



Determination 2008/121

Dispute regarding the provisions of the Building Code that protect neighbouring property from siteworks at 29-35 Khyber Road, Seatoun, Wellington



Aerial view of the site with the siteworks shown shaded

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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 that Department. The applicants are Mr H Rait and Ms M Culy (“the applicants”), the respective owners of “other property” as defined section 7 of the Act, being properties that are adjacent to the property that is the subject of this determination. The other parties are the Wellington City Council (“the authority”) carrying out its duties and functions as a territorial authority or building consent authority, and the joint owners of the subject property Mr J Nunns, Mr W Maas and Ms K Murray (“the owners”). Mr J Nunns has also acted as agent for the owners in some matters.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

- 1.2 This determination arises from the decision of the authority to issue a building consent for proposed siteworks including a driveway, footpath, car decks, and associated in-ground services. The applicants assert that the authority should not have issued a building consent for the siteworks because that work will not comply with Clause B1.3.6 (and consequently Clause B1.3.7) of the Building Code which provides that sitework, where necessary, shall be carried out to provide stability for construction on the site and avoid the likelihood of damage to other property.
- 1.3 I take the view that I must determine whether the proposed building work complies with Clauses B1.3.6, B1.3.7 and B2 of the Building Code.
- 1.4 This determination is limited to matters that can be considered under section 177 of the Act. That section enables me to determine the matters described in paragraph 1.3 because they involve specific proposed building work that has been designed and described in documentation forming part of an application for building consent. However, that section also prevents me from determining matters concerning buildings that have yet to be designed and for which no building consent application has been made. I make this observation because the application for determination refers to “proposed building of two houses” for which no building consent application has been made.
- 1.5 I also note that section 177 of the Act makes no reference to decisions made or actions taken under the Resource Management Act (“the RMA”). Consequently this determination cannot consider such matters.
- 1.6 In making my decision, I have considered the submissions of the parties, the report of an expert I engaged to provide me with independent advice, and the other evidence in this matter.
- 1.7 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.

2. The proposed siteworks

- 2.1 The proposed siteworks consist of a driveway, footpath, car decks and associated retaining works and in-ground services. The construction of the driveway and footpath involves earthworks (of a type described as “cut and fill”) and retaining walls, while the car decks involve construction of foundations and timber structures.
- 2.2 The siteworks have been designed by a firm of chartered professional engineers using information supplied by a firm of geological engineering consultants.

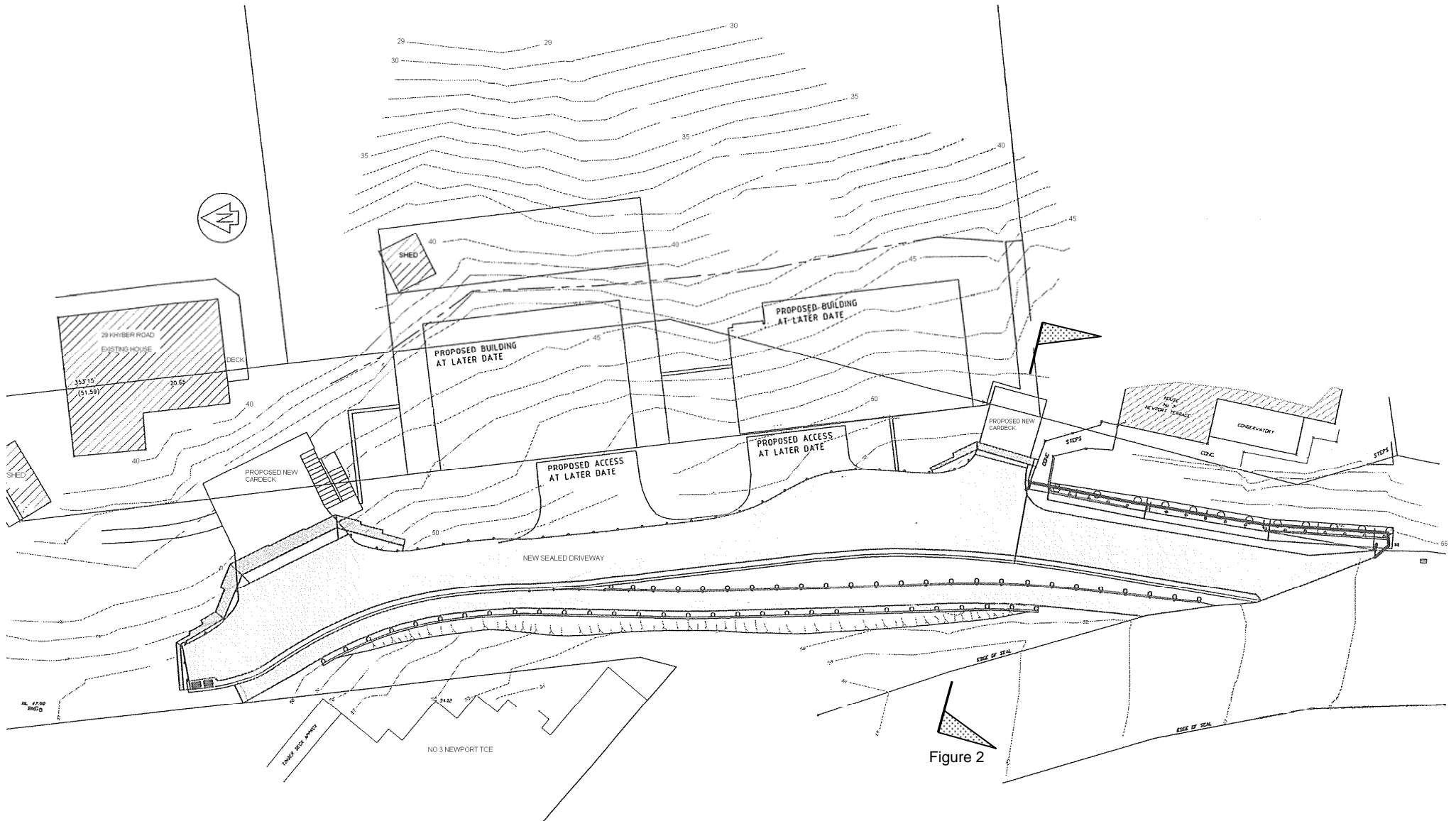


Figure 2

Figure 1: Site plan of proposed works

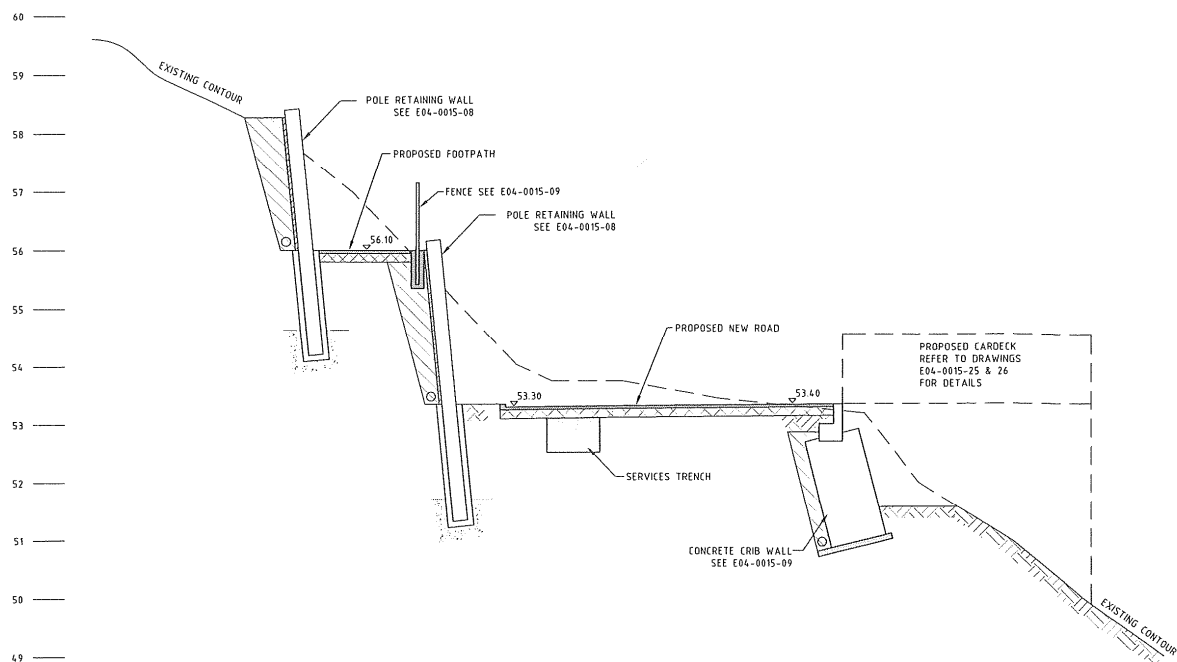


Figure 2: Cross section

3. Background

- 3.1 The authority issued a building consent (No SR138063) for the siteworks on 13 December 2005. Two amendments have subsequently been made to the consent, one on 18 February 2008 and another on 19 March 2008. In the case of each amendment the application was made, on behalf of the owner, by the same firm of engineers that applied for the original consent.
- 3.2 The suitability of the site for the building work is contested by the applicants. They contend that the proposed siteworks will not comply with the Building Code Clauses B1.3.6, B1.3.7, and B2 because the site is unstable and will put their properties at risk.
- 3.3 The Department received an application for a determination on 14 May 2008.

4. The submissions

- 4.1 In a statement accompanying the application, the applicants stated:

. . . the authority] has granted subdivision and land use consents [supplied] for the construction of two dwellings, structures on legal road and earthworks, beginning with construction of a driveway . . . and realignment of the existing pedestrian path. Building consent for the driveway . . . has been granted and driveway construction has begun.

We seek a determination . . . that [the authority] should not have issued the building consent for the driveway and should not issue building consents for dwellings on the site, on the grounds that previous findings relating to instability there have not been adequately addressed and the assessment of bedrock stability by the developer's engineer has not been adequately justified, and consequently that the risk of

damage to our properties and/or injury to the occupants of the houses below will be unacceptably high should development progress. If the decision to grant building consent is not reversed, we seek that a condition be imposed requiring further, substantial geotechnical investigations before any further work on the site is undertaken.

. . . we also seek a determination . . . that the development does not comply with Clause B1.3.6 of the Building Code. Clause B1.3.6 provides that sitework, where necessary, shall be carried out to:

- 1) Provide stability for construction on the site; and
- 2) Avoid the likelihood of damage to other property.

We are of the view that there is a risk of damage to any of our properties . . . if the construction on the site does not account for bedrock instability. Alternatively we seek a determination as to further conditions necessary to ensure that Clause B1.3.6 is complied with . . .

4.2 The applicants structured the application to include submissions under the following headings:

- The site
- Background
- History of site investigations
- Developer's engineer's findings versus those of other investigations
- Comparison with [an adjacent site]
- [The authority] review
- Concerns with the proposed development
- Risk assessment
- Conclusions

4.3 The applicants attached copies of correspondence, photographs and engineering reports and records in support of their submission.

4.4 In a letter to the Department, dated 23 May 2008, the authority confirmed the scope of building consent No SR 138063, and also confirmed that no application for building consent for the construction of any new dwellings associated with the siteworks had been lodged.

4.5 The authority submitted a copy of the documentation submitted for building consent No SR 138063.

4.6 Through its lawyers the authority made a submission which was received by the Department on 18 June 2008. The authority's position was summarised as follows:

- There is no basis to conclude that the [authority] should not have issued a building consent for the driveway.
- A determination preventing potential future building consents cannot be issued.

- The application is no more than an attempt to re-litigate matters that have been discussed, resolved and finalised through the resource consent process in the Environmental Court.
- There is insufficient basis and/or jurisdiction to impose the further building consent conditions sought requiring further geotechnical investigation.
- There are insufficient grounds upon which to conclude that clause B 1.3.6 of the Building Code is not met.

4.7 The submission went on to discuss the matter of compliance with Clause B1.3.6 of the Building Code, and the issuing of the building consent, as follows:

The only reference to the Building Code appears to be in the first page of the [applicants' submission] with reference to the site work requirements in clause B 1.3.6. It is not considered that this provides a strong enough link to enable re-assessment of engineers reports that have clearly gone through the full appeal process, resolution by consent and the satisfaction of the [authority] under the land use consent conditions. However, to the extent that there is a relevant Building Code compliance issue to resolve, the [authority's] position is that there are reasonable grounds for [the authority] to be satisfied that the building consent was appropriately issued. The balance of evidence does not lead to a conclusion that there will be underlying failure to the land upon which the building will be constructed and/or non-compliance with any provision of the code.

It is clear even from the summary from [the applicants] that there has been substantial engineering input into this site. In particular, the building consent SR138063 was issued on 13 December 2005, with an amendment issued on 18 February 2008 and the further amendment issued on 19 March 2008. All three stages involved reports, assessments and plans by both [a firm of geotechnical engineers] and [a firm of consulting engineers]. In particular reference is made to the producer statements from [the consulting engineers] dated 17 October 2005, 30 January 2008 and 3 March 2008. In essence, the [authority's] position is that the engineering assessment has been thorough, it has been carried out with engineers of the highest integrity and experience, the [authority] has appropriately relied upon this assessment in terms of being satisfied on 'reasonable grounds' and has the comfort of producer statements (with the underlying legal implications for authors of producer statements in the event of failure).

The documentation justifying the [authority's] decision to issue the building consent is also strongly backed by the process confirmed in the resource consent appeal, which involved full engineering investigation and assessment, including independent review. Taken in totality, it is the [authority's] position that there is insufficient basis for the determinations as sought.

4.8 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.

4.9 The draft determination was sent to the parties for comment on 10 October 2008.

4.10 The authority accepted the draft determination in principle on 14 October 2008. The owners accepted the draft determination without comment.

4.11 One of the applicants, Mr Rait, accepted the draft determination by letter dated 18 October 2008, subject to what he described as non-contentious amendments. His

proposed amendments did not specify what changes should be made to the draft determination. They were in fact points of criticism of the various reports written about the site and an expression of concern about the sites for the dwellings, which are outside the scope of the determination (refer paragraph 2.2).

4.12 By letter dated 24 October 2008 the other applicant, through her lawyer, did not accept the draft determination. She asked that the determination should acknowledge and take account of her comments on the draft. In summary the applicant said:

- The applicant remains of the view that a building consent should not have been issued by the authority for the driveway, footpath and cardecks. The applicant supported the “amendments” proposed by the other applicant (refer paragraph 4.12).
- The applicant remains uncertain that the site is stable and does not believe the principal documents relied upon by the expert are sufficient, and believes that further geotechnical investigations should be carried out.
- The She is concerned about the risks posed by any future works associated with the construction of the new dwellings and expressed the view that the determination could have been extended to include the new dwellings as well as the driveway.
- She reserves the right to seek a further determination in relation to the building consent for the dwelling.

4.13 I have considered the response from the parties. I note the reaffirmation of views previously expressed and taken into account in the draft determination, and that no amendments to the wording of the draft determination were proposed.

5. The expert’s report

5.1 As noted in paragraph 2.5 I engaged an expert to provide me with independent technical advice on the application for determination. The expert is a Chartered Professional Engineer with particular expertise in geotechnical engineering.

5.2 The expert was asked to conduct a “desk top” review of the application documentation and to provide an opinion whether the proposed building work complies with Clauses B1.3.6 and B1.3.7 of the Building Code.

5.3 In the course of his assessment the expert discovered that not all the attachments to which reference was made in some of the submitted documents were included in the submissions. The remaining attachments were received on 20 August 2008.

5.4 The expert’s report concluded that:

The principal issue is stability, namely whether the consented works provide for site stability and avoid the likelihood of damage to other properties caused by instability of or on the site. Having reviewed all of the documentation I am satisfied that the consented works meet the requirements of the Building Code. Outlined below are observations relevant to my conclusion.

I observe that while the resource consent also considered building development on the site, Building Consent SR 138603 is for construction of a driveway, footpath, car

decks and associated retaining works. My review of stability relates to those works and the ground that the works are sited on. I observe that the construction of the driveway and footpath involves earthworks (cut and fill) and retaining walls while the car decks primarily involve construction of foundations and timber structures.

Issues to be addressed with respect to stability include:

- Local stability, e.g. are the works designed to avoid the likelihood of local instability of the driveway, footpath or a retaining wall.
- Global stability, e.g. will the works affect stability of a portion of land much larger than that covered by the works, or will the works be affected by instability of such a portion of land.
- The likelihood of instability affecting neighbouring properties.

Stability has been assessed and reviewed in much detail as part of the resource consent process for the works. The geotechnical documentation for the site and adjacent Kakariki Track is voluminous and I have placed greater weight on one report. That report [name of geotechnical engineer consulting firm] 2004 report, ref [number of document] takes into account all of the previous geotechnical assessments, both on the site and for the adjacent Kakariki Track. I also note that another report [name of another engineering consultancy] 2007 letter ref [number of document] also reviews all available geotechnical data with respect to the proposed works. Both reports conclude that stability is satisfactorily addressed.

In this particular location stability is controlled by site geology. I am satisfied that [the geotechnical engineer consulting firm], the primary geotechnical and engineering geological consultants responsible for the investigations and stability assessments for the proposed works, has assessed site geology, carried out investigations, reviewed data from other investigations and assessed stability in respect to the proposed works.

The driveway, footpath, car decks and associated retaining and drainage works have been designed by [name of owners' consulting engineer] using recommendations from [the geotechnical engineer consulting firm]. The design is adequately documented and covered by Producer Statements. I have not checked the design as such but from reviewing the drawings and calculations the works appear to be robust with respect to stability. Obviously the works depend on good construction practice and appropriate review of ground conditions exposed during construction, I am satisfied that measures to ensure that these two factors are covered by the conditions of both the resource and building consents.

- 5.5 Copies of the expert's interim report were sent to the parties for comment on 28 August 2008; the interim report was produced prior to the receipt of the information referred to in paragraph 5.2. The interim report was sent to the parties prior to its completion due to expert's short-term unavailability.
- 5.6 The expert's final report was sent to the parties for comment on 18 September 2008. The covering letter to the report noted there was no substantial change from the interim report.
- 5.7 The applicants commented on the expert's report in a letter to the Department dated 21 September 2008. The applicants said they disagreed with the report because, in their view, the expert had not thoroughly critiqued all the previous work. In particular the applicants said the expert had not thoroughly read and discussed what they saw as the shortcomings or limited scope of certain reports. They also said the expert had not recognised the deficiency of certain Producer Statements and had not addressed all relevant Building Code clauses relating to ground stability.

5.8 I invited the expert to respond to the applicants comments. The expert said:

My role in the Application is to provide technical advice. In particular I was asked whether the consented works meet Building Code requirements, which in this case relate to site stability and avoiding the likelihood of damage to other property caused by sitework.

. . . I have not distinguished between short and long term stability in my review. Both are considered.

My advice is limited to and based on a desktop review of the Application documentation. My report references that documentation and I confirm that I have reviewed every document referenced. I have not set out a detailed commentary on, or a critique of, each document. Rather I have identified and commented on the two documents which I see as being the principal documents among the many documents submitted for the Application. I do not consider it necessary to provide a detailed critique of those two documents.

5.9 The other parties did not comment on the expert's report.

5.10 The expert's final report made no explicit reference to the compliance of the siteworks with Building Code Clause B2 Durability. This omission was raised in submissions made by the applicants, and in response I asked the expert to confirm whether the proposed siteworks would comply with Clause B2 Durability.

5.11 The expert supplied a letter to the Department dated 21 November 2008 that said:

I am aware that for any building to comply with the requirements of the Building Code it is implicit that clause B2 (Durability) must be complied with. To avoid any doubt concerning my report of 18 September 2008, I confirm that in finding that the proposed building works comply with clause B1 (Structure), I also confirm that the proposed works meet the requirements of clause B2 (Durability).

5.12 The expert's letter was sent to the parties for comment on 25 November 2008. No comment was received.

5.13 I have taken account of the applicants' comments on the expert's report, and of the expert's response, in compiling the determination.

6. Relevant Legislation

6.1 Relevant Clauses of the Building Code are:

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.

B1.3.7 Any sitework and associated supports shall take account of the effects of:

- (a) Changes in ground water level
- (b) Water, weather and vegetation, and
- (c) Ground loss and slumping.

7. Discussion

- 7.1 As I noted in paragraph 1.3 the Building Act 2004 makes no reference to decisions made or actions taken under the RMA. I therefore believe I cannot consider such decisions or actions for the purpose of reviewing them. That does not mean that I cannot consider evidence that has previously been produced for the purposes of the RMA or submitted to a tribunal constituted under the RMA.
- 7.2 The expert's detailed analysis of the evidence submitted by the parties shows that the stability of the site on which the proposed building work is to occur has been thoroughly investigated by people with extensive engineering and geotechnical skills and experience. The proposed work itself has been the subject of engineering design to take account of the site conditions as revealed by the site investigation.
- 7.3 I have been presented with no evidence to contradict the view I have formed that the stability of the site has been thoroughly investigated and the proposed building work has been consequently designed to comply with the relevant clauses of the Building Code, in this case Clauses B1.3.6 and B1.3.7.
- 7.4 Having concluded that compliance with Clauses B1.3.6, B1.3.7, and B2 has been demonstrated by the evidence submitted, I consider the authority's decision to issue a building consent for the work described in building paragraph 2.1 is correct.

8 The decision

- 8.1 In accordance with section 188 of the Act, I determine that the proposed building work complies with Clauses B1.3.6, B1.3.7 and B2 of the Building Code.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 December 2008.

John Gardiner
Manager Determinations