MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2020/027

Regarding the issue of a dangerous building notice requiring repair work to be carried out to the building at 40 Rankin Avenue, New Lynn, Auckland

Summary

This determination considers the issue of a dangerous building notice for an unreinforced masonry building, specifically in relation to the building work that was detailed in the notice as being required to reduce or remove the danger. The determination discusses whether the installation of hoarding and fencing meant the building was no longer dangerous, and what the Building Act requires of a dangerous building notice.

1. The matter to be determined

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

1.2 The parties to the determination are:

- the owner of the building, Dragon Group Enterprise Limited ("the applicant"), acting through a lawyer
- Auckland Council ("the authority")[2], carrying out its duties as a territorial authority or building consent authority.

[1] The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz

[2] Waitakere City Council previously issued dangerous building notices for this building before that Council was transitioned into Auckland Council. In this determination the term "the authority" is used for both.

1.3 This determination arises from the decision of the authority to issue dangerous building notice NOT21437812 ("the notice") for an unreinforced masonry building ("the building"). There is no dispute between the parties that the building was 'dangerous' as defined under section 121 of the Act. [3] The dispute concerns a requirement in the notice to 'Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works.' The applicant considers this requirement is contrary to the authority's powers under section 124(2)(c)(i) of the Act.

1.4 The matter to be determined[4] is whether the authority correctly exercised its powers of decision in issuing a dangerous building notice (NOT21437812) requiring the applicant to 'Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works.' I have not considered any other aspects of the notice than this requirement.

1.5 I note the authority has taken a prosecution against the applicant for failing to comply with the notice and that matter is before the District Court. This determination only considers the matter to be determined under sections 177(1)(b) and 177(3)(f) of the Act as described above.

1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building

2.1 The site at 40 Rankin Avenue is 2256m^2 in area. At the time the notice was issued there were two buildings on the site; a residential building located at the northwest of the site, and the building known as St Andrews Sunday School Hall that is the subject of this determination, and which has since been demolished, located on the southeast of the site. For the remainder of the determination I will refer to the building that is the subject of this determination as "the building". Adjacent on the east of the site is a public walkway and to the south is a footpath and road.

2.2 The main area of the building was the hall, which had a simple rectangular form. There was a small rectangular entrance area at the southwest side of the building and a services wing to the western side of the building. The walls to the entrance area and services wing were of a lower height than the wall height of the main area. There was a small lean-to structure at the northwest side of the building of brick construction that was an addition to the original form of the building.

2.3 The building was generally unreinforced double skin masonry construction, with each skin being a single wythe of thickness. A significant portion of the brickwork on the eastern side of the building had collapsed, and the lean-to structure had fallen away from the building.

2.4 The main area of the building had a tiled gabled roof formed between brick parapet ends, with the roof areas to the entrance area and service wing being monopitch and set behind brick parapet walls. A number of the tiles from the roof had fallen, leaving holes in various parts of the roof. As a result of water ingress into the building there was damage to the interior, including the floor.

[3] In this determination, references to sections are to sections of the Act. The relevant sections discussed in this determination are copied in Appendix A.
[4] Under sections 177(1)(b) and 177(3)(f) of the Act

3. Background

3.1 Due to the condition of the building the authority issued a number of dangerous building notices between 2010 and 2014 under section 124 of the Act because it considered the building was dangerous under section 121(1)(a).

3.2 The notices each required the building to be vacated, the entrance to be sealed/locked, an engineer to be engaged to determine the remedial work required, a building consent to be obtained for that work, and the work to be carried out. The notice dated 5 August 2014 also required a safety barrier no less than 5 metres from the perimeter of the building be erected.

3.3 On 14 December 2018, an architect's report commissioned by Auckland Council in its heritage management and planning capacity provided advice on the condition of the building and the remedial works required to make the building safe. The report was subsequently provided to the authority (in its role as a territorial authority) and the authority carried out an inspection of the site on 3 March 2019.

3.4 The notice that is the subject of this determination (dangerous building notice NOT21437812) was issued by the authority to the applicant on 27 March 2019. The notice had a timeframe of 27 July 2019 for the work to be carried out and stated:

> **The building is considered dangerous because:**
>
> The building has not been maintained allowing water ingress which has caused damage to the structure, resulting in partial collapse of and damage to the structural cladding system and foundation systems.
>
> Building work required to be carried out:
>
> In accordance with section 124(2)(c)(i) of the Act, [the authority] requires that you undertake the following building work, which [the authority] reasonably believes is necessary to reduce or remove the danger:-
>
> The following works are required to address the danger on the building;
>
> 1. Immediately hoard the building to prevent entry of persons to the building by boarding off the doors and windows of the building and repair the perimeter fencing to prevent people approaching the building.
> 2. Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works.
>
> The building work will require a building consent.

3.5 The applicant and authority engaged via email, between 27 March 2019 and July 2019, about requirements of the notice, the possibility of demolishing the building, and the processes to obtain the necessary consents.

3.6 On 11 April 2019, the applicant notified the authority that the works associated with item 1 of the notice had been completed. The authority carried out an inspection on 15 April 2019 and observed that the works associated with item 1 of the notice had been completed.

3.7 On 30 July 2019, the authority carried out an inspection of the site, with further inspections carried out between 31 July 2019 and September 2019. During a number of the inspections the authority observed the fencing was open in places, the hoarding had been removed in places, and there were people present in and around the building.

3.8 On 22 October 2019, an engineer's report commissioned by the authority found the building had deteriorated and posed an immediate danger. On the basis of this advice

the authority issued a warrant authorising demolition of the building, and the building was demolished on 27 November 2019.

3.9 The authority filed charging documents at the District Court on 22 January 2020.

3.10 The Ministry received an application for a determination on 3 March 2020.

4. The submissions

4.1 The following paragraphs provide a summary of the views of the parties made in submissions to this determination.

4.2 The applicant contends:

- the installation of hoarding and repair of fencing to prevent people entering the building in accordance with item 1 of the notice removed the danger posed by the building; there can be no risk of injury or death if there are no people inside or in close proximity to the building
- as the required hoarding and fencing removed the danger, the authority could not require further work to be undertaken
- the authority incorrectly presented repair of the building, as stated in item 2 of the notice, as the only option available to the applicant. This is contrary to the authority's powers under section 124(2)(c)(i) of the Act and limited the applicant's options to decide how to reduce or remove the danger
- item 2 of the notice should be reversed.

4.3 The applicant also provided a summary of the background to the dispute and the actions the applicant had taken, and provided copies of:

- the notice (dangerous building notice NOT21437812)
- the charging document CRN20090500100 dated 22 January 2020
- the letter from the authority to the applicant dated 22 March 2019
- the email from the authority to the applicant dated 19 April 2019
- the warrant issued by the authority for the demolition of the building, dated 6 November 2019
- Determination 2017/064[5].

4.4 The authority provided access to the property file on 16 April 2020, and made a submission on 30 April 2020 in response to the application:

- Compliance with the hoarding requirements (item 1 of the notice) was not sufficient to render the building no longer dangerous under section 121. The hoarding did not prevent people from working or entering the building or being in proximity to the building and did not guarantee safety of people using the paths adjacent to the building due to the location of the building on the site.
- A notice under section 124(2)(c) can require specific building work. The notice correctly specified the building work required to reduce or remove the danger. The references in sections 125(1)(d) and 125(1)(e) both support the authority's view in this matter. Section 125(1)(d) refers to "the building work"

[5] Determination 2017/064 Regarding a dangerous building notice for a building (11 August 2017).

and the timeframe in which it must be carried out, and section 125(1)(e) requires the notice to state whether building consent is required.

- There is nothing in the Act that requires the authority to present a range of options for a notice to be valid. While in many cases owners will have options for how to reduce or remove the danger, it doesn't follow that a notice cannot lawfully require an owner to undertake specific works.

4.5 The authority also provided copies of:

- the dangerous building notices dated 2 March 2010, 6 April 2011, 6 April 2012 and 5 August 2014
- Determination 2010/133[6]
- a report dated 14 December 2018 prepared by a firm of architects commissioned by Auckland Council in its heritage management and planning capacity about the condition of the building and the remedial works required to make the building safe.

4.6 A draft determination was issued to the parties for comment on 10 July 2020. The draft concluded that the authority was incorrect in the exercise of its powers of decision in issuing the dangerous building notice NOT21437812 that limited the applicant to the solution in item 2 of that notice as the only means to reduce or remove the danger.

4.7 The applicant responded on 24 July 2020, and submitted that the determination should reverse item 2 of the notice because (in summary):

- the requirement of the determination to either confirm, reverse or modify the decision or exercise of power is prescribed and confined by statute under section 188(1)(a) of the Act (with reference to *Weaver v HML Nominees Ltd*[7])
- as the determination concludes the authority incorrectly exercised its powers in issuing the dangerous building notice, the notice cannot be confirmed, and as the building has been demolished, it is not practical to modify the notice
- the only decision available is to reverse item 2 of the notice.

4.8 The authority also responded on 24 July 2020, and submitted the following (in summary):

Specificity of building work required

- The authority is not persuaded that the requirement in section 125(1)(e) is a mechanism to confirm whether or not the requirement for a building consent is excused under section 41 of the Act. The authority is of the view the Act envisions dangerous building notices requiring work with sufficient specificity to enable to the authority to correctly state whether or not a building consent was needed.
- There are many cases in which the required work to reduce or remove the danger will not require a building consent and the authority would have to state that consent is not required for reasons that relate specifically to the works rather than to section 41.

[6] Determination 2010/133: The exercise of the powers of an authority to issue a notice under section 124 of the Act regarding a building considered to be earthquake prone (20 December 2010).
[7] [2015] NZHC 2080

- In order for the authority to comply with section 125(1)(e) it must state whether or not building consent is required for the work, which in turn means the authority must know what the work will entail. There may be a range of options available to the building owner, some of which might require building consent and others not. It would not be practical for the authority to identify all possible solutions and determine whether each one will need a building consent so as to comply with section 125(1)(e).
- If section 125(1)(e) is just referencing section 41, instead of requiring the authority to state whether building consent must be obtained the authority would expect it to require a statement whether the need for any building consent was excused under section 41.

Item 2

- The word "repair" is capable of a wider meaning that includes any works that would fix the dangerous aspects of the building. With reference to the wording of the notice, a "solution to repair the structure" is one that "address[es] the danger on the building" and is "necessary to reduce or remove danger".
- Use of the word "repair" was not intended to exclude options; the notice envisaged that consultation with an engineer may yield a variety of repair options. It was open to the applicant to propose repairs in the nature of shoring up or stabilisation, provided the proposal addressed the danger.
- With regard to demolition, the authority had to take into account compliance requirements under the Resource Management Act 1991 that would prevent the applicant from demolishing the building to remove the danger within a reasonable timeframe without committing an offence. In the circumstances relating to these requirements, the authority's decision not to include demolition as an option in the notice was pragmatic and correct.
- It is not for the authority to identify all possible solutions in a dangerous building notice. The authority should be able to issue a notice requiring the work the authority considers to be necessary, and the onus is on the recipient to identify and propose any alternative solution, in which case the authority could amend the notice issued.
- The notice should not be treated as incorrect because it omitted an alternative solution.

4.9 The authority also requested that the determination consider whether the authority's decision would have been confirmed, reversed or modified had the building still been standing, and if modified what that modification would have been. In this regard the authority is of the view:

- the reversal of the notice would have been inappropriate given there is no dispute that the building was dangerous
- in the event the determination is not amended with regard to the remedies in the notice, it would have been open to confirm the notice or modify it as suggested in the draft of the determination
- in the event the determination is amended in line with the authority's submissions, confirmation of the notice would have been appropriate.

5. Discussion

5.1 General

5.1.1 There is no dispute between the parties about the issue of the notice in respect of the status of the building as a dangerous building as defined in section 121 of the Act. The building was in a state of disrepair, with collapsed brickwork from the walls and holes in the roof.

5.1.2 The matter to be determined is the authority's exercise of its powers of decision with regard to the requirement in the notice to 'Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works.' This requirement was listed in the notice as item 2.

5.1.3 The applicant contends the installation of hoarding and repair of fencing to prevent people entering the building (as required by item 1 of the notice) removed the danger posed by the building. The applicant considers there can be no risk of injury or death if there are no people inside or in close proximity to the building, and therefore no further work was necessary. The applicant also stated that even if it is accepted that further work was necessary to reduce or remove the danger, the authority incorrectly presented repair of the building, as stated in item 2 of the notice, as the only option available to the applicant. The applicant considers this is contrary to the authority's powers under section 124(2)(c)(i) of the Act and it limited the applicant's options to decide how to reduce or remove the danger.

5.1.4 Therefore I am of the view I must consider first whether the installation of the hoarding and repair of the fencing meant that the building was no longer dangerous. I will then consider whether the authority was correct to require the applicant to carry out the work as described in item 2 of the notice.

5.2 Whether the installation of hoarding and repair of fencing removed the danger

5.2.1 Section 121 defines a dangerous building as:

> (1) A building is dangerous for the purposes of this Act if,—
>
> (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
>
> (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
>
> (ii) damage to other property; or
>
> (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

5.2.2 In considering the applicant's argument that having fencing or hoarding in place removed the danger, I consider the relevant parts of the section 121 definition for a dangerous building is whether 'the building is likely to' cause injury or death 'to any persons in the building'. The definition presumes the presence of people in the building when determining whether the building is dangerous. In other words, there is no requirement that people actually be in the building in order that the building meet the test of being dangerous; rather the test requires an assessment of whether, if people were in the building, the building would be likely to cause injury or death to those people. I note also the test is not limited to persons in the building and includes 'persons on other property'.

5.2.3 I have considered whether the building ceased to be dangerous when hoarding and fencing was in place. If this were the case, then there are no powers in the Act that would to require the hoarding and fencing to remain, and so they could be removed. However, if the hoarding and fencing is taken down people are able to enter the building or be closer to the building than is safe.

5.2.4 In conclusion, the status of the building as dangerous remained regardless of whether people could approach, enter or occupy the building. Therefore, I consider it was correct that the building continued to be classified as a dangerous building while the hoarding and fencing was in place.

5.3 Item 2 of the notice

5.3.1 Section 124(2)(c)(i) provides for a territorial authority to issue a notice that complies with section 125(1) 'requiring work to be carried out on the building to reduce or remove the danger'. Amongst its requirements, section 125(1) requires the notice to state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice (subsection (e)), and to state the time within which the building work must be carried out (subsection (d)). Section 125(2) prescribes who the notice should be given to. Section 128A(1) provides a person who fails to comply with a notice issued under section 124(2)(c) commits an offence and is liable to a fine.

5.3.2 The applicant is of the view that the requirement to undertake remedial works to "repair the structure" limited the applicant's options to decide how the danger would be reduced or removed.

5.3.3 The authority on the other hand is of the view that:

- a dangerous building notice should make it clear to an owner what is required of them so that it is clear whether the requirements of the notice have been satisfied
- the Act provides for specificity in the notice, with reference to the requirement in section 125(1)(e) that the issuing authority must state whether a building consent is required and in section 125(1)(d) to state the time within which the building work must be carried out
- the authority is not required to set out a range of solutions and it remains open for the recipient of the notice to propose a different solution than that specified in the notice
- the term "repair" in the notice did not limit the applicant's solutions and includes any works that would fix the dangerous aspects of the building
- demolition was not an available option for the applicant within the timeframe for complying with the notice due to issues relating to compliance with the Resource Management Act, and so it was not included in the notice.

Notice requirements

5.3.4 What is required under section 124(2)(c)(i) of the Act is for the notice to require work to be carried out to reduce or remove the danger. In other words, it is the reduction or removal of the danger that is the required outcome from the issue of the notice; how that outcome is achieved is for the owner to propose and not for the authority to specify in the notice.

5.3.5 In response to a section 124 notice for a dangerous building (or part of a building), any of the following types of work would be typical:

(a) reducing or removing the danger by completing remedial work to the building or part of the building

(b) reducing the danger by shoring up or stabilising the building or part of the building or constructing a permanent protection barrier to the building

(c) removing the danger by removing the offending part(s) of the building

(d) a combination of types (a) to (c)

(e) demolishing the building[8].

5.3.6 I agree with the authority that a dangerous building notice must be clear in its description of what has rendered the building dangerous and consequently what requires addressing to reduce or remove the danger. I consider this is particularly relevant where the danger posed is limited to particular features or a part of the building rather than the building in its entirety.

5.3.7 I also agree with the authority that a dangerous building notice must be clear about the requirements that need to be satisfied because it is an offence not to comply with the requirements of a notice issued under section 124(2)(c). However, for the same reason that it is an offence not to comply, a notice that is prescriptive or limiting with regards to specifying how that outcome is to be achieved is problematic. There may be a number of options available to achieve the required outcome and non-compliance with the notice could mean an offence is committed for failing to carry out the required building work set out in the notice even it if was only one of a range of possible means by which the outcome in section 124(2)(c) could be achieved.

5.3.8 In my opinion the description of required building work in a dangerous building notice should be focussed on the necessary outcome for the identified dangers that exist in the building. The generalised description of building work to reduce or remove each identified danger, with a focus on the outcome required, can be made clear without being prescriptive or limiting or providing an exhaustive list of options.

5.3.9 Describing the required building work in terms of the outcome allows building owners to propose and carry out any type of work and/or differing types of work to reduce or remove the identified dangers. In this case for example:

- repair work and/or stabilisation work to the masonry walls to ensure the walls are no longer at risk of collapse
- repair work and/or stabilisation work to make the roof weathertight, structurally secure, and no longer at risk of collapse
- repair work and/or stabilisation work to the partially collapsed lean-to structure to ensure the structure is no longer at risk of collapse
- or demolition of the building or a combination of any of these.

5.3.10 Subpart 6 of the Act contains special provisions for dangerous, affected, and insanitary buildings. The focus of the provisions is on the health and safety of the occupants of particular buildings and other persons who may be affected by those buildings. A territorial authority has a range of powers in respect of such buildings

[8] Clause 30 of Schedule 1 provides for the complete demolition of a building that is detached and is not more than 3 storeys without building consent being obtained, and clause 31 provides for removal of a building element without building consent but subject to certain criteria being met.

and there are a range of offences for persons who fail to comply with a notice issued by a territorial authority. It would seem to be an inappropriate extension of the powers and functions of a territorial authority for a territorial authority when issuing a notice under section 124(2)(c) to also specify the work that must be carried out to reduce or remove the danger. While a territorial authority will have knowledge of the matters that make a building dangerous, it is quite a distinct exercise to have knowledge of the options that may reduce or remove that danger. Such knowledge is likely to involve specialist advice, for example, from a fire engineer or a structural engineer, each of whom would require detailed knowledge of the construction of the building and its systems.

5.3.11 If a territorial authority specifies the method for ensuring a building is no longer dangerous, the specification would involve the territorial authority taking some responsibility for that option, particularly if it turned out not to be feasible. That is unlikely to be a responsibility (and potential liability) that all territorial authorities would be prepared to accept.

5.3.12 The authority's references to the requirements of the Resource Management Act 1991 when considering the remedial option for the notice point to the difficulty of a territorial authority taking on this role of identifying a specific remedial option. It seems far more appropriate for a building owner to navigate the applicable requirements of the Resource Management Act 1991 when considering possible remedial options than for a territorial authority to consider such compliance issues (given a territorial authority would also have a potential conflict of interest to manage when making such a decision regarding the application of the Resource Management Act 1991).

5.3.13 With regard to the requirements in sections 125(1)(d) and (e), I am of the view these requirements should be read in conjunction with the other provisions concerning dangerous buildings. Specifically:

- section 126(1), which provides the authority may apply to the District Court for an order authorising the authority to carry out building work if any work required is not completed or not proceeding with reasonable speed; and
- section 41(1)(c)(i), which provides for urgent work to be carried out without a building consent first being obtained 'for the purpose of saving or protecting life or health or preventing serious damage to property'.

5.3.14 Section 41(1)(c)(i) is an important provision as it acknowledges that in some situations it will not be practicable to obtain a building consent because the work must be carried out urgently and if the work is delayed until after a building consent is issued that delay may create an unnecessary risk to people's health and safety or actually result in harm to people in or around the building. Section 125(1)(d) and (e) reflect this consideration and require a territorial authority to indicate in a section 124(2)(c) notice whether the work requires a building consent (because the delay occasioned by applying for and obtaining a building consent is unlikely to cause harm to any of the building's occupants or persons nearby) or does not require a building consent (because the territorial authority considers it must be carried out urgently).

5.3.15 In my view, there is no basis for reading into section 125(1)(d) and (e) any additional role for a territorial authority to specify the way in which an owner must reduce or remove the danger in a building.

5.3.16 In addition, and as the authority has submitted, in issuing a dangerous building notice an authority is not in a position to identify all the possible solutions and determine for each possible solution whether it would require a building consent or would be exempt under Schedule 1 of the Act. As noted in this discussion, the solution to achieve the necessary outcome of reducing or removing the danger is for the building owner to propose.

5.3.17 For the reasons discussed above, I do not accept the authority's contention that it was correct in specifying the building work as it did in item 2.

Specified building work in item 2

5.3.18 In this case the authority specified a process in the notice that the applicant must follow, comprising:

- Engagement of a registered structural engineer to survey the building and provide a solution to repair the structure.
- Obtaining a building consent to undertake these remedial works.
- Complete the remedial works.

5.3.19 In the draft of this determination I noted that repair, as described in item 2, was one option that could have reduced and removed the danger, but completing repairs to the building was not the only option available to the applicant that could have reduced or removed the danger posed by the building; other options included shoring up or stabilising the various parts of the building, or demolition[9]. The authority subsequently submitted that the term "repair" was inclusive of options such as shoring up and stabilising and was not intended to be limited to fixing the building.

5.3.20 As previously stated in this discussion, a dangerous building notice should be clear with regard to the requirements that the recipient must meet. In my opinion, the reference in item 2 to a solution to "repair" the structure is highly likely to be understood in terms of the natural and ordinary meaning of the term "repair", i.e. the action of repairing the building by replacing or fixing parts[10]. Replacement or fixing the walls and roof was not the only option available to the applicant to reduce or remove the danger.

Conclusion

5.3.21 I am of the view that the notice should not have limited the applicant to only one option as a means to satisfy the requirement to reduce or remove the danger. The applicant could have considered demolition, shoring up the building or stabilising the building so it was no longer at risk of collapse, or repairing the building. Each of these options could achieve the outcome of reducing or removing the danger that is the requirement of a notice issued under section 124(2)(c).

5.3.22 In conclusion, while I agree with the decision taken by the authority to issue a notice under section 124(2)(c)(i) of the Act, I consider the authority incorrectly limited the work required to be carried out in accordance with the notice with regard to the repair solution in item 2.

[9] Subject to demolition not being in breach of any other enactment.
[10] "repair, n.2." *OED Online*, Oxford University Press, September 2020, www.oed.com/view/Entry/162629. Accessed 27 September 2020.

5.4 Remedy

5.4.1 There is no dispute that the building was dangerous and the authority's decision to issue the dangerous building notice requiring the applicant reduce or remove that danger was correct.

5.4.2 Had the building remained, I am of the view the following two options would have been available to me to address the authority's exercise of its powers of decision to issue the notice including the requirement in item 2:

- reversing the authority's decision to issue the notice, requiring it to make a new decision taking into account this findings of this determination with regard to item 2 of the notice; or
- modifying the authority's decision to issue the notice in respect of item 2 of the notice.

5.4.3 The building has been demolished and the notice is therefore no longer in effect, so the notice cannot now be modified. Because I have concluded that the authority incorrectly limited the work required as described in item 2 of the notice, I cannot confirm the authority's exercise of its power of decision to issue the notice as issued.

5.4.4 In the draft of this determination I proposed not to exercise the power under section 188(1)(a) of the Act, because the building has since been demolished and there is now no value in exercising that power.

5.4.5 In response, the applicant has referred to *Weaver v HML Nominees Ltd* with regard to the provision in section 188(1)(a) that the determination must either confirm, reverse or modify the authority's decision. The applicant considers the notice cannot be confirmed, and as the building has been demolished it is not practical to modify the notice.

5.4.6 Section 188(1)(a) and (b) was discussed in *Weaver v HML Nominees Ltd* in the wider context of whether a determination is a judicial decision in respect of estoppel issues, and more specifically in relation to the drawing a link between section 188(1)(a) and (b) and the provisions in section 177(1)(a) and (b):

> [107] These two alternatives appear to be directly linked back to the two specific matters that may be submitted to the Chief Executive under s 177. If a determination is sought under s 177(1)(a) as to whether particular matters comply with the building code, then a determination by the Chief Executive must "determine the matter to which it relates", namely whether a particular matter complies with the building code or not. On the other hand, if the application for a determination is sought under s 177(1)(b), and relates to the exercise, failure or refusal to exercise a power of decision, then the Chief Executive is required to confirm, reverse, or modify the relevant decision. This enables all involved to know precisely where they stand moving forwards.

5.4.7 The Court does not address the wording in section 188(1)(a) and whether it requires a determination to confirm, reverse, or modify the decision or whether there is any discretion to not provide a remedy when this requirement cannot be fulfilled. The direction in section 188(1)(a) that "the chief executive must confirm, reverse or modify the decision or exercise of a power to which it relates" points strongly to a determination always specifying one of those remedies. However, there could be circumstances when such a remedy is not always appropriate.

5.4.8 The power to decline to exercise any of the powers under section 188(1)(a) of the Act may be contemplated in light of the paragraph quoted above from *Weaver v HML Nominees Ltd* where the Court refers to the determination decision enabling

"all involved to know precisely where they stand moving forwards". In this case, given the building has since been demolished, there are no future options for the parties to move forward with in relation to the building work required by the notice.

5.4.9 In these circumstances, it may be appropriate for the Determination not to exercise any of the powers in section 188(1)(a) of the Act. If it was clear there was a discretion not to exercise the powers in section 188(1)(a) of the Act, I would be inclined to exercise that discretion in this Determination and not provide for any remedy under section 188(1)(a) of the Act.

5.4.10 The matter for this determination is not whether the authority was correct to exercise its powers under section 124 with regard to its decision to issue the dangerous building notice, and I have concluded the authority was correct to issue the notice on the grounds that the building was dangerous. Because this determination is limited to item 2 specifying the building work required to reduce or remove the danger, I consider the appropriate decision under section 188(1)(a) is to reverse the authority's exercise of its power of decision in respect of item 2 of the notice.

5.4.11 Accordingly, I reverse the authority's decision in respect of the requirement in the notice that the applicant ''Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works" (referred to herein as item 2). This decision is limited to only that requirement, and does not reverse the authority's decision under section 124(2)(c)(i) to issue the dangerous building notice or item 1 of the notice.

5.4.12 Whether the applicant has committed an offence in failing to comply with that notice as it was issued is a consideration for the Court.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect in the exercise of its powers of decision in issuing the dangerous building notice NOT21437812 requiring the applicant to 'Engage a registered structural engineer to survey the building and provide a solution to repair the structure, obtain a Building Consent to undertake these remedial works and complete the remedial works', and accordingly I reverse the authority's decision with regard to that requirement.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 October 2020.

Katie Gordon
Manager Determinations

Appendix A

The relevant sections of the Act are:

41 Building consent not required in certain cases

(1) Despite section 40, a building consent is not required in relation to—

…

(c) any building work in respect of which a building consent cannot practicably be obtained in advance because the building work has to be carried out urgently—

(i) for the purpose of saving or protecting life or health or preventing serious damage to property; or

(ii) in order to ensure that a specified system in a building that is covered by a compliance schedule, or would be covered if a compliance schedule were issued in respect of the building, is maintained in a safe condition or is made safe; …

121 Meaning of dangerous building

(1) A building is dangerous for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

124 Dangerous, affected, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

(c) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary:

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

125 Requirements for notice requiring building work or restricting entry

(1) A notice issued under section 124(2)(c) must—

(a) be in writing; and

(b) be fixed to the building in question; and

(c) be given in the form of a copy to the persons listed in subsection (2); and

(d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period

reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and

(e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

(1A) A notice issued under section 124(2)(d)—

(a) must be in writing; and

(b) must be fixed to the building in question; and

(c) must be given in the form of a copy to the persons listed in subsection (2); and

(d) may be issued for a maximum period of 30 days; and

(e) may be reissued once only for a further maximum period of 30 days.

(2) A copy of the notice must be given to—

(a) the owner of the building; and

(b) an occupier of the building; and

(c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 2017; and

(d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 138 of the Land Transfer Act 2017; and

(e) every statutory authority that has exercised a statutory power to classify or register, for any purpose, the building or the land on which the building is situated; and

(f) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.

(3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).