Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2012/035

Regarding the refusal to grant building consent for a dwelling on cross-lease land subject to flooding at 4a Leinster Avenue, Mount Maunganui

1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004[1] ("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.

1.2 The parties to the determination are:

- WD and JA Earwaker and Bailey Ingram Trustees, the owners of the property ("the applicants"), acting through their solicitor as their agent
- Tauranga City Council, carrying out its duties and functions as a territorial authority and a building consent authority ("the authority")
- CG Christie, and E Sproston and SR Tauranga 2006 Trustee Ltd, the owners of the other cross-leases on the subject property.

1.3 I have also included the Registrar-General of Land ("the Registrar-General") as a person with an interest in this determination.

1.4 The determination arises from a decision by the authority to refuse to grant building consent for the construction of a new dwelling to replace the applicants' existing dwelling on their cross-lease property. This decision was made on the grounds that the requirements of section 74 of the Building Act (to record a section 73 notification against the title) had not been complied with.

1.5 I therefore take the view that the matter to be determined[2] is whether the authority was correct to refuse to grant the applicants' building consent.

1.6 In this determination, I will refer to the Building Act 2004, its predecessor the Building Act 1991, and the Building Code; the relevant parts of which are set out in Appendix A.

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[1] The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

[2] Under section 177(1)(b) and 177(2)(a) of the Act.

1.7 In making my decision, I have considered the submissions of the parties and other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The background and building work

2.1 The applicants have owned the property for approximately 20 years. It is a cross-lease property, with two other owners in addition to the applicants. Each of the three owners holds a composite title to their share of the property. The applicants' solicitor has explained this as:

> The Property is what is commonly termed a 'cross-lease' property, in that three leases are granted in respect of the fee simple title granting each leaseholder exclusive possession of part of the land contained within the fee simple title… Each lease is granted for a period of 999 years from 1 April 1984… A composite title has been issued for each leasehold estate and the share of the fee simple tile owned by each leaseholder.

2.2 The applicants' property is contained with composite title SA31C/178.

2.3 The applicants have a dwelling on their part of the property (Flat 1 DPS 35623), as do each of the other two owners: flat 2 is owned by CG Christie, and flat 3 owned by E Sproston and SR Tauranga 2006 Trustee Ltd.

2.4 Within the overall property (and under the terms of their leases) the applicants and each of the other owners have areas for their shared use (such as the driveway) and areas for their exclusive use (such as the areas where their dwellings are).

2.5 The property, which is situated close to Tauranga Harbour, has a total area of 809m^2. The land has elevation of less than 2.7 to 2.9 metres above the Moturiki Datum, and as such falls within the Flood Hazard Policy Area identified in the authority's district plan. Under the plan, buildings within this area have a minimum required floor level of 3.2m to avoid the possibility of flooding and inundation.

2.6 There is an existing two-storey dwelling with attached garage on the applicants' property. This dwelling was constructed in 1985. The applicants are proposing to replace this dwelling and garage with a new dwelling.

2.7 The new dwelling will occupy essentially the same footprint as the old dwelling, but will have a deck and additional storey added. The total ground coverage of the new dwelling and deck will be 164m^2 (compared with 165m^2 for the existing dwelling and garage). The new dwelling will be constructed from concrete, masonry block and timber. The basement level will contain a garage, workshop, bathroom, entranceway and stairwell, and will be built from masonry block and concrete. The two floors above will contain the living areas and bedrooms. The basement floor level of the proposed new dwelling will be 2.150m above Moturiki Datum, which is the same as the garage floor level of the existing dwelling. The floor levels of the two storeys above will be: ground floor, 4.725m; and first floor 7.590m.

2.8 In early 2011, the applicant's architect discussed the proposed new dwelling with the authority. In an email dated 16 May 2011, the authority advised the architect about resource management and building consent requirements for the proposal. This included advice to the applicants that:

> Any building consent application for the new dwelling may be issued subject to the provisions of Section 72 of the Building Act which will result in registration on the **parent title** of the hazard concerned. [Emphasis is mine.]

2.9 On 12 July 2011, the applicants' solicitor wrote to the authority stating that:

> …we do not believe that the [authority] is correct in its view that the Certificate must be registered against the underlying freehold title and we would be pleased if you could confirm that the [authority] has reviewed its position and our clients [sic] application for Building Consent will be dealt with on the basis that a Certificate would be required against their composite Title only.

The applicants' solicitor advanced several arguments to support this request including statutory interpretation, the effects on third parties and the authority, reasonableness, the form of the application and the practicality of the certificate being registered solely against the applicants' title.

2.10 In August 2011, the applicants applied for a building consent and resource consent for the new dwelling. (Because the dwelling was to be constructed within the Flood Hazard Policy Area it required resource consent as a restricted discretionary activity under section 17.4(a) of the Tauranga District Plan.) The applicants filed the following supporting information with their application.

- A report by their architect, including photos and site location plans.
- An engineer's report dated 1 August 2011 providing recommendations on soakage to dispose of surface water around the proposed new dwelling.
- An engineer's report dated 2 August 2011 'considering the floor levels in respect to flood levels for the proposed new dwelling'.
- A letter from the applicants confirming that they were aware of the risk of flooding to their new dwelling due to the floor levels being lower than the specified minimum. They also confirmed that they had not experienced any flooding during the 20 years that they had owned the property, including during a major flood in 2005.

2.11 The authority granted resource consent (RC15669) on 29 August 2011. In the accompanying advice it was noted that:

> As this property is in an area with a known risk for inundation and it is not proposed to raise the level of the land above the minimum inundation level a s72 notations will be required to be registered on the Certificate of Title acknowledging this risk.

2.12 On 29 August 2011, the authority also advised that the resource consent application could be processed on a non-notified basis. In its accompanying planning assessment, the authority stated that:

> The actual and potential effects on the environment are considered to be acceptable, and relate primarily to the flood hazard risk.

> The proposed garage/basement floor level is 2.15m above Moturiki Datum, which is the same level of the garage in the existing house. To construct a minimum floor level of RL 3.2m for the dwelling would mean that the surrounding ground would need to be raised, resulting in increased flooding risk to adjoining properties. This dwelling will not accelerate or worsen any damage to other land or structures through inundation compared to the existing situation. The basement level will be constructed from masonry blocks and concrete floors to resist water damage in the event of any flooding. It is proposed to provide one 0.9 m diameter by 0.9 m deep soak hole per 40 m2 of roof /paving, placed as far apart as possible within the site.
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> Overall, the adverse effects of flooding are considered to be less than minor.

2.13 On 31 August 2011, the authority wrote to the applicants' architect advising that the building consent 'cannot be issued until the Section 72 process has been completed'. It attached a consent form for the applicants to complete, in which they were to agree to the notice being registered against the title because the property was subject to inundation. The form stated that:

> In the event that the property is a cross lease, then all owners with an interest in the property, will have to consent to the registration of a Section 72 Building Act Certificate on their title, and will need to produce that title.

2.14 On 15 September 2011, the authority wrote to the applicants' solicitor responding to their letter of 12 July and confirming that it required a section 72 certificate to be registered against the whole fee simple, and that the consent of all the cross-lease owners would be required to register the certificate against their titles. To support its position, the authority referred to the case of *Doyle* v *Earthquake Commission*[3], stating that because 'all the land at 4 Leinster Avenue is prone to flooding…[and] the three cross lease owners own an undivided share in the land', they were all required to consent to the 'building consent application'.

2.15 On 4 October 2011, the applicants' solicitor wrote to the owners of the other cross-leases requesting that they sign 'an acknowledgement that you will allow the Section 72 Certificate to be registered against your title'.

2.16 On 12 October 2011, the applicants met with an officer of the authority who confirmed that the authority would not review its position.

2.17 On 20 October 2011, the applicants' solicitor wrote again to the authority advising that:

- they had been unable to gain the consent of the other owners to the registration of the section 72 certificate
- if the authority would not review its position and allow the certificate to be registered solely against the applicants' title, they would issue proceedings for a judicial review.

2.18 The applicants made an application for a determination, which was received by the Department on 28 November 2011. The Department then wrote to the parties seeking further information and this was provided by the applicants on 4 January 2012. The applicants also provided the other parties with a copy of their application and supporting documentation.

[3] *Doyle* v *Earthquake Commission* [2009] NZRMA 546.

3. The submissions

3.1 The applicants have asked for a determination about the authority's refusal to:

> process an application for building consent until the owners of the fee simple title have consented to a certificate pursuant to section 72 of the Building Act 2004 being recorded on all titles sharing in the fee simple title.

3.2 Within this they have identified an issue of statutory interpretation about what is meant in section 74 by 'the certificate of title to the land on which the building work is carried out'.

3.3 In their submission, the applicants summarised their position as:

> a The [authority] is required to grant the applicants' building consent application as the statutory criteria are met;
>
> b The Registrar-General of Lands has statutory responsibility for the registration any Building Act 2004 notice, not the [authority]
>
> c In any event, the Building Act 2004 requires a section 72 notice to be registered over the title upon which the building works are to be undertaken. The plain meaning of this is that the applicants' title is the only appropriate title upon which a notice can be recorded. To require notices recorded on other composite titles is unreasonable and contrary to statute.

3.4 With their submission the applicants supplied copies of:

- correspondence between the parties
- supporting information filed with their applications for resource and building consent
- the authority's resource consent and notification decisions
- plans for the proposed building work
- photographs of the property.

3.5 The authority acknowledged the application for a determination and made a submission on 8 December 2011.

3.6 In its submission the authority stated that:

> [The authority] currently requires the Section 72 Certificate to be registered against all of the cross lease titles for all owners that have an undivided share in the fee simple estate.

This was a generic requirement for all section 72 certificates where a 'building consent application relates to a cross lease title', and was not specific to the applicants' consent.

3.7 The authority went on to state that it did not agree with the applicants' submission that land in section 74 only relates to the exclusive use area defined by their composite title. The authority relied upon the judgement in *Auckland City Council* v *Logan*[4] and 'the very nature of cross lease ownership' where all the registered proprietors have 'an undivided interest in the freehold estate of the entire freehold

[4] *Auckland City Council* v *Logan*, 1/10/99, Hammond J, HC Auckland, AP77/99.

lot'. The authority also raised arguments with respect to reasonableness, statutory interpretation, and the impact of section 72 notices on Earthquake Commission and private insurance entitlements to support its view.

3.8 The authority concluded by recognising that while in the past gaining cross-lease owners' consent had been relatively straightforward:

> There is a real likelihood that there is going to be increased resistance to the registration of Section 72 Certificates against all cross lease titles and the Building Act 2004 does not specifically address cross lease registration requirements.

The authority therefore supported an application being made for either a determination or a declaratory judgement to decide the matter.

3.9 A draft determination was issued to the parties on 13 February 2012 and to the Registrar-General on 21 February 2012.

3.10 The authority, the applicants, and one of owners of the other cross-leases accepted the draft without further comment. In an email on 16 April 2012, the Registrar-General confirmed he had no further comments to make.

4. Discussion

4.1 The matter to be determined is the authority's refusal to grant a building consent for the applicants' proposed new dwelling.

4.2 The reason the authority has refused is because the dwelling is to be constructed on land within the authority's Flood Hazard Policy Area. The authority therefore believes that it is required to make a section 73 notification of the building consent for registration under section 74 against 'the certificate of title to the land on which the building work is carried out'.

4.3 The authority has interpreted this reference to a certificate of title to the land to be the underlying fee simple estate comprising the entire parcel of land at number 4 Leinster Avenue, and has required the applicants gain the consent of the other cross-lease owners to the registration. From the correspondence and submissions it appears that this is the authority's standard approach when making section 73 notifications with respect to cross-lease sections. In the present case, consent from the other cross-lease owners has not been forthcoming, effectively preventing the applicants gaining their building consent for their proposed new dwelling.

4.4 The applicants have queried the authority's requirement, taking the alternative view that all that is required by section 74 is that the notification be registered against their own composite title, to which they accept.

4.5 The authority's role and responsibility under section 73(c)

4.5.1 As far as I am aware there is no dispute between the parties that (except with respect to the requirements of sections 72 to 74 of the Act) the applicants' proposed new dwelling will comply with the Building Code. Resource consent has already been granted for the dwelling. The assessment carried out by the authority in granting

resource consent found that there was no extra risk of flooding or inundation from the new dwelling, and accepted that the dwelling had been designed to 'resist water damage in the event of any flooding'.

4.5.2 There is also no dispute that this is a situation where sections 72 to 74 of the Act apply. Instead, the parties' submissions and their preceding correspondence have focussed on what is meant by 'the certificate of title to the land on which the building work is carried out' in section 74 of the Act. In particular, the parties do not agree about which title or titles the section 73 notification should be registered against.

4.5.3 The authority has refused to grant the building consent on the basis that the other cross-lease owners have not agreed to the registration of the section 73 notification against their titles. It is my view that the authority does not have the power to refuse to grant the building consent on this basis. The terms of section 72 are clear. Section 72 provides that the authority "must" issue a building consent if the matters listed in section 72(a) to (c) are satisfied.

4.5.4 The authority's responsibilities regarding notification are set out in section 73(c) and require the authority to impose a condition on the building consent, that when the building consent is issued, it must notify the Registrar-General. There is no provision within sections 72 or 73 for the authority to first obtain the consent of the owner to the proposed section 73 notification, and consequently no power for the authority to refuse to grant the building consent on the basis that the owner has refused their consent to the section 73 notification. The notification under section 73 is a condition of the building consent and simply follows the granting of the building consent under section 72.

4.5.5 Accordingly, I find that the authority was incorrect to refuse the building consent on these grounds. The authority should now grant the building consent under section 72 and in accordance with section 73 notify the Registrar-General that it has been granted.

4.6 The requirement to record the building consent against the certificate of title to the land on which the building work is to be carried out

4.6.1 Section 73 requires an authority that grants a building consent under section 72 to include, as a condition of the consent, that the authority will, on issuing the consent, notify the consent, in the case of general land, to the Registrar-General. Section 73(2) requires the notification to be accompanied by a copy of the project information memorandum that has been issued and section 73(3) requires the notification to identify the natural hazard concerned.

4.6.2 On receiving a notification under section 73 the Registrar-General is required to record as an entry 'on the certificate of title to the land on which the building work is carried out' that a building consent has been granted under section 72 and the particulars that identify the natural hazard concerned.

4.6.3 The prescribed form for an application for a project information memorandum and for a building consent requires the 'legal description of land where building is located' and when a building consent is issued it must state the 'legal description of land where building is located' (Forms 2 and 5 of the Schedule to the Building (Forms) Regulations 2004).

4.6.4 When an authority is considering whether to grant a building consent an authority will be required to consider the nature and scope of the proposed building work in relation to the land title on which the building work will be carried out. This is because there are a number of provisions in the Act and Building Code that specifically concern the location of the boundaries of the land title on which the building work is being carried out (see for example, section 75 and Clause C3 of the Building Code relating to the spread of fire).

4.6.5 In matching the proposed building work in the plans with the legal description of the land it is the authority that is in the best position to identify 'the land on which the building work will be carried out'. It is the title to that land that the authority is required to include in the notification of the building consent to the Registrar-General under section 73.

4.6.6 The Act does not define land or land on which the building work is carried out. Nor does it provide any specific guidance as to which certificate or certificates of title the notice is to be registered against. However, I consider it is very relevant that when submitting an application for a project information memorandum or a building consent the owner must include the legal description of the land on which the building work will be carried out.

4.6.7 In my view, in the present case, 'the certificate of title to the land on which the building work is carried out' refers only to the particular leasehold estate that the applicants' new dwelling is being erected on, as represented in the applicants' composite title. This is also the certificate of title land that will be referred to in the application for the project information memorandum and the building consent as the 'legal description of the land where the building is located'. It is not a reference to the underlying fee simple titles or the other leasehold estates relating to the land.

4.6.8 Section 74 is about public notification, by way of recording against a property's certificate of title, that building work is to be carried out on land that is subject to a natural hazard. It follows that it is the particular title on which the building work will occur that is of interest, not any related titles that are connected by way of a technical land interest.

4.6.9 This is the interpretation supported by the applicants and I agree with them. The proposed dwelling on the applicants' property, and the immediate parcel of land that it stands upon, is part of their exclusive use area, as defined by their composite title. Any person purchasing or otherwise acquiring an interest in any of the other composite titles to the property has no legal right to access the applicants' exclusive use area. Nor would they expect to attract any liability or responsibility for any building upon it.

4.6.10 This approach is consistent with that taken by the Court of Appeal in *Auckland City Council* v *Logan*[5], referred to in the authority's submission. In *Logan*, the Court of Appeal was considering section 74's predecessor, section 36 of the Building Act 1991. While not directly relevant to the present case, *Logan* does stand for the proposition that when deciding whether or not land is subject to a natural hazard it is not, by default, all the land comprised in a title that is affected; it may just be part of the land particularly where the title covers a large area.

[5] *Auckland City Council* v *Logan*, 1/10/99, Hammond J, HC Auckland, AP77/99.

4.6.11 This approach is also consistent with the purpose of section 74, which is to notify future owners and other interested parties of natural hazards that may affect actual buildings on the land in question. The provision should not be used as a planning provision or to impose general land use restrictions. Nor should it be used to ensure that landowners are generally notified of natural hazards in particular areas. This is the function of the authority's district and city planning instruments.

4.6.12 Likewise the provisions should not be used to impose extra restrictions or liabilities with respect to natural hazards on landowners beyond those that they have elected to take on. The effect of registering the section 73 notification against the underlying fee simple certificates of title would, in the current case, be to spread responsibility for the applicants' decision to build a new dwelling to the other owners of the cross-leases. This would not be reasonable, either in terms of the potential liability it may impose on the other owners, or in the restrictions it might place on the applicants' ability to enjoy their land.

4.6.13 I note here that one of the significant consequences of a section 73 notification is that the authority will potentially gain protection in respect of the building consent that is notified (see section 392(3)). The protection relates to the issue of a particular building consent to a particular owner or owners; it does not make sense, and would be unreasonable, to extend it against other landowners to whom no building consent has been issued.

4.6.14 In its correspondence, the authority has relied on the case of *Doyle* v *Earthquake Commission*[6] to support its position. The judgement in *Doyle* was to the effect that it is not just the land immediately beneath a building that is subject to section 72 or 36 notification; it is all land within the title that the building is on and that is subject to the hazard. The judgement does not clarify which title is meant in the instance of a cross-lease.

4.6.15 For the reasons above I support the applicants' position that in respect of the building consent the authority proposes to grant to the applicants it is the applicant's composite title for their cross-lease interest in the property that is to be included in the proposed notification of the building consent to the Registrar-General under section 73, and the notification is not to include the other leasehold estates relating to the land that share the underlying fee simple title.

[6] *Doyle* v *Earthquake Commission* [2009] NZRMA 546.

5. The decision

5.1 In accordance with section 188 of the Act, I hereby determine that the authority was incorrect to refuse to grant the applicants' building consent due to the lack of agreement by the other cross-lease owners to the registration of the section 72 notice, and I therefore reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 May 2012.

John Gardiner
Manager Determinations