, evidence from adjacent properties suggests that significant modification of the foreshore occurs as a result of local property owners seeking to protect their properties from the forces of the sea. Historic modifications include the dumping of rubble, rock, construction debris, tyres etc, all of which can adversely affect coastal processes and result in increased erosion either by end effects or by restriction of normal sediment transport trends.

Conclusions

. . . The proposed building is likely to be at risk within 50 years of storm erosion, ongoing shoreline retreat and flooding from the sea. . . .

The building itself can increase reduction in beach level by preventing material from entering the beach system. This can exacerbate erosion processes. . . .

Should Council consider granting of consent as well as the limitations required by [section 36(2) of the former Act, now sections 73 and 74] we would suggest consideration of a term of less than 50 years. [A condition of the consent should be] a requirement that full removal of any structures from the property be carried out by the property owner to Council's satisfaction.

4.3 Response to the review

4.3.1 In response to the review, the owner's coastal expert said:

[The review] generally agreed with the [report], but reduced the expected time to 50 years. . . .

Comment

1. I am able to state that, without doubt, the piles [supporting the building] will not have any impact on erosion processes. They will be spaced too far apart to significantly affect wave hydraulics and have any net result during a storm episode. Therefore they will not retain material, will not prevent material being released to longshore drift as required by wave energy, and will not affect neighbouring properties.

2. While the [review] reduced my estimate of time before wave action will have an impact on the building to 50 years, it is proposed in the application that the cottage be removed after 40 years . . .

4.3.2 In its application for determination, the owner said that the review had been made on the basis of an earlier application for building consent, and that the current application was different in that:

(a) The floor level of the building would be 750 mm above existing ground level rather than the 250 mm mentioned in the review.

(b) The building would have wooden piles "to ensure . . . removable [*sic*]" rather than the "standard concrete . . . foundation" mentioned in the review.

4.4 Refusal of building consent

4.4.1 On 13 March 2006 the territorial authority gave the owner written notice that the territorial authority had refused to grant a building consent, saying:

> The applicant has accepted that Section 72 does not apply . . . [and the territorial authority] has concerned itself only with whether it may grant a building consent pursuant to Section 71(1) or (2). . . .
>
> In relation to Section 71(1)(b) the applicant proposes to raise the building on piles as a mitigation measure. However it is not clear whether the existence of the piles themselves may accelerate, worsen, or cause the natural hazard on that land or any other property. . . .The [plans and specifications] show baseboards are to be fixed to the building [which] may negate claims that the building design protects the building from the hazard.
>
> The [territorial authority] has considered whether . . . it can be satisfied adequate provisions have been made, or will be made, to deal with [section 71(2)(a) or (b), [and] has concluded . . . that it cannot be satisfied either 71(2)(a) or (b) can apply.
>
> The reasons why the [territorial authority] cannot be satisfied are:
>
> 1) The application omits to demonstrate how the land will be protected, how the building work (being light timber-framed construction) will withstand impacts from wave action/inundation, and how inundation might impact on other property. . . . Therefore the [territorial authority] cannot be satisfied as to the adequacy of provisions and consent cannot be granted under subsection 71(2)(a).
>
> 2) The application is silent on any [provisions to restore damage to the land or other property]; the protection measures are focussed on the building itself. Therefore the [territorial authority] cannot be satisfied as to the adequacy of provisions and consent cannot be granted under subsection 71(2)(b).

4.4.2 There was also some discussion of the on-site foul water disposal system, see 5.6 below.

4.5 The assessment

4.5.1 In the assessment, the territorial authority's coastal expert said:

> . . . we have reviewed the coastal monitoring and the findings expressed in [the review]. . . .
>
> . . . the long term erosion rate . . . has increased from 0.42 m/yr . . . to 0.55 m/yr.
>
> The majority of the site [is] in the current erosion risk zone ["CERZ"] [which] represents the shoreline potentially affected by erosion without consideration of ongoing erosion of the effects of sea level rise [and] based on the width of shoreline fluctuation resulting from a significant storm event (11.2 m, estimated return period of 200 years), 10 years of ongoing long term retreat (4.2 m) and the width of the beach from dune crest to MHWS (22.3 m) [with] a factor of safety of 1.25 . . . [Table 1] shows the number of years [from April 2002] it is projected to take the beach crest to

reach the mapped CERZ. A range of scenarios have been considered ranging from the published long term rate established during the hazard report and no consideration of storm effects to consideration of storms and updated long term retreat rates.

Table 1 Years for beach crest to reach published CERZ boundary

Case	Long term retreat rate (m/yr)	Storm event allowance (m)	Years to reach CERZ boundary (from April 2002)	Comments
1	0.42	0.0	44.5	2004 retreat rate, no storm allowance
2	0.55	0.0	34.0	Current retreat rate, no storm allowance
3	0.42	11.2	17.9	2004 retreat rate, storm allowance, no factor of safety
4	0.55	11.2	13.6	Current retreat rate, storm allowance, no factor of safety
5	0.55	15.1	6.5	Current retreat rate, storm allowance and factor of safety

The present site is currently at risk to extreme seas and onshore storms. However, the most significant risk is the high rate of ongoing shoreline erosion. The risk of additional storm damage will progressively increase as a result of ongoing shoreline retreat erosion and beach crest lowering. . .

. . . We do not believe the foundations as proposed are sufficient to mitigate instability. The proposed piles . . . are not sufficiently robust or deep to provide a stable platform to the proposed structure should land levels drop. . . .

In our opinion, the options proposed . . . to mitigate erosion are unlikely to provide a 40 year period where the dwelling will be free from hazard and there is a risk of injury or harm that could occur to occupants of the building.

. . . The proposed relocation . . . when MHWS reaches 10 m of the property is unsound as the dwelling will experience significant wave action and damage well before [then]. A more pragmatic approach of relocation when the beach crest reaches within 10 m of the property would result in the building being removed within 5 to 20 years and significant wave inundation of the land would occur prior to the dwelling being removed . . . .

4.6 At the hearing

4.6.1 At the hearing, the owner's coastal expert quoted Determination 2004/08 and spoke to the analysis in his letter of 20 April 2007 of the "most likely" period before the house had to be removed on what I took to be the implicit assumption that a new application for building consent would be successful if it was made on the basis that:

(a) The house had a specified intended life expressed in terms of when the beach crest came to within a certain distance from the house ("the trigger point"), and

(b) The building consent was subject to:

(i) A section 113 condition to the effect that the house must be removed or demolished on or before the end of that specified intended life, and

(ii) A section 73 condition requiring an entry on the certificate of title,

with the result that the owner accepted the risks of coastal hazards, particularly the risk that the building might come to the end of its specified intended life after only a few years, and the territorial authority was exempted from liability under section 392.

4.6.2 As to Determination 2004/08, owner's coastal expert referred to his letter of 20 April 2007, which said:

> The essence of the finding is that action should be taken to remove the house when the foredune has reached a trigger point ten metres from the front of the house. The ten metre distance is considered adequate to enable safe removal even in the event of a 10% AEP storm.
>
> It could be suggested that this is an overly conservative requirement as the likelihood of a 10% AEP storm occurring exactly on the two or three day period after the trigger point has been reached is very low (in addition, when predicting the most likely time for the trigger point to be reached, a conservative approach would have made allowance for a 10% AEP storm to have already occurred in that period, and the probability being considered is that of a second 10% AEP storm occurring precisely at the trigger point). An "annual" storm might have been more appropriate.
>
> However, accepting that a 10 m trigger point is appropriate, the question is what is the "most likely" period before this point is reached.
>
> [The assessment] notes that the coastline . . . adjacent to the property is now receding at 0.55 m per year (taken as 0.42 m per year prior to more recent data has been received [*sic*]).
>
> However it does not do this at that regular rate, and instead moves sharply with storms and recovers to a lesser extent between storms. This could be seen as moving at an average rate plus or minus some variation.

4.6.3 After discussing various approaches to the statistical analysis of available data as to the dynamic behaviour of the beach, the letter of 20 April 2007 concluded that:

- The coastline at Haumoana is susceptible to erosion, but the rate and timing of movement depends on the ongoing sequence of storms and not on the coast itself;
- What comes next does not depend on what has happened before – the fact that there has been a long period of no significant retreat does not necessarily mean that there will be a period of large erosion to catch up with the average;
- Nor does a long period of no significant retreat mean that this is going to continue;

- There is great difficulty in defining an "average" rate of retreat that covers the whole of the survey period (1974 to present), and that will govern future movement;

- There is a curious pattern of movement taking place at present.

4.6.4 On the basis of what he considered to be the appropriate method of statistical analysis, the owner's coastal expert said:

> . . . there is expected to be an interval of 21 years before the trigger point is reached.
>
> . . . it would . . . be appropriate to include some level of safety factor to account for the fact that that the data is not a continuous record, and may have missed some critical movements. A factor of 1.25 gives a time interval of 17 years.
>
> . . . this is a theoretical statistical analysis, and adverse events can combine unexpectedly . . . . Therefore there is no guarantee of 17 years of life – just that circumstances would be on the unlucky side if the life were substantially less.

4.6.5 The territorial authority's coastal expert disagreed with the discussion of Determination 2004/08 (see 4.6.2 above) saying in his letter of 21 May 2007:

> [Determination 2004/08] concluded that the house does not comply with clause E1.3.1 due to timeliness factors affecting the building's removal. This would suggest that 10 m in that instance was not considered adequate and that a larger distance would be required.

4.6.6 The owner's coastal expert's analysis had used recent data that had been collected monthly instead of annually as previously, whereas the assessment had used only annual data. The territorial authority's coastal expert's letter of 21 May 2007 said:

> . . . Using annual change data is likely to change the results slightly.
>
> Accepting these limitations and using [the formula adopted by the owner's coastal expert], the following horizontal excursions from the trend line can be deduced for a range of return period events. [The] following table also provides [my] estimates based on a statistical analysis on annual change. It can be seen from both methods that similar excursions from the trend were calculated.

Table 1 Comparison of annual excursion estimates

Return period (years)	Excursion estimates (m)	
	[Owner]	[Territorial authority]
6.25	4.10	3.73
10	4.95	
40	7.37	7.45
50	7.76	
100	8.94	
200	10.12	11.18

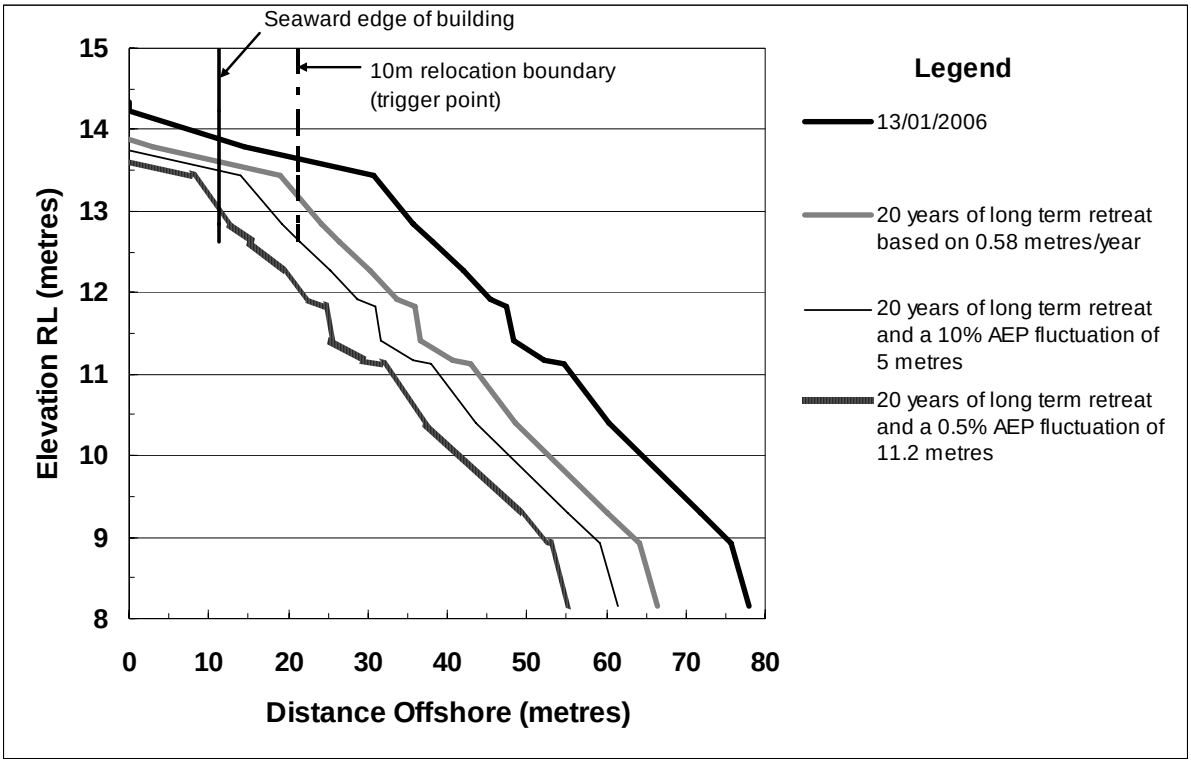
Therefore, both methods show a similar order of magnitude fluctuation of the beach profile.

[The owner's coastal expert] concludes that there is a "most likely" period of around 17 years before the trigger point would be reached. I have plotted a range of shoreline profiles on Figure 1 that show the most recent survey from the regional council data base (13/01/2006) together with translated profiles based on:

1) 20 years of long-term retreat based on 0.58 m/yr

2) 20 years of long-term retreat and a 10%AEP fluctuation of 5 m

3) 20 years of long-term retreat and a 0.5% AEP fluctuation of 11.2 m.



From Figure 1 of the letter of 21 May 2007

This supports [the] conclusion that there would be a period of 17 years before the trigger point is reached, although it is reached in this time without taking into account any short term fluctuation. With the beach retreat there is also a reduction in beach crest level over time. This will increase the rate and frequency of wave overtopping.

Over a period of 20 years the change [*sic*] of a 10%AEP fluctuation occurring is almost 90% (i.e. highly likely), while there is a 10% chance of a 0.5%AEP fluctuation occurring. Therefore, there is a reasonable chance of the crest of the beach reaching this trigger well before 17 years.

. . . However, it is my opinion that this position is likely to be reached sooner [than] this due to the combination of long-term erosion trends and shoreline fluctuation. Climate change effects may further reduce the time the beach crest reaches the boundary.

4.6.7 In response to questions, the territorial authority's coastal expert said that:

(a) It was possible to visually identify the position of the beach crest from time to time.

(b) In order to estimate flood levels it was necessary to consider not only MHWS but also wave effects and possibly a general rise of sea level.

(c) Neither the piles supporting the house, nor the concrete slab floor of the garage, would divert sea water to an extent that would adversely affect neighbouring properties.

4.6.8 In response to questions, counsel for the territorial authority said that it did not concede that the proposed floor level of RL 14.94 m was sufficient to ensure that water would not enter the house. No indication was given as to what floor level the territorial authority considered appropriate.

5 Discussion of technical issues

5.1 Determination 2004/08

5.1.1 At the hearing there was some discussion of Determination 2004/08, which was made by the then Building Industry Authority ("the Authority") under the former Act. I consider that many of the technical issues considered in Determination 2004/08 are essentially the same as issues raised in this determination.

5.1.2 Determination 2004/08 was made on the application of a neighbour disputing the issuing of the building consent and was therefore in terms of section 16(d) of the former Act, now section 176(e)(i), confined, to the provisions of the Building Code that have the purpose of protecting the neighbour's property, specifically clause E1.3.1. However, clause B1 was also relevant to the protection of the neighbour's property because the building included concrete blockwork so that its collapse could form a groin that might divert water on to the neighbour's property. One of the points at issue was the adequacy of the 10 m trigger point used to specify the intended life of the building. The Authority took the view that it was appropriate to define a building's specified intended life in terms of the occurrence of a certain event instead of in terms of a particular time (although a specified intended life must not exceed 50 years). I take the same view. In both cases, the event occurs when the beach crest reaches the trigger point.

5.1.3 In Determination 2004/08, the Authority determined that the proposed 10 m trigger point was not adequate because of considerations relating to the facts of the case, and in particular the protection of the neighbour's house. In this case, somewhat different considerations apply, in particular because the house is of light timber construction and will be easier to remove or demolish, and its collapse is not likely to form a groin.

5.1.4 I understood from the hearing that the owner's and the territorial authority's coastal experts agreed that the "trigger point" approach was appropriate but did not agree as to whether 10 m trigger point would in fact be adequate in the circumstances of this determination.

5.2 Relevant provision of the Building Code

5.2.1 The provisions of the Building Code relevant to coastal hazards in this case are:

(a) Clause B1.3.1 which requires in effect that throughout the life of the house there must be a low probability of the house becoming unstable because of:

(i) loads imposed by sea water, clause B1.3.3(e), or

(ii) removal of support by erosion, clause B1.3.3(r).

(b) Clause E1.3.1 which requires in effect that the house must not damage or cause nuisance to other property by diverting sea water in a 10% AEP storm.

(c) Clause E1.3.2 which requires in effect that sea water must not enter the house in a 2% AEP storm.

5.3 Clause B1.3.1 re structural stability

5.3.1 In refusing building consent, the territorial authority said in effect that it could not be satisfied on reasonable grounds that the house "will withstand impacts from wave action/inundation".

5.3.2 Given that the floor level of the house is 2.68 m above MHWS, loads imposed by wave action will mainly be against the piles but, in a large enough storm, waves might possibly reach the walls.

5.3.3 I read clause B1 as requiring that the house must have a low probability of collapsing as a result of inundation that it is likely to experience during its specified intended life. For example with respect to earthquakes, NZS 4203[1] cited in the Compliance Document for clause B1, takes a 10% probability of occurrence in a 50 year period as being a "low probability". I take the view that what is a low probability for one type of event might not be a low probability for a different type. Even in a low probability storm there will be time for the occupants to leave before they are in any danger from the collapse of the house, but nevertheless, I consider that in this case the house is required to retain its structural stability in inundation caused by a storm having a 10% probability of occurring during the specified intended life of the house.

5.3.4 From the plans and specifications submitted for building consent it appears to have been assumed that "conventional" piles strong enough to resist low probability wind and earthquake loadings on the house will be strong enough to resist low probability inundation loadings. That might well be the case, but I consider that it needs further consideration. That is a matter of design.

[1] New Zealand Standard NZS 4203: Code of practice for general structural design and design loadings for buildings

5.3.5 Accordingly I consider that it has not been established that the piles, will withstand the loads likely to be imposed by sea water inundation.

5.3.6 As to erosion, I understood the submissions to be in general agreement that the house will retain its structural stability unless and until the beach crest has retreated so far that the support is removed from the house because the piles have been undermined by erosion.

5.3.7 Accordingly, I conclude that the house will comply with clause B1 throughout its life provided that:

(a) That life is specified in terms of an appropriate trigger point,

(b) There are no baseboards,

(c) The piles are properly designed to resist inundation having a low probability of occurring before the beach crest reaches the trigger point, and

(d) The piles are embedded to sufficient depth (allowing for variations of beach profile, see 4.6.6 above) to remain unaffected by erosion throughout the life of the house.

5.4 Clause E1.3.1 re diverting sea water to other property

5.4.1 From the submissions of the owner's coastal expert, see 4.3.1 above, and the territorial authority's coastal expert, see 4.6.7(c) above, I am satisfied that the house complies with clause E1.3.1 provided that the baseboards shown in the drawings are not installed.

5.5 Clause E1.3.2 re sea water entering the house

5.5.1 Sea water will not enter the house in a 2% AEP storm, that is to say the house will comply with clause E1.3.2, unless and until either or both:

(a) the beach crest has retreated far enough, and

(b) sea level, specifically MHWS, has risen high enough

for the surface of the sea, allowing for wave effects, to be higher than the floor level of the house.

5.5.2 The only evidence I have seen as to likely future sea levels allowing for wave effects is the estimate given in the review (see 4.2 above) of RL 14.9 m inclusive of sea level rise to 2100. At the hearing, the territorial authority's coastal expert said that estimate did not include any "freeboard".

5.5.3 Also at the hearing, counsel for the territorial authority did not offer any additional evidence on the point, but said that the territorial authority did not accept that the RL 14.94 m floor level was sufficient to ensure that water would not enter the house. I take that comment to be intended to reserve the territorial authority's position rather than to indicate any doubt as to the evidence of its coastal expert. Responding to the second draft, the territorial authority said that it had intended to convey that

"insufficient evidence had been supplied . . . to discount the [territorial authority's] concerns or to demonstrate that water would not enter the building". In addressing that point, I can only say I do not know what evidence the territorial authority requires in addition to the evidence mentioned in 5.5.2 above.

5.5.4 I do not know whether the estimate of RL 14.9 m applies in a 2% AEP storm, as specified in clause E1.3.2, or in some larger storm having a lower probability of occurrence as discussed in 5.3.3 above. I do not know what proportion of the estimated "sea level rise to 2100" is likely to occur during the life of the house.

5.5.5 In the absence of other evidence, I accept the estimate made by the territorial authority's coastal expert and therefore conclude that the houses floor level of RL 14.94 m is sufficient to ensure that the building complies with clause E1.3.2.

5.6 Disposal of foul water

5.6.1 As mentioned in 2.1.4 above, the owner excluded the foul water disposal system from the application for building consent. As I have concluded that the application did not establish compliance with the Building Code in other respects, I do not need to consider foul water disposal except to note that for the house to comply with clause G13 there is a need for such a system.

5.6.2 I take it that the owner's intention was for the house to be connected to the existing foul water disposal system but for that system to be subsequently replaced under a separate building consent. The existing system consists of a septic tank with an effluent disposal field. The replacement system will be of a different type.

5.6.3 At the hearing, counsel for the territorial authority said that it "never contemplated the new house being permitted to discharge to the existing substandard system". I have seen no evidence to the effect that the current system is "substandard". If it is in fact insanitary in terms of section 123, then it is clearly open to the territorial authority to take action under section 124.

5.6.4 Responding to the second draft, the territorial authority said:

> . . . the Council is aware (and has provided evidence to the Department) that the existing system has been inundated and suffered damage in recent storm events.

I have re-examined the cited evidence, being inspection reports in respect of storms in April 2002 and March 2005, and note that in March 2005 the territorial authority's records note that part of the septic tank lid had shifted but the territorial authority had been advised that "the system has been cleaned and repaired". I was given no evidence as to the effect of inundation on a septic tank system and, given that the territorial authority took no action in 2005, I must conclude that at that time the territorial authority was satisfied that the system was not insanitary in terms of section 123. Presumably that remains the situation with regard to the current building consent.

5.6.5 I conclude that the house, connected to the existing foul water disposal system, complies with clause G13 unless and until storm inundation adversely affects the proper operation of that system. I do not need to discuss an appropriate trigger point

for the replacement of the system, that is a matter for the owner to propose and the territorial authority to approve.

5.6.6 Accordingly, any building consent granted for the house should include a condition under section 113(2)(b) to the effect that when the beach crest reaches an appropriate trigger point the existing foul water disposal system is to be replaced, under a new building consent, by a new system resistant to inundation.

5.7 Removal of the building

5.7.1 The territorial authority said that it was "not satisfied that any removal vehicle could necessarily be obtained at short notice, that a removal vehicle could gain safe access to the site and building, or that the building could be removed in time to avoid damage to other property and to avoid worsening the hazard".

5.7.2 Determination 2004/08 listed various factors that needed to be taken into account when considering whether the building was likely to be demolished in time. Those factors were specific to the particular situation concerned, but addressed concerns similar to those expressed by the territorial authority.

5.7.3 I observe that for the purposes of any future application for a building consent for the house, factors relevant to the particular situation will need to be taken into account when specifying the trigger distance.

5.8 Conclusions

5.8.1 From the submissions and the hearing I conclude that there is no dispute that the house will become subject to coastal hazards if and when the sea comes too close to it. Estimates of when that is likely to occur vary, but the parties agree that if the house has an appropriate specified intended life under section 113 then the house will comply with the Building Code throughout that life. The coastal experts agree that a specified intended life of 40 years is not appropriate, but that it would be appropriate to specify such a life in terms of the beach crest reaching a "trigger point" whereupon the section 113 condition will require the house to be removed or demolished.

5.8.2 I conclude that the application for building consent did not adequately identify the specified intended life and that therefore the application for building consent had to be rejected for that reason alone. The real dispute is over the legal issues discussed in 6 below.

5.8.3 I also conclude from the submissions that for the purposes of sections 71 and 72 and taking no account of the specified intended life of the house:

(a) The land on which the house is to be constructed is likely to be subject to natural hazards, specifically coastal erosion, storm surge, and tidal effects, see sections 71(1)(a), 72(b), and 71(3)(a) and (d).

(b) The house is not likely to accelerate, worsen, or result in a natural hazard on the land or on other property, see sections 71(1)(b) and 72(a).

(c) Adequate provision has not been made to protect the land from coastal hazards, see section 71(2)(a).

(d) There will be no damage to the land or to other property as a result of the construction of the house, see section 71(2)(b).

5.8.4 As to section 72(c), see 6.6 below.

6 Legal submissions and my responses

6.1 General

6.1.1 As indicated above, there was little if any dispute about the technical issues, the real dispute was about legal issues, particularly:

(a) Whether I have jurisdiction, and

(b) Whether the Act:

(i) prevents the owner from constructing the house at all, as the territorial authority contends, or

(ii) permits the owner to construct the house and use it throughout its specified intended life during which it will continue to comply with the Building Code, subject to any properly granted waivers or modifications, as the owner contends.

6.1.2 The territorial authority's submissions on the legal issues are discussed below. The owner, in response to the first draft, simply said:

> As far as we understand, there is no dispute about the facts, it is simply a matter of correctly applying sections 71 and 72. This case is not dissimilar from many other applications determined by the Department (for example . . . determination 2006/49).

6.2 Jurisdiction

6.2.1 The territorial authority contended that it had refused to "grant" a building consent but had never refused to "issue" one. A decision to refuse to grant a building consent was not one of the matters that may be submitted for determination under section 177.

6.2.2 The first draft rejected that contention, in effect saying that a refusal to "grant" a building consent was also a refusal to "issue" the consent because it cannot be issued unless it has first been granted.

6.2.3 Counsel for the territorial authority responded that:

> . . . such an approach makes the order in which the process of building control takes place superfluous, and in the context of the legislative framework the process becomes unmanageable. [It] is analogous to arguing that because an accused was

> found not guilty and no sentence was imposed then one could appeal the absence of a penalty.. . .

Counsel then advanced the arguments relating to sections 71 and 72 that are set out in 6.4, 6.5, and 6.6 below.

6.2.4 At the hearing, counsel for the owner accepted that granting and issuing a building consent were different processes, but noted that if a building consent authority refused to grant a consent then the question of whether to issue the consent could not arise. One of the purposes of section 177 was to provide that an unsuccessful application for a building consent had a right to apply for a determination, but under the territorial authority's interpretation that could never happen, which was clearly against the intention of the Act. As counsel for the owner put it when commenting on the territorial authority's response to the first draft:

> . . . the effect of the Council's argument would be that in any circumstances when a building consent was refused then the only legal course of action open to an applicant to challenge that decision would be to initiate judicial review proceedings in the High Court. We do not accept that that is the correct interpretation of the relevant provision of the Building Act 2004.

6.2.5 I accept that section 177 gives the Chief Executive jurisdiction in respect of a decision to refuse to issue a building consent but does not mention a decision to refuse to grant a building consent. I also accept that the Act distinguishes between granting a building consent, section 49, and issuing a building consent, section 51. I also accept that a preliminary decision to grant under section 49 may well be of no effect if section 72 requires the grant to be refused. However, I agree with counsel for the owner as to the intention of section 177. I also take the view that a consent cannot be issued unless it has first been granted, so that a refusal to "grant" (whether under section 49 or section 72) is also a refusal to "issue". I therefore conclude that I do have jurisdiction to determine the matter.

6.2.6 Responding to the second draft, the territorial authority said that 6.2.1 to 6.2.5 above:

> totally fail to address logically the submissions made by the Council about the Chief Executive's jurisdiction having regard to the clear distinction in the Building Act 2004 between the words "grant" and "issue".

I recognise that contents of paragraphs 6.2.1 to 6.2.5 above give only the barest outline of the party's submissions. However, I consider that outline is sufficient to identify the point in issue and the competing arguments. Accordingly, I have made no change in that respect.

6.2.7 The territorial authority said that during the period between the territorial authority's decision to refuse to grant a building consent and the owner's application for a determination, the house had become a non-complying activity in terms of the Resource Management Act 1991.

6.2.8 I have no jurisdiction in respect of the Resource Management Act. However, as I read section 49 a territorial authority has no power to refuse to grant a building consent on the grounds of any failure to comply with the Resource Management Act,

whether or not a certificate to that effect was attached to the project information memorandum under section 37.

6.3 Sections 3 and 4

6.3.1 The territorial authority's response to the first draft said:

> . . . sections 3 and 4 of the Act . . . set out the purpose of the Building Act and the principles that the chief executive and . . . a territorial authority performing functions or duties and exercising powers under the Act "must take into. . . [sic] that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act." See . . . *Neil Construction & Others v North Shore City Council** for an illustration of the importance of doing so.
>
> * High Court, Auckland, CIV 2005-404-4690, 21 March 2007

6.3.2 At the hearing, the territorial authority's deputy chief executive said that, as he read sections 71 and 72, section 71 "was not needed" if section 72 applied. He did not accept that section 72 meant that a territorial authority must grant a building consent if the territorial authority considered that to do so would be contrary to the purposes and principles of the Act as set out in sections 3 and 4. He gave examples of buildings on land subject to natural hazards that might comply with the Building Code but which would, in his opinion, be unacceptable in terms of sections 3 and 4.

6.3.3 Responding to the second draft, the territorial authority said:

> . . . that interpretation [in the first draft] renders section 72 superfluous because such an interpretation assumes that if a building complies with the Building Code that building can be built anywhere. However, it is the Council's view that section 72 is intended to recognise the fact that the Building Code cannot protect against all eventualities.

That response overlooks the fact that any building consent granted under section 72 must be subject to a section 73 condition. That is not the case with a building consent granted under section 71.

6.3.4 As for *Neil Construction*, in my view the judgment in that case has no direct application to this determination. That case concerned "the decision-making process followed by the defendant . . . in determining its 2004 development contributions policy" under the Local Government Act 2002. The judgment turned on the interpretation of the statutory framework for development contributions policies as set out in the Local Government Act. That is different from the statutory framework for issuing building consents set out in the Act.

6.3.5 The deputy chief executive did not specifically refer to any of the purposes listed in section 3 or of the principles listed in section 4.

6.3.6 However, from the submissions and the evidence as discussed above, I am satisfied that if the specified intended life of the house is properly specified then the house will comply with the Building Code throughout that life. The Building Code specifies performance criteria for each of the matters listed in sections 3(a), (b), and (c). Accordingly, I take the view that the territorial authority must accept those

sections as being satisfied because section 18 prevents it from requiring additional or more restrictive criteria.

6.3.7 As to the "sustainable development" mentioned in section 3(d), I note that the term "sustainable development" is not defined in the Act, and I recognise that the performance criteria for durability specified in clause B2 might not cover all aspects of sustainable development. Nevertheless, I take the view that section 3(d) does not authorise a territorial authority to ignore section 113 and refuse to grant a building consent for a building that, in the territorial authority's opinion, will have a life so brief that it cannot be regarded as "sustainable".

6.3.8 As for the principles listed in section 4(2), I consider that all of those principles, with certain exceptions[2] that are not relevant to this determination, relate to or are addressed in the Building Code. Furthermore, section 4(1)(c) provides that section 4 applies to a territorial authority "only to the extent that the territorial authority . . . is performing functions or duties, or exercising powers, in relation to the grant of waivers or modifications of the building code and the adoption and review of policy on dangerous, earthquake-prone, and insanitary buildings". Accordingly, I take the view that a territorial authority cannot rely on any of the principals listed in section 4(2) to justify its decision to ignore sections 17 and 18 and impose its own requirements instead of or as well as the performance criteria specified in the Building Code.

6.3.9 I recognise that section 4 does apply to the Chief Executive, but I have not found it necessary to discuss those principles in this determination, which is primarily about whether the house will comply with the Building Code throughout its specified intended life.

6.4 Sections 71 and 72: General

6.4.1 From the hearing I understood that there was no longer any dispute that the application for building consent had to be refused under section 71 because no provision had been made to protect the land from coastal hazards.

6.4.2 When it refused to grant a building consent on 13 March 2006, the territorial authority said:

> The applicant has accepted that Section 72 does not apply . . . [and the territorial authority] has concerned itself only with whether it may grant a building consent pursuant to Section 71(1) or (2). . . .

I do not agree that section 72 does not apply, see 6.5 below.

6.4.3 In their letter dated 28 February 2005, the solicitors for the territorial authority said in effect that sections 71 to 74 "had different meaning from" section 36 of the former Act.

6.4.4 In response to the first draft, and at the hearing, counsel for the territorial authority expanded on those differences, saying:

[2] Section 4(2)((a)(ii) and (iii), (d), (e), (g), (l), (m) in part, (o), and (p).

> . . . Section 71(2) requires the building consent authority to come to a judgment . . . about the suitability of arrangements made to "protect" or "restore" in terms of the subsection.
>
> . . . the Council regards [sections 71 and 72] as addressing different matters; section 71 is essentially about the land, section 72 is about the building. The inevitable conclusion that seems to follow from the Draft Determination is that a building may be built anywhere and be subject to one of the hazards, thus rendering section 71 entirely superfluous. . . .
>
> The problems with the Draft Determination's approach can be illustrated by a further example. An applicant seeks a building consent on a site subject to erosion. Following the approach in the Draft Determination . . . the consent must be granted as long as the affects [*sic*] on other land, etc are not increased. The building as a consequence of erosion could be left standing on essentially an island, which would be nonsensical. The Building Code is irrelevant in such circumstances.
>
> . . . section 71 creates an exception to the general presumption under section 49(1) that a Council "must grant a building consent if . . . the Building Code would be met . . ." Quite clearly, by enacting sections 71 and 72, Parliament intended that a wider judgment would be exercised, rather than merely assessing compliance with the Building Code.

6.4.5 My responses to specific points made above (but see also 6.6 below regarding section 72(c)) are:

(a) I do not agree that "section 71 is essentially about the land". Section 71(2)(a) refers to protecting "the building work" and "other property". I take the view that compliance with the Building Code must be accepted as being "adequate provision" to protect the building work (and also to protect other property where that is an objective of the clause concerned) because section 18 prevents a territorial authority from requiring the owner to achieve performance criteria that are additional to or more restrictive than the performance criteria prescribed in the Building Code. On the other hand, because it has the power to grant waivers or modifications of the Building Code, section 67, I take it that a territorial authority may accept something less than complete compliance with the Building Code as being "adequate provision".

Responding to the second draft, the territorial authority emphasised that it had said that section 71 was **essentially** about the land (its emphasis) but that:

> It has always understood that section 71 is about the land, building and other property, whereas the focus of section 72 is on the building.

I accept the correction, but note that section 72 also refers to the land and other property.

(b) I do not agree that the approach taken in the first draft makes section 71 "entirely superfluous". The example of a building "left standing essentially on an island" would not be "nonsensical" if the building was, for example, a lighthouse or a power pylon. I do not read the Act as preventing building consents from being issued for buildings supported by the seabed such as a

boat houses or a wharf, or for a house such as the one considered in Determination 2006/49[3]. I do not agree that "the Building Code is irrelevant in such circumstances", see 6.5.4 below.

(c) I agree that when sections 71 and 72 apply they require a building consent authority to assess matters, such as the protection of the land, that are not covered by the Building Code, but that does not mean that the building consent authority may ignore the Building Code.

6.4.6 My own general view is that sections 71 to 74 contain substantively similar requirements to section 36 of the former Act except in relation to:

(a) Structures owned or controlled by network utility operators (compare section 9(a) with section 3(a) of the former Act).

(b) The urgency with which a building consent authority must give a section 73 notification (compare section 73 with section 36(2) of the former Act).

6.4.7 I therefore take the view that, except in relation to those matters, cases decided under the former Act, remain good law under the Act, specifically the Court of Appeal judgment in *Logan v Auckland CC* 9/3/00, CA243/99 and those parts of the High Court judgment in *Auckland City Council v Logan* 1/10/99, Hammond J, HC Auckland AP77/99 that were not superseded by the Court of Appeal judgment.

6.4.8 Accordingly, I consider that I am bound by the following passage from the Court of Appeal judgment:

> [26] Sections 36(1) and (2) [of the former Act, now sections 71 and 72] are to be read in sequence, not with subs (2) [now section 72] coming first. On a natural and straightforward reading, subs (1) [now section 71] requires a territorial authority to refuse a building consent if either condition (a) or (b) [now section 71(1)(a) or (b)] is present unless satisfied that provision for adequate protection is made in respect of (c) or (d) [now section 71(2)(a) or (b)]. If (c) or (d) as the case may be is satisfied, the building consent issues. But if in terms of the subsection [now section 71] a building consent is otherwise to be refused, then the opening words of the subsection "except as provided for in subsection (2)" [now the opening words of section 72 "Despite section 71"] come into play. In that situation the territorial authority is entitled to grant the building consent only where each of the paras (a), (b), and (c) of subs (2) [now paragraphs(a), (b), and (c) of section 72] is satisfied.

I take the view that the words "despite section 71" in the Act have the same effect as the words "except as provided for in subsection (2)" in the former Act, see 6.6.2 below. As to the correspondence of section 72(c) to section 36(2)(c) of the former Act see 6.5 below.

6.4.9 In particular, I take the view that:

[3] Determination 2006/49 was about a house "supported by extended timber piles and spanning a small incised ephemeral waterway running through the site". The house complied with the Building Code, and in particular its floor level had been designed to be above flood levels to comply with clause E1 and its timber pole sub-frame had been designed to withstand possible erosion effects to comply with clause B1.

(a) It is only when a building consent must be refused under section 71 that a building consent authority can consider granting a consent under section 72, with any such consent being subject to the condition specified in section 73.

(b) The protections listed in section 71(2)(a) are cumulative, so that protection of the building work does not suffice, there must also be protection both of the land and of other property. Similarly, the restorations listed in section 71(2)(b) are cumulative.

(c) Sections 71(2)(a) and (b) may be either alternative or cumulative, so that in some cases it might be sufficient either to protect against damage or to restore damage, for example, when constructing a building on land subject to a natural hazard, it is acceptable to damage neighbouring property (with its owner's permission) in the course of construction provided that it is restored to its original condition once construction is completed. However, in other cases it might be necessary both to protect the land or other property and to restore any damage.

(d) Sections 72(a), (b), and (c) are cumulative so that it is necessary to satisfy each of them if a building consent is to be issued.

See 6.6 below for a specific discussion of section 72(c).

6.4.10 In broad outline, therefore, for building work on land subject to natural hazards:

(a) Building consent must be refused under section 71 unless adequate provision has been made to:

(i) protect or restore the land; and

(ii) protect the building work (in which case compliance with the Building Code must be accepted as being adequate protection); and

(iii) protect or restore other property (defined in terms of legal boundaries, see section 7).

(b) A building consent that must be refused under section 71 must nevertheless be granted under section 72 if:

(i) the building work will not adversely affect the effects of the natural hazards on either the land or other property; and

(ii) section 72(c) is satisfied (see 6.5 below).

6.4.11 Responding to the second draft, the territorial authority noted the acceptance that section 71 must be read first followed by section 72, but said that it:

> Remains concerned that the inter-relationship of sections 71 and 72 is not being properly interpreted.

I have reconsidered that inter-relationship but have not changed my view of the matter.

6.5 Sections 71(1)(a) and 72(a): The land on which the building work is to be carried out

6.5.1 In the notice issued with its letter of 13 March 2006 the territorial authority said:

> The property and this application has been considered in the context of *Auckland City Council v Logan* [1/10/99, Hammond J, HC Auckland AP77/99]. Therefore *the land* on which the building work is to be carried out is considered to be the entire section at 35 Clifton Road, being an area of 735.80 m^2 as opposed to only the building platform consisting of 80 m^2.

6.5.2 The relevant part of that decision read:

> When [the former Act] refers, as it does, to "the land on which the building work is to take place", is it referring to the area contiguous to the building or to the land in general? Plainly, the circumstances may vary greatly. The "land" may be a 1000 acre property, on which a new house is to be built. The house may be far away from any potential inundation. Or, as here, the site may be a smallish suburban one, which is earmarked for higher density use, and it is very difficult to dissociate the building from the entire parcel of land.
>
> [Protection of the land refers to protection of] the site itself where (at least as in this case) the building and the site are intimately connected.

6.5.3 That case was decided under the former Act, which used the phrase "the land on which the building work is to take place", whereas the Act now uses the phrase "the land on which the building work is to be carried out". In context, I take the view that those phrases are substantively identical, so that the case is to be accepted as authority for the proposition that "the land on which the building work is to be carried out" is to be interpreted as meaning the land "intimately connected" with the building.

6.5.4 Accordingly, for the purposes of this determination, I consider that "the land on which the building work is to be carried out" means the entire allotment because in the context of coastal hazards the entire allotment is intimately connected to the building, not because the allotment is "a smallish suburban one".

6.6 Section 72(c)

6.6.1 General

6.6.1.1 Section 72 says in effect that, despite section 71, a building consent authority "must" grant a building consent for building work on land subject to natural hazards, section 72(b), if the building consent authority considers that:

- the building work is not likely to accelerate, worsen, or result in a natural hazard on the land or on other property, section 72(a), and
- "it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned", section 72(c).

6.6.1.2 As mentioned in 5.1.3 above, I conclude that section 72(a) and (b) are satisfied.

6.6.1.3 The territorial authority, in its letter of 21 September 2005 said:

> . . . we agree that if you are able to meet all three tests under section 72, then consent may be able to be granted.

To which the owner's solicitors, in its letter dated 2 November 2005, said:

> Section 72 is unclear. However, it is likely that a court would determine that all three subparagraphs (a), (b), and (c) must be met in order for a consent to be issued under that section. Thus, there must be some element of the proposed building that does not comply with the building code that, consequently, requires a waiver or modification. If there is no such element, then subparagraph (c) can never be met.
>
> On that basis, section 72 does not apply where the proposed building complies with the code. It follows, in our view, that buildings that comply with the code fall to be considered under section 71.

6.6.1.4 When it advised the owner that consent had been refused, the territorial authority said in effect that it agreed with the owner that section 72 did not apply, and attached a letter dated 28 February 2006, from the territorial authority's solicitors, which said:

> The applicant has conceded, correctly we believe, that section 72, Building Act 2004 does not apply . . . .

6.6.1.5 In its submissions of 21 December 2006 the territorial authority, through its solicitors, said:

> . . . the Council considers that Parliament would not have intended that buildings should be allowed to be constructed in such a way as to render them to risk of damage or destruction which would be the case if Determination 2006/49 is taken to its natural conclusion.

6.6.1.6 The first draft took the view, for reasons mentioned below, that section 72 did in fact apply and that section 72(c) was not to be read as preventing a territorial authority from granting a building consent for building work that complied with the Building Code.

6.6.2 "Despite section 72"

6.6.2.1 In response to the first draft, the territorial authority said:

> . . . the Draft Determination does not recognise or address the effect of the [section 72] phrase ["Despite section 71"]. It is important as section 72 only applies when section 71 does not, and provides an exception from the strictures imposed by section 71. The phrase . . . makes this clear, but . . . also provides an important contextual background for section 72 (i.e. notwithstanding the strictures in section 71).

6.6.2.2 Responding to the second draft, the territorial authority said that it had not intended to imply that the phrase "Despite section 71" meant "When section 71 does not apply". On the contrary, it submitted that:

> . . . the ordinary meaning of the word 'despite" means that notwithstanding section 71, if all the tests in section 72 are met consent should be granted. . .

6.6.2.3 I accept the correction, but maintain my view that the phrase covers situations where a building consent must be refused under section 71 but nevertheless must be granted under section 72, see 6.4.7 to 6.4.9 above.

6.6.3 The use of "satisfied" and "considers"

6.6.3.1 The territorial authority also pointed out that whereas section 71 referred to the building consent authority being "satisfied", section 72 used the word "considers". The territorial authority said:

> The word "considers" suggests a belief, while the phrase "is satisfied" suggests at least a quasi-judicial determination [by the building consent authority].
>
> Once the building consent authority is "satisfied" it has no alternative and no choice – it "must" grant the building consent. To paraphrase section 72, and also to consider only subsection (c) when the requirement of each of the subsections must be met, is to lose the sense of what section 72 requires.

6.6.3.2 I do not accept that anything relevant to this determination turns on the use of "satisfied" in section 71 but "considers" in section 72. It is not disputed that the building consent had to be refused under section 71, so that the only issue is whether it had to be granted under section 72. As I have already concluded that sections 72(a) and (b) are satisfied, it is only section 72(c) that remains to be considered.

6.6.3.3 Responding to the second draft, the territorial authority said:

> The use of two different terms . . . "satisfied in section 71 and "considers" in section 72, must have been intended by Parliament to convey two different meanings. It is therefore surprising that the [second draft] has dismissed the issue without considering the detailed submissions made by the Council on the proper interpretation of the two words . . . .

I can assure the territorial authority that I had carefully considered the relevant submissions before concluding that the point was not relevant to this determination. I have reconsidered the point and arrived at the same conclusion.

6.6.4 The Building Code and natural hazards

6.6.4.1 The first draft quoted the following passage from Determination 2006/49:

> I . . . take the view that section 72(c) has no application unless the territorial authority is considering granting a waiver or modification of the Building Code because it is inconceivable that Parliament should have intended to prevent territorial authorities from granting building consents for building work that complied with the Building Code.

The first draft also said:

> . . .I note that sections 71 to 74 contain no other mention of the Building Code. I take that to be because sections 71 to 74 correspond to section 36 of the former Act which in turn was based on and replaced sections 641 and 641A of the Local Government Act 1974 and were enacted in the days of local building bylaws when there was no such thing as a national building code. That being so, I take the view that sections 17, 67, and 78 apply to all building work, including work to which sections 71 and 72

> apply, so that all such work must comply with the Building Code subject to any properly granted waivers or modifications.
>
> The territorial authority's concern [see 6.5.5 above] about Determination 2006/49 being "taken to its natural conclusion" seems to me to be misconceived. I do not accept that any building that complies with the Building Code will be liable to unacceptable risks of "damage or destruction". That is not to say that there is no risk, but rather that the risk is acceptable. A basic purpose of the Building Code (and the compliance documents that support it) is to define what risks are unacceptable and therefore must be avoided.

6.6.4.2 The territorial authority responded to those passages by saying:

> . . . there is a fundamental difference between the Building Code and the Building Act 2004, in that the Building Code does not address all natural hazards, whereas the Building Act expressly does so. Quite simply, a building that complies with the Building Code may well be liable to damage or destruction as the Building Code does not address the effects of natural hazards such as erosion and inundation, and particularly coastal processes such as storm surges and erosion. Thus, a building may well be strongly built (and may comply with the Building Code) but that will not prevent damage or destruction of it if natural hazards affect the land . . . .
>
> The issue of whether a building is at risk to damage from natural processes of the sea is independent on whether it complies with the Building Code. . The Building Code requires consideration of wind, earthquake and ice loadings, but is silent on other natural forces, such as waves and coastal erosion. One could take from this that buildings are to be situated at locations where these factors do not arise, or have a low probability of occurrence. Wind and earthquake have return periods in the order of 500 years for a 50 year design life for a Level 2 structure (i.e. a 10% risk of occurrence of a 2% AEP event over the life of the dwelling) in the Structural design action part of AS/NZS 1170. . .
>
> [The first draft] ignores the legislature's words:
>
> (a) If a proposed building complies with the Building Code, section 71 addresses what is to be done where the land on which the building work is to be carried out is subject or is likely to be natural hazards [*sic*] or the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.
>
> (b) Section 72 deliberately addresses the alternative, where a proposed building does not comply with the Building Code.
>
> (c) Section 72(c) provides that, if the section applies, the building may not have to be designed to withstand the relevant hazard.
>
> (d) If no "waiver or modification of the building code in respect of the natural hazard concerned" is required, section 72 can have no application.

6.6.4.3 I disagree. My own reading of the legislation is as follows:

6.6.4.4 Contrary to the territorial authority's response, sections 71 and 72 do not "expressly" address all natural hazards. In particular, the section 71(3) definition of "natural hazards" omits several significant hazards that occur in nature, including the hazards of wind and earthquake (to which every building in New Zealand is subject).

6.6.4.5 Contrary to the territorial authority's response, the Building Code does address all hazards that occur in nature, whether or not listed in section 71(3). In this case, the relevant hazards are coastal erosion and inundation, and relevant provisions of the Building Code are:

(a) Clause B1.3.3 requires account to be taken of "all physical conditions likely to affect the stability of the building including [those listed in (a) to (r)]".

(b) Clause B1.3.3(e) requires account to be taken of "water", which I take to include the effects of waves on structural stability.

(c) Clause B1.3.3(r) requires account to be taken of "removal of support", which I take to include removal of structural support by coastal erosion.

(d) Clause E1 addresses surface water, defined as including water flowing onto the site from the sea.

(e) Clause E1.3.1 specifies the performance criterion for avoiding damage or nuisance to other property.

(f) Clause E1.3.2 specifies the performance criterion for preventing water from entering buildings.

6.6.4.6 In general terms, therefore, I take the view that if building work complies with the Building Code to the extent required by the Act then that building work must be accepted as achieving an acceptable level of safety, health, and so on. When the building work is on land subject to the defined natural hazards then sections 71 and 72 address matters relating to the land and other property that are not addressed by the Building Code, in particular whether or to what extent the building work affects the hazards in respect of the land.

6.6.4.7 All of the territorial authority's submissions appear to have been affected by the misconception that the Building Code "does not address all natural hazards whereas the Building Act expressly does so".

6.6.4.8 Nevertheless, I recognise the force of the territorial authority's contention that section 72(c) "must not be read down".

6.6.5 Must there be a waiver or modification?

6.6.5.1 Section 72 reads:

> Despite section 71, a building consent authority must grant a building consent if the building consent authority considers that –
>
> (c) it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned.

I note that the corresponding provision in section 36(2) of the former Act read:

> (2) Where a building consent is applied for and the territorial authority considers that --

(c) The building work which is to take place is in all other respects such that the requirements of section 34 of this Act have been met.

The relevant provisions of section 34 of the former Act correspond to sections 49 and 67.

6.6.5.2 In this case, I accept that it is not reasonable to grant a waiver or modification because:

(a) The owner has not asked for one.

Responding to the second draft, the territorial authority said:

> . . . the Act sets out no process for seeking a waiver or modification and, while an applicant can formally seek one, that does not appear to be a pre-requisite to the grant of a waiver or modification by a building consent authority. Further, the Building (Forms) Regulations 2004 do not include any such application form . . . The Council believes that in the absence of any prescribed processes Act [*sic*] it is left to the building consent authority to consider whether a waiver or modification should be granted whether or not such a waiver or modification is sought in a formal sense.

I agree that the Act does not specify any procedures for seeking a waiver or modification. However, under section 67, a territorial authority may grant a waiver or modification only in relation to a building consent, and under section 49 a building consent may be granted only in respect of the plans and specifications that accompany the application for that building consent. I read those provisions as meaning that a waiver or modification may be granted only when it is explicitly or impliedly necessary for the granting of a building consent in respect of the building work concerned. In this case, there was no explicit or implied need for a waiver or modification because the owner maintained that the building work complied completely with the Building Code.

(b) There is no need for one if the house will comply with the Building Code throughout its specified intended life.

6.6.5.3 However, the literal application of section 72(c) means that a building consent must not be granted solely because the work complies completely with the Building Code.

6.6.5.4 In this case, the literal application would mean that a building consent for the house cannot be granted unless the territorial authority has reasonably granted one or more waivers or modifications such that during its life the house:

(a) Will have more than a low probability of collapsing due to coastal erosion (clause B1.3.3); or

(b) Will have more than a low probability of collapsing due to wave action (clause B1.3.3); or

(c) Will be entered by water resulting from an event having more than a 2% probability of occurring annually (clause E.1.3.2).

6.6.5.5 In different circumstances it might be reasonable to grant such waivers or modifications. For example, in circumstances where compliance with the Building Code would be impracticable:

(a) In respect of clause B1.3.3, a waiver or modification in respect of erosion might be reasonable because it would relate solely to property damage and would not reduce life safety (as noted in 5.3.3 above, even in a low probability storm there will be time for the occupants to leave before they are in any danger from the collapse of the house).

(b) In respect of clause E1.3.2, if the house were, for example, a demonstration home, or a bach used only for holidays, a waiver or modification in respect of water entering the house in, say, a 30 year instead of a 50 year storm, might be reasonable because it would relate to loss of amenity and to property damage but would not reduce life safety.

However, in this case the house is of conventional light timber frame construction presenting no difficulties in achieving compliance with the Building Code. That being so, I consider that it would not be reasonable to grant a waiver or modification. Accordingly, the literal application of section 72(c) would mean that a building consent cannot be granted for the house.

6.6.5.6 I take the view that such an outcome could not have been intended by Parliament. One of the major reforms instituted by the former Act was the introduction of the national Building Code to replace the previous plethora of regulations and building bylaws. As I read the Act its numerous references to the Building Code and code compliance certificates[4] continue to promote the basic premise that all new building work must comply with the Building Code.

6.6.5.7 A literal application of section 72(c) to prohibit building work complying with the Building Code but permit non-complying work is repugnant to that basic premise. I can think of no reason why Parliament would have intended that result, and I can find nothing anywhere else in the Act that corresponds to such an intention.

6.6.5.8 Furthermore, I take the view that I am bound by the following passage from the Court of Appeal decision in *Logan*[5]:

> . . . if [the section 36(1), now section 71(2)] requirement [to protect the land concerned as well as the building work] cannot be satisfied, [section 36(2), now section 72] goes on to provide the flexibility to allow for the issue of a building consent . . .
>
> . . . I can see no logical basis in the scheme and purpose of the legislation for [the interpretation that] section 36(2) [now section 72] can be invoked only where the territorial authority has granted a waiver or modification of the building consent [*sic* – "Building Code"?].

I recognise that the wording of section 72(c) is significantly different from the wording of section 36(2)(c) of the former Act. Nevertheless, I do not accept that the

[4] See in particular sections 4, 11, 12, 13, 16, 17, 19, 26, 49, 96, 169, 363, 363A, and 364.
[5] *Logan v Auckland CC* 9/3/00, CA243/99.

change of wording was intended to reverse "the scheme and purpose of the legislation". If Parliament had intended to counter the decision in *Logan* by making such a drastic change then I believe that Parliament would have said so in clear words and not merely by implication.

6.6.5.9 Responding to the second draft, the territorial authority said:

(a) It did not accept the general proposition that sections 71 to 74 were "substantively similar" to section 36 of the former Act except in relation to certain matters, preferring the view that the provision of the Act were "somewhat different from" those of the former Act.

I consider that there is no need for me, in this determination, to examine the distinction, if any, between "substantively similar except" and "somewhat different".

(b) That *Logan* was not binding in respect of sections 71 to 74 because those sections were not "identical or effectively identical" to section 36 of the former Act.

I acknowledge the points, but take the view that sections 71 to 74 are not effectively identical to section 36 of the former Act only in respect of the matters mentioned in 6.4.6 above, and that those matters are not relevant to this determination.

6.6.5.10 I recognise that a territorial authority may grant waivers or modifications of the Building Code under section 67, but take that to provide a degree of flexibility in recognition that no building code or building regulations can cover all possible contingencies. Indeed, I take the view that as a matter of general law territorial authorities are required to act reasonably when carrying out their building control functions under the Act, see for example *Invercargill CC v Hamlin*[6]. However, the effect of granting a building consent under section 72 is that the territorial authority is exempted from liability under section 392, which could well explain why section 72(c) specifically refers to the reasonableness of a waiver or modification.

6.6.5.10 I therefore conclude that a literal application of section 72(c) would be contrary to the scheme and purpose of the Act in respect of land subject to natural hazards.

6.6.5.11 In the absence of decided cases, therefore, I take the view that section 72(c) is not to be read as preventing a territorial authority from granting a building consent for building work that complies with the Building Code[7].

6.6.5.12 Accordingly, I consider that section 72(c) is satisfied if the building work will comply with the Building Code throughout its specified intended life.

[6] [1996] 1 NZLR 513.

[7] I also note that although in this case a literal application of section 72 would act as a prohibition ("must not grant a building consent") section 72 itself is worded as a direction ("must grant a building consent"), which might be relevant to further consideration of sections 71(1)(b) and 72(a) in respect of, for example, dams constructed so as to "worsen or result in" inundation.

7 What is to be done?

7.1 It is not for me to say whether or how the owner should amend the plans and specifications (particularly the definition of the building's specified intended life) in order to obtain a building consent. That is for the owner to propose and for the territorial authority to consider.

7.2 As discussed above, I take the view that if there are reasonable grounds for being satisfied that the house, if properly designed, particularly in respect of the points mentioned in 5.7 above, will comply with the Building Code throughout its specified intended life a building consent must therefore be issued under section 72.

7.3 As discussed above, I consider that the house (if properly designed) would comply with the Building Code if its specified intended life was defined as being the lesser of 50 years or until the beach crest comes within X m of the seaward edge of the house, where X is a distance that, taking account of all relevant factors, will give the owner sufficient time to remove or demolish the house before it is adversely affected by coastal hazards. It will be for the owner to establish that it will be reasonably feasible to remove or demolish the house within that time, taking account of those factors listed in Determination 2004/08 that apply to this situation and all other relevant factors such as the restricted access along the side boundaries of the house.

7.4 On the evidence, and subject to the considerations mentioned above, it seems that if X were specified as 10 m then the corresponding life could well end in 2024 after 17 years, with shorter lives for smaller values of X and *vice versa*. However, there can be no absolute certainty, and it is for the owner to state the value of X and take the risk that the house might have to be removed or demolished earlier than expected.

7.5 Any amendment to the plans and specifications will also need to ensure that:

(a) There are no base boards.

(b) The design of the piles takes account not only of likely inundation loads but also of likely changes in the elevation of the beach (see Figure 1 of the territorial authority's coastal expert's letter of 21 May 2007 in 4.6.6 above).

(c) The on-site foul water disposal system will not be adversely affected by wave action.

7.6 Any building consent will need to be subject to:

(a) Section 113(a) and (b) conditions, including a condition to the effect that when the beach crest reaches an appropriate trigger point the existing foul water disposal system is to be replaced, under a new building consent, by a new system resistant to inundation.

(b) A section 73 condition.

8 The decision

8.1 In accordance with section 188, I hereby:

(a) Determine that the building work as specified does not comply with the provisions of the Building Code in respect of coastal erosion and inundation.

(b) Confirm the territorial authority's decision to refuse to grant the building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 September 2007.

John Gardiner
Manager Determinations