MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2015/043

Regarding the authority's powers of decision in relation to a natural hazard identified on a building consent for a property at 20 Allan Street, Nelson

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the current Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the owners of the property A Daines and S Burt ("the applicants")
- Nelson City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to remove a notice issued under section 36 of the Building Act 1991 ("the former Act") registered on the certificate of title for the applicants' property.

1.4 I take the view that the matter to be determined[2] is whether the authority correctly exercised its powers of decision in respect of the identification of a natural hazard on a building consent ("the section 73 notification").

1.5 I note in respect of the matter to be determined, the removal of the section 73 notification on the Certificate of Title is an automatic action by the Registrar-General who has no discretion in the matter and acts on the decision made by the authority.

[1] The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.
[2] Under sections 177(1)(b) and 177(2)(a) of the current Act.

1.6 The property has been subject to the requirements of section 36 of the former Act. However, as set out in section 434 of the transitional provisions in the current Act, an entry on a certificate of title under section 36(2) of the former Act must be treated as if it had been made under the current Act. Accordingly, all such title entries described in this determination are considered in terms of the current sections 71 to 74.

1.7 In making my decision, I have considered the submissions of the parties, the reports of the geotechnical engineers engaged by the applicants (refer Appendix B), the report of the expert commissioned by the Ministry to advise on this dispute ("the expert") and the other evidence in this matter.

2. The building and site

2.1 The site is located on ground that forms the lower slopes of Grampians Reserve ("the reserve"); the reserve is owned by the authority. An aerial photo of the site illustrating its main features is shown in Figure 1 (the figure is taken from the expert's report).

2.2 The site is terraced through a number of low rock faced retaining walls. The dwelling and associated garage, driveway, decks and footpaths encompass the lower two thirds of the site.

2.3 A tennis court area across the rear of the applicants' and neighbouring property, is retained by a timber pole and panel retaining wall around 2.5m in height at the rear, with a smaller retaining wall closer to the dwelling. The horizontal distance between the front retaining wall and the dwelling is around 8m. The tennis court is 15m in width and 34m wide in total. The net forms the boundary line for the applicants' property and the neighbours.

2.4 A surface water cut off drain has been excavated upslope of the property above the retaining wall (0.5m deep, bund height of 0.6-1m) and is graded downslope to a grated sump.

2.5 The Ronaki Track is located in the reserve, 35m upslope from the boundary of the applicants' site. The track is graded to allow surface water to run into grated permanent surface water drains. I have not received any information as to the depth of the subsoil drains, maintenance schedules, back fill material or the design rainfall event.

3. Background

3.1 The applicants' dwelling was originally constructed in 1937.

3.2 An extension to the existing property was carried out in October 1996 under Building Consent No. BC961207, issued with a notice under section 36(2) of the former Act (referred to in this determination as the section 73 notification). The authority's "Condition No 392" applies to the property which states:

> Stabilising works were carried out in 1996 but time is required to prove the effectiveness of this work

On 14 and 15 December 2011 the Nelson-Tasman and Golden-Bay region was subject to heavy rainfall. The rainfall caused land slippage on the steep slopes of the reserve upslope of the applicants' property. The presence of vegetation (mature trees and shrubs) helped to prevent landslip debris from reaching residential land; however some residences downslope were subject to inundation.

Figure 1: Aerial photo annotated to show the main features of the site (nts)

3.3 In August 2013 the applicants commissioned a firm of geotechnical engineers ("the first geotechnical engineers") to produce a report regarding the stability of the property. Refer Appendix B.On 31 January 2014 the authority wrote to the applicants advising the property was no longer within the updated earthquake fault line known as the Fault Hazard Corridor and that this would be removed from the Fault Hazard Overlay in a future plan change process. The letter noted the purpose of the Fault Hazard Overlay and Corridor was to:

> avoid building directly over an active fault line, and therefore reduce the risk to people and property from ground rupture during an earthquake. Ground rupture is different from the general shaking that could occur throughout Nelson during an earthquake.

3.4 On 17 February 2014 the applicants wrote to the authority requesting the removal of the section 73 notification. In summary the reasons for the request were as follows:

- The property was no longer within the new Fault Hazard Corridor.
- The December 2011 "one in 400 year rain event" the area was subjected to having had only a minor effect on the property as described by the applicants' first geotechnical engineers.
- The applicants' attached the first geotechnical engineer's report which found no evidence of damage to the property arising from land instability, and no record of such damage on the authority's property file.
- The substantial planting in the area in the last 15 years to the rear boundary area of the property.
- The risk to the property of potential slip hazards has been mitigated against – referring to section 71(2) of the current Act.

3.5 On 27 February 2014 the authority responded to the applicants stating the fault is not a hazard under section 71 of the current Act and is not the reason for registering the notification on the Certificate of Title. The applicants' first geotechnical report does not describe the mitigation undertaken to address the 'variable stability' on the lower slopes and does not confirm adequate provision has been made to protect the land, building work or other property. Therefore the registration cannot be removed.

3.6 On 5 March 2014 the applicants wrote to the authority seeking a reconsideration of the decision not to remove the registration on the Certificate of Title. The further points made by the applicants were, in summary:

- At the time the section 73 notification was issued the effectiveness of remedial work undertaken on the upper-slope of the property was unknown.
- The mitigation work undertaken to protect the property includes:
  - substantial surface and sub-surface drainage on the upslope in the mid-1980s
  - planting of trees on the area between the rear boundary to the property and the public walking track.
- The property had no damage during the December 2011 rainfall event. The Building Code requires a minimum of 50 years performance from any building, the property was constructed over 80 years ago.
- A neighbouring property is being constructed without a section 73 notification being required.

3.7 On 19 March 2014 the applicants sought legal advice on the matter. The letter seeking advice was a summary of the above listed correspondence and views held by the applicants. Further points not noted above, and requiring to be considered by the authority, included:

- The precedent set by the authority in relation to two new houses on the same street not requiring section 73 notification is not justified.
- The Auckland Council Practice Note which refers to the accepted practice of using 1% probability of the occurrence of a natural hazard is the appropriate methodology to determine if the land is subject to a natural hazard.
- *Auckland CC v Logan* Court of Appeal judgement[3] was cited, and that the authority must take a common sense approach to section 73 notification.

3.8 On 26 March 2014 the authority responded to the applicants' letter of 5 March 2014. The authority was not satisfied the natural hazard has been reduced or removed. The authority's independent geotechnical advisor reviewed the applicants' first geotechnical report, stating he did not agree that the section 73 notification can no longer be justified. The authority's geotechnical advisor noted the following in an attached memo in response to the applicants' first geotechnical report:

- The report discusses the general history of the area and states the property is fully situated within the "Grampians Slope Risk Overlay" an area defined as showing widespread but not uniform evidence of instability.
- The applicants' first geotechnical report makes no comment as to the effectiveness of previous mitigation work.
- In relation to the December 2011 rain fall event, although the event supports the success of mitigation factors it does not "prove it" and further information or geotechnical review would be required.
- The applicants' first geotechnical report acknowledges no subsurface ground information was obtained and the area of the tennis court is on an area of known past instability.

3.9 On 30 November 2014 the applicants wrote to the authority advising a second geotechnical engineer had been engaged ("the second geotechnical engineers") to undertake an assessment for the potential removal of a section 73 notification. The applicants attached the report dated 28 November 2014 (Refer Appendix B), noting it covers a wider and more detailed scope but comes to the same general conclusions regarding the stability of the property. The applicants restated other points already put forward to the authority in previous correspondence.

3.10 On 16 December 2014 the authority wrote to the applicants stating it had sought specialist geotechnical advice in relation to the second geotechnical report provided by the applicants, stating the report does not conclude that it would be more appropriate to remove the section 73 notification on the Certificate of Title and no discussion has been provided with regard to the removal. The authority maintained its position.

[3] Logan v Auckland City Council (2000) 4 NZ ConvC 193,184 (CA)

3.11 On 31 December 2014 the applicants produced a 'file note' prepared in response to the authority. I note this was not sent to the authority but was provided to this determination. In summary this note stated:

- The second geotechnical report made it clear it was the authority's responsibility to make a decision (whether it was appropriate to remove the section 36(2) registration) based on the evidence the report outlined. The second geotechnical report concluded with 'strong guidance' as to why the notice should be removed.
- The authority's approach is such that every property (in the area) would now be required to have section 73 notification. This is contrary to the guidelines provided by the Auckland City Council Practice Note and the Supreme Court decision[4].
- The applicants referred to Determination 2013/022[5] in relation to the word 'likely' that a level of evidence akin to 'certainty' is above and beyond that required by the application of the likely test.
- The authority did not state it required the geotechnical report to specifically recommend that the notice be removed.

3.12 The Ministry received an application for determination on 20 January 2015.

4. The submissions

4.1 The applicants provided a written overview with their application for determination. In summary the applicants' submit:

- There are two geotechnical reports from two different companies that state there are no issues relating to stability and risk to the property. However the property has not been able to be sold due to potential buyers not being able to get insurance and concern that any alteration work for the future may result in the authority insisting on a further section 73 notification.
- There are two new properties on the same street within the slope risk overlay that do not have section 73 notification. These properties 'do not have a history of stability'. The applicants' provided examples of other inconsistent application of section 73 notification and the authority's condition (No. 392) in the same area.
- The authority has inconsistently applied section 73 notifications and it appears it does not have a clear policy.
- The authority is not justified to decline the application to remove the section 73 notification.

4.2 The applicants provided the following documentation with their application:

- Correspondence in the form of emails and letters with the authority dated between 12 February 2014 – 16 December 2014.
- The applicants' first and second geotechnical engineer's reports and associated earlier reports completed for the property (refer Appendix B).

[4] Logan v Auckland City Council (2000) 4 NZ ConvC 193,184 (CA)
[5] Determination 2013/022 Dispute about a subdivision being considered land subject to a natural hazard due to slippage at 6 to 40 Morere Street, Porirua *(Ministry of Business, Innovation and Employment)* 15 July 2013

- The Practice Note from Auckland City Council.
- The Certificate of Title for the applicants' property and two other properties on the same street.

4.3 On 13 March 2015 the authority provided a 'preliminary submission'. The authority stated it did not agree that section 177(2)(a) of the current Act gives the Ministry the power to make a determination over the original decision under the 1991 Building Act as the transitional powers under section 446 do not cover this. However, the authority agrees the decision made last year could be deemed to be determinable under section 177(2)(a) as it does relate to the power of decision made under the Act, section 74(3)(c) in relation to a building consent. In summary the authority submitted:

- The authority's removals under section 74(3)(c) is aligned with the Auckland City Council Practice Note 2012 which states that 'such notices can be removed by [an authority] if a specialist report is accepted by [the authority] that demonstrates that natural hazard is no longer present'.
- It is required the specialist report provide a recommendation based on the reduction or removal of the risk, or confirmation the risk is low.
- The report from the applicants' first geotechnical engineer was a condition report of the current situation and offered no insight into the likely risk or reduction of the risk due to slippage (being the initial reason the section 73 notification was required). The report advises movement in retaining walls of 4-6 degrees and no sub surface ground information was obtained.
- The report from the applicants' second geotechnical engineer did not address a clear indication of risk removal or reduction to a low level. The authority considered providing arguments for and against 'is ambiguous' and it would be unreasonable for the authority to rely on a report that does not make a clear conclusion on the level of risk questions.
- The authority considered neither report provided recommendation that the risk of slippage and instability had been reduced to a low level or removed, therefore the authority did not remove the section 73 notification from the title.

5. The expert's report

5.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me. The expert is a specialist geotechnical engineer. The expert inspected the house on 17 March 2015, providing a report dated April 2015 which was provided to the parties on 30 April 2015.

5.2 The expert reviewed the natural hazards, as defined under section 71(3) of the current Act in relation to the applicants' site. The expert found a low probability of erosion, falling debris, subsidence and inundation to the site; however the tennis court area is subject to slippage from the reserve.

5.3 In relation to slippage, the expert noted the land slippage from the reserve had inundated the tennis court during the December 2011 rain event. Landslides from the reserve are attributed to rainfall events and ground saturation. The expert agrees the December 2011 rain fall event was a 1% AEP (annual exceedance probability), defined as 200.5mm of rain over a 24 hour period. The December 2011 landslip has been attributed to the blockage of the upslope drainage on the reserve.

5.4 The expert noted upslope drainage has been improved by the authority since the December 2011 event but has not yet been exposed to a 1% AEP rainfall event and is therefore difficult to assess.

5.5 Additional planting has also been undertaken on the slope since 2011. The expert is of the opinion the additional planting will have a nominal effect on slope stability until the trees have matured sufficiently for the roots to bind the shallow ground.

5.6 The expert considered the risk of future landslides inundating the tennis court is still considered to have a greater than 1% probability of occurrence; however the rest of the allotment is not believed to be significantly at risk.

5.7 The expert considers if the storm water system reliably accommodates a rainfall event with a probability of occurrence of less than 1% without overland flow (this is currently unknown) then it may be inferred that the probability of occurrence from a future landslide is also less than 1%, and therefore low.

5.8 In conclusion the expert stated:

- The damage from land slippage to the allotment is limited to the area of land covered by the tennis court as seen in the December 2011 event. Additional drainage and track widening by the authority has been carried out in the reserve but has not been tested by a major low return storm event. It is expected these measures will have improved the site conditions.
- The area of allotment downslope of the tennis court, including the residential dwelling, has not been affected by land slippage, and there is no evidence of land slippage from within the allotment which could affect other properties.
- The expert notes any future building works within the dwelling footprint or tennis court will invoke the geotechnical requirements of the Nelson Resource Management Plan rules (due to the reserve overlay).
- It is unknown what rainfall even the authority designed the storm water drainage system on the track as part of the reserve.
- The expert considers the section 73 notification is valid for the area of land covered by the tennis court, but not the entire allotment.

6. The further submissions and the expert's response

6.1 The applicants

6.1.1 On 3 and 4 May 2015 the applicants provided a written response to the expert's report. In summary:

- The wire rope around the top of one of the posts was not remedial work but was installed during the original construction of the retaining walls.
- In response to the authority's letter of 13 March 2015 which the applicants noted they had only recently received, the applicants stated the letter infers the authority has some form of policy for removing section 73 notifications, applied on an ad-hoc basis and the second geotechnical expert's report clearly stated the protective measures were effective in protecting the land.
- In relation to subsidence, the expert's report states the tennis court falls within the 'Flaxmore Fault System' however the letter from the authority confirms none of the property falls within this area (refer paragraph 1.1).

- In relation to the December 2011 rain event, the space that was inundated was the basement space that had access from outside only and no living or habited rooms were affected by inundation. A blockage in the storm water drain below the tennis court caused the inundation to the basement space, this has been cleared and no further damage has occurred.
- The expert's report infers the area covered by the tennis court has been inundated on previous occasions. The applicants contend no record or report of any material provides evidence for this, except for the December 2011 event. In addition the material was 'silt enriched surface water' not slippage material. It was evenly distributed over the area and varied between 5-15mm thick and was removed by hand (due to the location) by 5-6 people in one day, the applicants stated this was 'less than minor'.
- Other properties in the Nelson city region suffered greater damage and are not the subject of section 73 notifications or included within the hazard identification zone.
- The applicants 'strongly disagree' with the conclusion that the December 2011 event was a 1% AEP event, and submitted it is in the order of a '1 in 250 year' event. The applicants provided figures of rainfall intensities and evidence that 'clearly points to rainfall intensity well in excess of the 1 in 100 year level stated in the [expert's] report'.
- The applicants agreed a section 73 notification is not justified for the balance of the allotment and noted further improvements have been made to the drainage system since the December 2011 event.

6.2 The expert's response

6.2.1 On 15 May 2015 the expert provided a response to the applicants' submission. In summary:

- In relation to the return period for the December 2011 event, the expert's report and the applicants' second geotechnical report suggest this event was equal to or greater than a 1 in 100 year return period rainfall event. The actual intensity of rainfall experienced on the site is not possible to assess due to the localised variation that occurs in hilly areas. The expert does not dispute the applicants' claim the December 2011 event was a significant event, probably in excess of a 1% AEP and may have been equivalent to a '1 in 250 year' event.
- In relation to the inundation of the tennis court from the December 2011 event the expert accepts this is the only significant slope instability event that has affected the site since the tennis court was constructed, and the dwelling has not been significantly affected since construction. However the second geotechnical engineer's report confirms the slope instability has affected the general area, including the site in recent 'geological past'.
- There are other factors aside from high intensity rainfall that can influence slope failures. It is incorrect to assume if a particular area experiences a potential slope failure triggering event greater than the 1% AEP without failure, the likelihood of any slope failure mechanism significantly affecting that site is less than 1%.
- Engineering works installed in the area immediately upslope from the tennis court will have an impact on the stability of the slope in that area. Drawings

have been supplied but no further information in relation to capacity or the return period they have been designed for has been provided.

- On the basis of the expert's review, potential slope hazard mechanisms are present that could affect the site. The remedial measures described address some of these mechanisms, but the evidence does not demonstrate the slope hazard mechanisms have been mitigated to the extent that allows the removal of the notice.

6.3 The authority

6.3.1 On 11 May 2015 the authority provided a written submission and information it could gather to locate the Grampians Track drainage, consisting of some as-designed and as-built plans from the engineer engaged to complete the work. In summary:

- The authority submitted the two initial reports from the applicants' two engineers have not provided clear reliable evidence establishing that there is low to no risk to the applicants' land.
- In relation to other properties in the Nelson City region, these properties may have avoided section 73 notifications when engineering reports assessed the risk remaining to these properties is low, or alternatively sufficiently reasonable measures were integrated in the building work to protect the land. The hazard identification zones were pre-existing to the December 2011 event.
- The authority notes the applicants are trying to get the 'best price' to sell their home however the removal of a section 73 notification has the potential to impact future owners and interested parties after the property is sold.
- The authority submitted that due to this legal responsibility to other parties, it requires support of a suitably qualified person who can 'clearly advise the level of risk in this situation'.

7. The draft determination and further submissions

7.1 On 11 June 2015 I issued a draft determination to the parties. The draft concluded that the authority incorrectly exercised its powers of decision in respect of the identification of a natural hazard on the building consent in requiring a section 73 notification.

7.2 On 18 June 2015 the applicants accepted the draft determination with non-contentious amendments.

7.3 On 19 June 2015 the authority accepted the draft determination with non-contentions amendments. The authority noted:

- The information provided by the expert has provided clearer guidance around the level of risk for the site (refer paragraph 5.6).
- The authority acknowledges the indication that a hazard could be likely to occur to part of the site, in addition the expert's comments that the evidence does not demonstrate the slope hazard mechanisms have mitigated to the extent that allows the removal of the notice (refer paragraph 6.2.1).
- The wording of the draft decision indicates the decision point being determined was 'identification of a natural hazard on a building consent'. The wording is misleading as there is no 'consent' in question for this decision, rather the

determination is around the notification 'remaining' on a title and whether the natural hazard is still present.

- The authority observes that section 74(3)(c) is the decision area being determined, in that the authority did not exercise its powers to remove the notification placed under section 36 of the former Act.

7.4 I have taken account of the party's comments and amended the determination where appropriate.

8. Discussion

8.1 As noted in Determination 2013/022 the wording of both section 36(2) of the former Act and section 71(1) of the current Act, with minor exceptions, convey the same meaning. In addition, section 434 of the current Act requires such notices to be applied as if they had been made under the current Act. I have therefore addressed this matter in terms of the provisions of the current Act.

8.2 At the time the section 73 notification was made for the applicant's land, the authority was satisfied the land was subject to a natural hazard, being slippage. The applicants have applied to the authority seeking to have the section 73 notification removed.

8.3 Section 74 of the Act states:

> (3) Subsection (4) applies if an [authority] determines that any of the following entries is no longer required:
>
> …
>
> (c) an entry under section 36 of the former Act
>
> (4) The [authority] must notify the Surveyor-General, the Registrar of the Maori Land Court, or the Registrar-General of Land, as the case may be, who must amend his or her records or remove the entry from the certificate of title

The authority was therefore asked to decide if the land was still subject to a natural hazard.

8.4 Is the land subject, or likely to be subject to a natural hazard?

8.4.1 This requires a decision on whether the land on which the building has been constructed is subject, or likely to be subject to a natural hazard. The expert has identified slippage as the relevant natural hazard for the purposes of section 71(3) of the current Act. Slippage in general terms is defined at the action or an instance of slipping or subsiding or falling away. I accept slippage is the natural hazard concerned for the purposes of this determination.

8.4.2 As discussed in para 3.3 the authority has concluded that the property is no longer within the Fault Hazard Corridor. As I understand it this is a local hazard assessment that does not override but complements the National seismicity assessment that is published as the "z" factor in NZS 1170[6]. This confirms that Nelson is in a high seismic zone. For the purposes of sections 71 to 73, earthquakes are not listed as a natural hazard for which a notice is required (refer section 71(3)). Hence I have excluded seismic effects from consideration relating to slippage in this determination.

[6] Australian/New Zealand Standard AS/NZS 1170 Structural design actions

8.4.3 The phrase 'likely' has been previously established in determinations in particular in the context of section 121 of the current Act relating to dangerous and insanitary buildings. The courts determined "likely" to mean something more than probable, and a reasonable consequence or [something which] could well happen'.[7] This approach has been adopted in relation to 'likely' in the context of natural hazards in Determination 2011/034[8]. I consider this is good law in relation to the current case.

8.4.4 The applicants' land consists of a dwelling, a detached garage and a tennis court area. The High Court case of *Auckland City Council v Logan*[9] the meaning of 'land' can be different depending on the circumstance of the case, however, should relate to the protection of "the site itself where … the building and the site are intimately connected". The interpretation from this case is that 'land' is that intimately connected with the building. I consider this is still good law in relation to the current case.

8.4.5 I also note the common-sense approach as noted by the Court of Appeal in *Logan v Auckland City Council*[10] in respect of when a property will be subject to a natural hazard, and the requirement to assess considerations of fact and degree.

8.4.6 In this case the retaining wall for the tennis court is 8m from the main dwelling. The tennis court sits above the main dwelling and is accessed through terraced steps. The sole purpose of a tennis court is to play tennis; it does not have a dual or multi-purpose in comparison to a deck area for example. I also consider the tennis court is restricted to seasonal use as it is not covered and will therefore typically be in use during the summer period. I do not consider the tennis court to be 'intimately connected' with the building. Although it is reasonably close to the main dwelling it serves no function needed for the running of the household, and no necessary amenity for day to day use. I consider the tennis court as an occasional use activity is sufficiently removed from the main dwelling.

8.4.7 The expert found around 5.5m³ of material was removed from the tennis court following the December 2011 event, which can be described as a 1% AEP event. The expert also noted as the tennis court is a shared ownership with the applicants' neighbours it is unclear how much of the 5.5m³ material was removed from the applicants' half of the tennis court, however I consider it reasonable to assume 50%. I also note the damage listed in the applicants' second expert report that 'bulging and undulations of the AstroTurf were noted within 2m of the tennis court retaining wall'

8.4.8 I do not consider the amount of material likely in a 1% AEP event to be significant, and has no effect on the health and safety of any occupant of the main dwelling. When considering 'fact and degree' there will be little damage caused to the tennis court, asides from the removal of a small amount of debris material, that would need to be restored. It would therefore be disproportionate for a section 73 notification to remain for whole site.

[7] Auckland City Council v Weldon Properties Ltd [1996] DCR 635 (DC)
[8] Determination 2011/034 Does work to an existing building constitute 'major alterations' and therefore should a section 73 notice be issued in respect of land subject to natural hazards? *(Department of Building and Housing)* 13 April 2011.
[9] Auckland City Council v Logan HC Auckland AP77/99, 1 October 1999
[10] *Logan v Auckland City Council* (2000) 4 NZ ConvC 193,184 (CA)

8.5 Has adequate provision been made, or will be made to protect the land from the natural hazard?

8.5.1 As I have concluded the land is not subject to a natural hazard, I am not required to determine whether 'adequate provision' has been made to protect the land in this case, however I consider some mitigation of the natural hazard has been undertaken in the form of:

- widening and re-grading of the Ronaki Track to form a catch bench for debris arising from land slippage
- additional planting, although I note the comments from the expert the trees need time to mature for the roots to bind to the shallow ground.

8.5.2 I agree with the expert (refer paragraph 6.2.1) that information regarding the design basis of the drainage system above the applicants land would assist with an evaluation, noting a one in 200 year return period threshold would be acceptable.

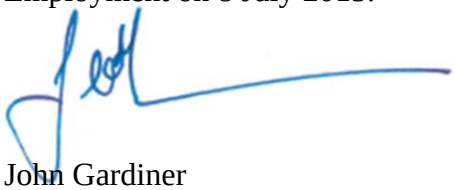
9. What happens next

9.1 I consider the authority is required to direct the Registrar-General to remove the section 73 notification on the Certificate of Title under section 74(4) of the Act.

10. The decision

10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in its refusal to remove the notification placed under section 36 of the former Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 July 2015.



John Gardiner
Manager Determinations and Assurance

Appendix A – The legislation

A.1 The relevant sections of the current Act are:

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:

(c) subsidence:

(e) slippage.

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 to 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,—

(c). . . the Registrar-General of Land.

[I note that section 73(1) of the Act has in effect as Section 36(2) of the former Act]

434 Transitional provision for certain entries on certificates of title made under former Act

(1) This section applies to any of the following entries that is made before the commencement of this section:

(a) an entry on a certificate of title under section 36(2) of the former Act; and

(b) an entry in the records of the Surveyor-General or the Maori Land Court under section 36(7) of the former Act; and

(c) an entry under section 641A of the Local Government Act 1974.

(2) On and from the commencement of this section, an entry to which this section applies must be treated as if it had been made under this Act and the provisions of this Act apply accordingly with all necessary modifications.

A.2 The relevant sections of the former Act are:

36 Building on land subject to erosion etc

(1) Except as provided for in subsection (2) of this section, a territorial authority shall refuse to grant a building consent involving construction of a building or major alterations to a building if –

(a) The land on which the building work is to take place is subject to, or is likely to be subject to erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or

(b) The building work itself is likely to accelerate, worse, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property –

Unless the territorial authority is satisfied that adequate provision has been made or will be made to –

(c)Protect the land or building work or that other property concerned from erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or

(d) Restore any damage to the land or that other property concerned as a result of the building work.

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

(a) The building work itself will not accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property, but

(b) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; and

(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 territorial authority shall, if it is satisfied that the applicant is the owner in terms of this section, grant the building consent, and shall include as a condition of that consent that the territorial authority shall, forthwith upon the issue of that consent, notify the District Land Registrar of the land registration district in which the land to which the consent relates is situated; and the District Land Registrar shall make an entry on the certificate of title to the land that a building consent has been issued in respect of a building on land that is described in subsection (1)(a) of this section.

Appendix B

B.1 The relevant geotechnical reports

B1.1 The applicants' first geotechnical engineer's report dated 12 August 2013 found, in summary:

- The property lies within an area broadly characterised by natural hazard overlays, however the first engineer found no evidence of damage to the property (dwelling, garage and surrounding yard areas) arising from instability and no such evidence was found on the property file.
- The tennis court area and associated retaining wall had been subjected to some movement however the engineer considered it did not appear to be at imminent risk of failure under 'normal climatic conditions'.
- The '1 in 400 year' rain event (December 2011) caused widespread damage for the region but had only a minor effect on the property.
- The general stability of the property was assessed during a site walkover; no subsurface ground information was obtained during the investigation.

B2.1 The applicants' second geotechnical engineer and associated reports are summarised as follows:

- A stability assessment report dated 19 August 1996 in relation to site investigations for support of a building consent (an extension to the rear of the house, excavation of a new garage and moving a deck forward and extending the front of the house). In summary the report notes:
    - The reserve at the rear of the property has a history of instability and two surface drains run across the slope to intercept water. Surface and sub-surface drainage was installed in 1986 due to land sliding and ground cracking behind two other properties on Allan Street.
    - The reserve has been planted with trees and is well vegetated with grass, scrub and trees 4-5m high.
    - There was no evidence of ground movement at the property and the ground was 'relatively dry'.
    - A cover letter (dated 16 August 1996) that the proposed developments would not decrease the stability of the area and would satisfy the authority's conditions (No. 392). The applicants' engineer's provided some conditional works to be undertaken.
- A report dated 28 July 1998 in relation to the proposed excavation for a tennis court on the applicants' property. The report notes the proposed tennis court is an area of known past instability however the in situ soils are 'fault derived' and contain clays of high plasticity, and the planting and surface drainage works on the slopes above the site will have a beneficial effect on slope stability.
- A geotechnical assessment report was produced dated 28 November 2014. In summary:
    - A summary of the effect of the December 2011 event on the applicants' property. The engineer concluded whilst some damage occurred this did not affect the utility of the dwelling or tennis court. It has been indicated the December 2011 event was at least a 1% AEP event.
    - Remedial works carried out on the track areas in the reserve by the authority following the December 2011 event. The trees and drainage upslope of the property are 'now effective in protecting the land'.

- There has been no recorded or observed ground movement at the applicants' property since the 1996 remedial works.