



Determination 2015/085

Regarding the authority's exercise of its powers of decision in relation to a building consent application for an earthquake-prone building at 16 Cameron Street, Whangarei

Summary

This determination considers the authority's decision to refuse to issue a building consent for alterations to an existing earthquake-prone building. The alterations were for an internal fitout on the ground floor of the three-storey commercial building. The determination considers the authority's policy on earthquake-prone buildings in relation to the proposed work, and raises some matters in relation to the policy itself. Detailed discussion on the policy itself will follow in a further determination.

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 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 licensed building practitioner concerned with the relevant building work, Mr C Shields, and who applied for the determination ("the applicant")
 - the owner of the property, Mrs S Morris ("the owner")
 - the lessee, Mr M Nooyen ("the lessee")
 - Whangarei District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority's exercise of its powers of decision in respect of a building consent application for a fit out to an existing building. The existing building has been assessed as meeting the definition of an earthquake-prone building as defined in section 122 of the Act. The authority has suspended the application for a building consent as the proposed work included in the building consent application does not include seismic upgrade work to make the building no longer earthquake-prone.
- 1.4 I consider the matter to be determined² is whether the authority correctly exercised its power of decision in relation to a building consent application for an earthquake-prone building by suspending its processing of building consent application No. BC1500622.

¹ The Building Act, Building Code, Acceptable Solutions and Verification Methods, 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 Act.

- 1.5 The applicant has also requested the determination consider whether the proposed building work complies with the Building Code. I consider this can be addressed by considering the matter set out in paragraph 1.4, and I note that based on the information provided to me that this does not appear to be in dispute between the parties.
- 1.6 In the course of this determination it has become apparent that there is a further matter that requires determination, concerning the failure of the authority to issue a section 124 notice for the building, given the parties agree the building is earthquake-prone. The authority's approach, which involves avoiding the use of section 124 notices, appears to be sanctioned by the authority's earthquake-prone building policy. However, this matter will require further consideration of the authority's earthquake-prone building policy, as it may affect how the policy applies to other potentially earthquake-prone buildings in the area. It is more appropriate that it be considered in a separate determination so as not to hold up the building work proposed by the applicant.
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. Background

- 2.1 The building is a two storey building occupied by a number of commercial tenants.
- 2.2 According to the seismic assessment provided as a part of the building consent application documentation, the building is likely to have been constructed in the early 1920s. A number of internal refurbishment and fit outs have been completed over the life of the building.
- 2.3 The building is constructed using an in-situ reinforced concrete two-way moment frame system with a concrete slab suspended roof and floors. The building has a parapet on the roof along the road frontage and a canopy structure extending from the building.
- 2.4 The applicant applied for a building consent on behalf of the leasee and owner. The building consent is for proposed alterations to the building consisting of an internal fitout for a shop.
- 2.5 According to the summary provided by the applicant in the application for determination, the proposed building work consists of the installation of plumbing and drainage (where none currently exists), the installation of an area of suspended timber floor, the removal of the remaining part of a non-load bearing wall, and changing a shop front door to a window.
- 2.6 I have not seen a copy of building consent application No. BC1500622.
- 2.7 Based on the information provided to me, it appears that the authority requested further information about the proposed building work and existing building (although I do not know the date of this request), including:
- information about how the proposal meets the requirements of section 112 of the Act for compliance as nearly as is reasonably practicable for means of escape from fire and access and facilities for people with disabilities
 - a seismic assessment to confirm whether or not the building is earthquake-prone, which appears to have been requested on the basis of the authority's

Dangerous, Insanitary and Earthquake-prone Buildings Policy, dated December 2011 (relevant sections of this are included the Appendix A).

- 2.8 The authority has stated that (refer also to paragraph 3.2.1):
- The consent documentation now shows compliance with means of escape and access and facilities for people with disabilities [as nearly as is reasonably practicable] to comply with section 112 of the Act.
- 2.9 A seismic assessment of the building was provided to the authority. The report from the owner's engineers is dated 4 June 2014. The report included the result of an initial evaluation process ("IEP"), which states that the building was assessed as 18% new building standard ("%NBS"). The detailed seismic assessment provided stated 'the building is likely to achieve 13% NBS under seismic loading for the critical elements (boundary wall columns)'.
- 2.10 The authority subsequently wrote to the owner to say that it intended to suspend the building consent application. I have not seen a copy of this correspondence, however, I have been provided with a copy of an email dated 26 August 2015 from the applicant to the authority referring to this correspondence. In this email, the applicant requests, from the authority, more information about the Building (Earthquake-prone Buildings) Amendment Bill currently before Parliament and the likely impact of this Bill; and the determinations process.
- 2.11 The authority responded in an email dated 27 August 2015 stating:
- The building consent application is suspended and the [authority's] decision is that the [earthquake-prone building] policy applies
- The [owner] has the right to consider the email from the other day and weigh up their options for the next step as doing nothing (seismic upgrade wise) is off the table
- ... the weakness of the building meant that any work had to be the whole building as part or targeted areas just wouldn't improve the overall [building] to [be not earthquake-prone].
- 2.12 An application for determination was received by the Ministry on 28 September 2015.

3. The submissions

3.1 The applicant

- 3.1.1 As part of the application documentation, the applicant described the matters for determination (in the applicant's view) as:

The building has been identified by [the authority] as being earthquake-prone and as the building does not meet the minimum standard of 33.3%NBS [the] local earthquake-prone building policy requires the seismic upgrade works to be completed as part of, and triggered by, the first building consent application applied for within the 30 year period the [authority] has set down for the seismic upgrade. This would result in substantial cost and time implications to complete the seismic upgrade of the building, and the building owner is not currently in a financial position to undertake this work in the short term.

... We believe the works proposed for the [fitout] are minor in nature and should not trigger the immediate requirement for seismic upgrade works to be undertaken.

[The authority] have identified public safety concerns by granting a building consent for the shop [fitout] work. We believe this to be an unbalanced view given that the tenancy could be leased to many different businesses which would not require a building consent in order to occupy the premises.

3.1.2 The applicant provided copies of the following:

- copies of emails between the applicant and the authority (refer to paragraphs 2.10 and 2.11)
- a copy of the detailed seismic assessment for the building (refer to paragraph 2.9)
- a copy of the authority's Dangerous, Insanitary and Earthquake-prone Buildings Policy, dated December 2011
- a copy of the building plans submitted for the proposed fitout.

3.2 The authority

3.2.1 I requested information from the authority on 1 October 2015 and on 15 October 2015, the authority advised that:

- the building is not currently unsafe or insanitary and no section 124 notice has been issued
- the authority's earthquake-prone building policy provides for an active and passive approach to earthquake-prone buildings (see section 5.2 of the policy) and in this case the passive approach is triggered by the building consent application
- the authority is not of the view that its policy overrides the provision of the Act; however, its policy is made under section 131 of the Act
- the building has been identified by the building owner as being earthquake-prone as a part of the building consent process (although this was not initially part of the building consent application)
- the options for the owner are to undertake a seismic upgrade as a part of the building consent; or if the building consent application is cancelled or withdrawn, the owner will have 20 years to complete the seismic upgrade work in accordance with the authority's earthquake-prone building policy
- the authority has made an assessment of the proposed alterations under section 112 of the Act and requested information about this as a part of the building consent process. The building consent documentation now demonstrates the proposal meets the section 112 requirements for compliance as nearly as is reasonably practicable for means of escape from fire and access and facilities for people with disabilities.

3.3 The draft determination and responses received

3.3.1 A draft determination was sent to the parties for comment and response on 19 November 2015.

3.3.2 No response was received and a reminder was sent to the parties on 9 December 2015. The owner replied by email on the same day saying that the consent had been issued and work on the fitout was underway.

3.3.3 The authority confirmed this in an email received on 9 December 2015 advising that it also accepted the draft determination and did not wish to comment further. The authority awaited a second determination on its 'Dangerous, Insanitary and Earthquake-Prone Buildings Policy and section 122, 124 of [the Act]'.

3.3.4 No response was received from the applicant or the lessee.

4. Discussion

- 4.1 The authority has advised that it has made an assessment of the proposed alterations under section 112 of the Act and that the building consent documentation demonstrates the proposal meets the section 112 requirements for compliance as nearly as is reasonably practicable for means of escape from fire and access and facilities for people with disabilities. I note that it is not in dispute between the parties that the proposed building work meets the requirements of the Building Code, and that the additional requirements for alterations to existing buildings under section 112 of the Act are satisfied.
- 4.2 The authority has advised that its earthquake-prone building policy provides for an active and passive approach to earthquake-prone buildings (refer section 5.2 of the policy). I note that it is not in dispute between the parties that the building is earthquake-prone and the authority has not issued a notice for the building under section 124 of the Act.
- 4.3 Aspects of the earthquake-prone building policy and its application to the building and the building consent raise a number of issues as discussed below.
- 4.4 The earthquake-prone building policy says a wholly active approach cannot be justified given the low seismicity of the area, and it adopts a combination of an active and passive approach. The passive approach involves no timeframes being set for strengthening, but requires strengthening to be considered when a building consent for alterations is applied for, or there is a change of use of the building. An active approach involves the authority setting various timeframes within which owners must strengthen their buildings so they are no longer earthquake-prone. Owners of lower risk more isolated structures are usually given longer to strengthen their buildings than owners of higher risk buildings in areas that are frequented by a greater number of people.
- 4.5 The effect of combining an active and passive approach appears to require an assessment of each building that is triggered by a building consent application for alterations or a change of use. If agreement between the authority and owner about the timing and method of strengthening the building cannot be reached then a section 124 notice will be issued specifying a timeframe set by the authority for the building to be strengthened.
- 4.6 The earthquake-prone building policy notes that an application for a building consent for alterations or a change of use will trigger the requirement for an assessment to be undertaken and the ‘consent will not be issued without the seismicity of the building being addressed’.
- 4.7 The approach is further explained in section 5.3 of the policy as requiring an owner to engage an engineer to assess their building if it is identified as potentially earthquake-prone in the IEP, and, as the policy states ‘undertake any remedial work within 20 years or at the time of the next Building Consent application’. The policy goes on to explain that:

Such an approach will enable owners to discuss their intended plans for the building and whether an acceptable solution can be achieved without evoking Section 124 of the Building Act; for example demolition within a specified time. Should this not be possible, then action under Section 124 of the Building Act 2004 will be pursued as deemed appropriate...

- 4.8 This part of the policy appears to require discussion between the owner and the authority about the best timing and method of strengthening the building so it is no longer earthquake-prone. If agreement cannot be reached between the authority and the owner, then a section 124 notice would be issued if considered appropriate. This is consistent with the combined active and passive approach of the policy.
- 4.9 Having decided to avoid the set timeframes of an active approach because of the low seismicity of the area, the authority has settled for a case-by-case approach that allows strengthening to be considered when a building consent is applied for alterations or there is a change of use.
- 4.10 In my view, the way the earthquake-prone building policy has been applied in this case seems unduly harsh and inconsistent with the intent of the policy. The authority appears to be seeking to use the policy to require immediate strengthening when it could not do so by applying the wholly active approach, and is also beyond what could be achieved by the issue of a section 124 notice.
- 4.11 The applicant's view is that that proposed works for the fitout are minor in nature and should not trigger a requirement for a seismic upgrade to also be completed. I agree that the proposed work is minor in nature, and note that much of it is not far from being exempt building work under Schedule 1 of the Act.
- 4.12 An issue that arises with the authority's earthquake-prone building policy concerns the absence of section 124 notices. Where the strengthening of a building is triggered by an application for a building consent or a change of use, the policy seeks to avoid issuing a section 124 notice except where agreement cannot be reached with the owner about the appropriate timeframe for strengthening a building. It is unclear whether this is consistent with the requirements of section 124 of the Act that provides for a notice to be issued when a building is earthquake-prone. The issue of such a notice ensures those persons with an interest in a building, as well as users of a building and members of the public are informed of the earthquake-prone status of the building by way of the section 124 notice that is required to be posted on the building.
- 4.13 In respect of the minor nature of the work, I also note that the changes proposed in the Building (Earthquake-prone Buildings) Amendment Bill, would see a national approach applied to dealing with earthquake-prone buildings, with different timeframes for identifying and remediating earthquake-prone buildings, and there will be a requirement for earthquake-prone buildings that are undergoing substantial alterations to have the required seismic upgrade work completed at the same time. It is very unlikely that alterations of the nature proposed in this case would be considered as substantial alterations and therefore the authority is likely to have 15 years to identify the building as earthquake-prone and the owner is likely to have 35 years to make the building no longer earthquake-prone.
- 4.14 I have decided that given the concerns identified above as to how the earthquake-prone building policy has been applied to this building, the absence of a section 124 notice despite the agreed status of the building as earthquake-prone, the minor nature of the proposed alterations, the fact that the parties agree that the proposed work meets the compliance tests under section 17 and section 112 of the Act, and the context I have set out in paragraph 4.13 means there is no reason why the processing of the building consent application should be suspended in this case.
- 4.15 I will consider the authority's decision not to issue a section 124 notice for this building in a subsequent determination where the matter for determination will be

whether the authority has correctly exercised its powers in not issuing a notice for a building it has determined to be earthquake-prone under section 122 of the Act.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to suspend the processing of building consent application No. BC1500622, and accordingly I reverse the authority's suspension of its processing of the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 December 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A

- A.1 The relevant sections of the authority's Dangerous, Insanitary and Earthquake-prone Buildings Policy are as follows:

5.2 Overall Approach

... Council will also consider whether it wishes to take an active or passive stance in relation to how it addresses its policy regarding EPBs.

An active approach would mean that a programme of an initial evaluation of building stock within the District is carried out and a risk categorisation of those buildings is produced. All the buildings are then put onto an active list which results in Council agreeing a timetable to have the buildings brought up to the appropriate requirements to comply with the legislation.

A passive approach still requires an initial list to be drawn up of the District's building stock, but establishes a triggering system to enact any upgrading work; such as building consent applications or building changes of use; or even potentially no action.

It is believed practical to adopt a combination of both an active and passive approach in the District, with a triggering mechanism via consent applications, changes of use, with each building then being considered on its own merits as to how much should be done to the building and to what level, in order to comply with the code. ...

Therefore once Council has prepared a seismic building list via the Independent Evaluation Process (IEP) [stet] a building owner would be notified that their building has been identified as being earthquake-prone and be required to prepare a detailed assessment and submit it to Council within 36 months of the new Policy being approved. An application for building consent or change of use will also trigger the requirement for an assessment to be undertaken and the application will only be processed on the basis that a detailed report will be supplied and consent will not be issued without the seismicity of the building being addressed.

The nature of the District does not justify a fully active approach as the seismicity of the area is identified as Low.

5.3 Identifying Earthquake Prone Buildings

... Once an initial evaluation process (IEP) has been carried out, with any buildings identified as potentially being earthquake-prone, the building will need to be assessed by the owner using an appropriately qualified Engineer within 36 months of the Policy being approved. And undertake any remedial work within 20 years or at the time of the next Building Consent application.

Such an approach will enable owners to discuss their intended plans for the building and whether an acceptable solution can be achieved without evoking Section 124 of the Building Act; for example demolition within a specified time. Should this not be possible, then action under Section 124 of the Building Act 2004 will be pursued as deemed appropriate; this may include erection of hoardings, fencing or warning signs and does not necessarily mean a written notice, although that could also be used to achieve compliance.