

# Determination 2024/017

## Regarding the issuing of an earthquake-prone building notice for a commercial building

### 45 Chapel Street, Masterton

#### **Summary**

This determination considers the decision by a territorial authority to issue an earthquake-prone building notice under section 133AL for a commercial building. The determination discusses the requirement for a territorial authority to ask an owner of a building to provide an engineering assessment before an earthquake prone building notice is issued.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

The Act and the Building Code are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at [www.building.govt.nz](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. The Masterton Trust Lands Trust (“the owner”), the applicant in this determination which is a statutory trust under the Masterton Trust Lands Act 2003 and the registered owner of 45 Chapel Street, Masterton
  - 1.2.2. Masterton District Council (“the authority”), carrying out its duties as a territorial or building consent authority.
- 1.3. This determination arises from a dispute between the parties over the authority’s decision to issue an earthquake-prone building notice (“the EPB notice”) under section 133AL of the Act for the building at the property.
- 1.4. The authority says it issued the EPB notice because it considered the building to be earthquake prone under sections 133AB and 133AK.
- 1.5. The owner is of the view that the authority has not followed the statutory procedure required for determining the building to be earthquake prone and, therefore, considers that the EPB notice is invalid.
- 1.6. The matter to be determined<sup>2</sup> is the authority’s decision under section 133AL to issue the owner with an EPB notice for the building. In making this determination, I must consider whether the requirement in section 133AH(1) – for a territorial authority to ask an owner of a building to provide an engineering assessment for their building – must be exercised before a territorial authority issues an EPB notice under section 133AL.

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<sup>1</sup> The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

<sup>2</sup> Under section 177(1)(b) and (3)(fa).

## Matters outside this determination

- 1.7. I note that the owner applied for a determination in relation to three buildings, each of which had been issued with its own EPB notice by the authority.<sup>3</sup> The owner subsequently agreed for the scope of this determination to be limited to one of those three buildings, namely the building at 45 Chapel Street, Masterton. No consideration is given in this determination to the buildings that were excluded by agreement or any other buildings belonging to the owner.
- 1.8. Further, I have not considered:
  - 1.8.1 how the earthquake-prone building provisions apply to the building apart from section 133AH(1) and its relationship with section 133AL
  - 1.8.2 any reports or investigations by the owner, or any other persons, regarding the building
  - 1.8.3 whether the authority's decision to issue the EPB notice was reasonable
  - 1.8.4 any matters related to the laws of privilege and information obtained during a High Court discovery process.

## 2. The building and background

- 2.1. The building was constructed in 2011 and is predominantly made from reinforced concrete and structural steel. It is a single-storey commercial building, with a small mezzanine, and is currently in use by its tenants as a retail store.
- 2.2. On 14 April 2022 the authority wrote to the owner to advise that it had determined that the building was 'earthquake prone' under sections 133AB and 133AK. The EPB notice for the building was enclosed with the letter.
- 2.3. The owner responded questioning the authority's decision to issue the EPB notice. The parties corresponded about the notice. In these communications the authority said it considered it had grounds to issue the notice and suggested the owner apply for a determination if it disagreed with their view.
- 2.4. The owner subsequently applied for a determination.

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<sup>3</sup> These buildings are located at three separate properties.

### 3. Discussion

- 3.1. The matter to be determined is the authority's decision under section 133AL to issue the EPB notice to the owner.
- 3.2. The owner submits that the authority's process leading to issuing the EPB notice was flawed and, therefore, the notice is invalid. The authority submits that it had grounds for and was justified in issuing the EPB notice "because of the information it was in receipt of".
- 3.3. In order to determine this matter, I must consider the relevant provisions of the Act.
- 3.4. Subpart 6A<sup>4</sup> of Part 2 of the Act came into force on 1 July 2017 and changed the way earthquake-prone buildings are identified and managed under the Act.<sup>5</sup> These provisions set out a procedure for identifying earthquake-prone buildings.
- 3.5. Where a territorial authority determines that a building or part of a building is 'earthquake prone' for the purposes of the Act, it must issue the owner with an EPB notice for the building under sections 133AK and 133AL.<sup>6</sup>
- 3.6. However, before a territorial authority issues an EPB notice, there are statutory preconditions which must be met.
- 3.7. Those preconditions include the requirement under section 133AH(1) for a territorial authority to ask the owner of a building identified as potentially earthquake-prone to provide an engineering assessment for the building.<sup>7</sup> I note the Act does not provide for the requirement in section 133AH(1) to be set aside. I consider that it is a mandatory precondition which must be exercised before a territorial authority issues an EPB notice.
- 3.8. I have not received any evidence that the authority asked the owner to provide an engineering assessment for the building prior to issuing the EPB notice. In the absence of such evidence, I find in this instance that the requirement set out in section 133AH(1) was not satisfied by the authority and so it could not exercise its powers under section 133AL to issue the EPB notice.

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<sup>4</sup> Sections 133AA to 133AY.

<sup>5</sup> The Act, as first enacted, dealt with earthquake-prone buildings in the same way (and through the same set of provisions) as dangerous and insanitary buildings under part 2 of the Act.

<sup>6</sup> EPB notices are issued by territorial authorities when they determine that a building or part of a building is earthquake prone according to the requirements in the Act. An EPB notice creates a legal obligation to undertake necessary seismic work so that the building is no longer earthquake prone. If an owner does not comply with a specified time period, a territorial authority can apply to the District Court for an order authorising the remediation to be carried out by the territorial authority, at the expense of its owner.

<sup>7</sup> This requirement is subject to further requirements which are set out in section 133AH(2) (ie, the request must be in writing, must be dated and must include information as prescribed in section 133AH(2)).

- 3.9. As this finding is sufficient to determine the matter, I am of the view that there is no need for me to consider whether the authority has misapplied the earthquake-prone building provisions in any other respect (for example, whether the authority had grounds to identify the building as ‘potentially earthquake prone’ or ‘earthquake prone’ for the purposes of the Act).
- 3.10. As a consequence of determining that the authority did not meet the requirement in section 133AH(1) prior to the issue the EPB notice, I reverse that notice.
- 3.11. I strongly suggest the authority informs the agency responsible for maintaining the EPB register about this determination, and requests that the EPB notice be removed from the register.

### **Additional comments**

- 3.12. I note the authority submits that:

... [s]ection 133AH does not anticipate a scenario where a council has its own engineering reports – and in this case – two engineering reports advising that the [building] fell below 34% NBS.

- 3.13. The authority also submits that “[it] had to act on the information it had. It could not ignore it ...” and that:

It was not reasonable to put in motion a process under section 133AH of the Building Act 2004 that could take 12 months, when the Council had all the information it needed to make the assessment. If there was a 12 month delay occasioned by following the process, and an earthquake occurred in that time with loss of life (or injury) in the Buildings, the Council could and should be severely criticised for not acting on the information it held. That is why the Council issued the EPB notices.

- 3.14. I note that the Act explicitly sets out the procedure for identifying earthquake-prone buildings. The Act does not provide for territorial authorities to substitute or put aside these procedural requirements. For example, a territorial authority cannot put aside the requirement in section 133AH(1) – to ask a building owner to provide an engineering assessment for their building – even where that authority already has information which, in its view, establishes it is earthquake prone.
- 3.15. I further note it is possible that the interpretation set out in this determination may be applicable to other properties belonging to the owner. I leave it to the parties to resolve those matters, or for the owner to apply for further determinations for other properties should they consider it necessary to do so.

## **4. Decision**

- 4.1. In accordance with section 188 of the Building Act 2004, I determine that the authority had not met the requirement in section 133AH(1) before issuing the earthquake prone building notice, and accordingly I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 April 2024.

**Peta Hird**

**Principal Advisor Determinations**