Determination 2019/006[1]

Regarding the removal of an insanitary building notice and lack of notification of a natural hazard for a relocated building at 500 Pupuke Mangapa Road, Kaeo

Summary

This determination considers the lifting of an insanitary building notice and whether the building in its current state is insanitary or dangerous. The determination also considers whether two building consents should have been granted subject to notification of the natural hazard inundation, and whether a notice to rectify[2] should have been issued for building work that was not compliant with the Building Code and for building work carried out without building consent.

1. The matter to be determined

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

1.2 The parties to the determination are:

- the owner of the property, G Whitehead, who applied for this determination ("the applicant")

[1] This determination is subject to a clarification under section 189 of the Building Act 2004. The determination was originally issued on 1 March 2019. The clarification consists of the addition of paragraph 2.18.
[2] Equivalent to a notice to fix under the Building Act 2004
[3] 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.

- Far North District Council carrying out its duties and functions as a territorial authority or a building consent authority ("the authority").

1.3 This determination arises from the authority's decision to remove an insanitary building notice. The notice had previously been issued under section 124 of the Act after the building was subject to the effects of flooding. The authority removed the notice as it was satisfied the building was no longer insanitary.

1.4 The applicant is of the view that the authority did not correctly exercise its powers in making that decision because the work identified in the notice was not carried out. The applicant considers the authority should also have issued a notice to fix (or the then equivalent notice to rectify) in relation to compliance of the relocated building and the property should have been subject to notification of the natural hazard when the authority granted building consents for the relocated house. In addition, the applicant contends the building is insanitary and/or dangerous due to regular inundation of the site.

1.5 The applicant has also requested I determine whether the building is a dangerous building. I note the concerns raised by the applicant are in relation to access from the house to the driveway when the site is subject to inundation, and the potential damage to the electrical system from previous flood events. Given the observations of the independent expert ("the expert") engaged by the Ministry to assist me in making this determination, I have also considered whether the adjoining carport structure is a dangerous building under section 121 of the Act.

1.6 Accordingly, the matters to be determined[4] are:

- the authority's exercise of its powers of decision to remove the insanitary building notice on the basis the authority considered the notice had been satisfied and the building was no longer insanitary
- the authority's exercise of its powers of decision in granting building consents for the relocation of the building and re-piling without notification of a natural hazard under section 36(2)[5] of the Building Act 1991 ("the former Act")
- the authority's failure to exercise its powers of decision by not issuing a notice to rectify under section 42 of the former Act in relation to non-compliance with the Building Code of the building work.

1.7 In making my decision, I have considered the application and the submissions of the parties, the report of the expert, and the other evidence in this matter.

1.8 In this determination, unless otherwise specified, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code (First Schedule, Building Regulations 1992). Relevant sections of the Building Acts 1991 and 2004 are copied in Appendix A.

2. The building and the background

2.1 The applicant's property is located in a rural area on a low-lying site. The site is near a bend in the Pupuke River to the north northwest and adjacent a road on the south boundary of the property. Roadside drainage discharges into the property down the western boundary.

[4] Under sections 177(1)(b), 177(2)(a), 177(2)(f) and 177(3)(f) of the Act.
[5] Equivalent to notification under section 73 of the Building Act 2004

2.2 The Northland Regional Council's GIS[6] website shows the majority of the site is subject to flooding from the nearby river in both 10% and 1% AEP[7] flood events. This flood mapping was released in September 2012; prior to that date information on flood susceptibility was based on soil mapping at a regional level and scale, and was indicative only.

2.3 On 18 April 1994 the original owner of the property applied for building consent for a house ("the building") to be relocated onto the property, noting the building had not yet been chosen and the owner intended to subdivide the property. Building consent No. BC 940433 (herein referred to as "the 1994 consent") was issued on 12 May 1994 under the under the former Act for relocation of the building. The PIM[8] did not identify the site as subject to a natural hazard and the building consent was issued without notification under section 36(2) of the former Act.

2.4 On 8 June 1994 the original owner of the property applied for subdivision of the Lot. A district engineer's department engineering report for resource planning (undated) notes:

> Site suitability: Topography, Stability, Erosion, Flooding, Ground Cover, etc
>
> 'existing house on terrace above Pupuke River and below road
>
> no anticipated flood risk to house when is raised up on piles'

2.5 The building was moved to its current position in 1995. The building is a timber framed single-storey dwelling, clad in timber weatherboards with corrugated iron roofing. The original construction of the building is estimated to have been circa 1910.

2.6 The original owner applied for building consent on 11 December 1997 to raise and re-pile the building so that the finished floor level is approximately 1000mm above ground level. The PIM did not identify any natural hazard on the site and building consent No. 980895 (herein referred to as "the 1997 consent") was issued on 18 December 1997 under the former Act without notification of a natural hazard under section 36(2) of the former Act.

2.7 The authority carried out a final inspection of the relocated building on 15 September 2005, at the request of a subsequent owner, which failed. The inspection record[9] notes:

> relocated house
>
> This house was sited in a wet area set on foundation about 1m high with sub floor bracing completed.
>
> The outside of house is in a very dilapidated state unpainted split w/boards & joints not [indecipherable]
>
> Plumbing work not compliant
>
> Bathroom kitchen & laundry uncompleted
>
> Carport needs to be removed as it's very substandard[10]. A consent required.
>
> Front & back steps require hand rails & some barriers.

[6] Geographic Information System
[7] A 10% AEP (Annual exceedance probability) means an event having a ten percent probability of occurring annually - also commonly referred to as a 10-year event or a 1-in-10 year event.
[8] Project Information Memorandum
[9] The record refers to the building consent No. 1994433. A letter dated 20 September 2005 then refers to the consent number ABA 1994-433
[10] It is not clear from the information available whether the carport formed part of the relocated building or was constructed at a later date.

2.8 On 20 September 2005 the authority wrote to the then owners advising that the building had 'extensive defects'. The authority stated that it would not be issuing a code compliance certificate[11] and required the owners 'obtain an independent building and weathertightness report' and all necessary remedial works were to be completed.

(I note here that the existing building and its external envelope was required to comply only to the extent that section 112 applies (refer paragraph 5.4.7)).

2.9 From 28 to 30 March 2007 the Far North District experienced severe flooding, with another severe flood event occurring on 9 to 11 July 2007[12]. The applicant, who did not own the building at that time, contends the flood levels were >2m above ground level outside the building and flood waters entered the building to a level of 0.6m above the floor level. On 13 July 2007[13] the authority carried out a 'rapid assessment' of the property. In regards to flooding damage, the "damage and needs assessment" record of that rapid assessment noted:

Details of problems being faced e.g. - Nature and type of damage to property - Loss or damage to contents.	 Flooded Ruined
Is the property habitable? If no how long is the property likely to remain uninhabitable?	No Till cleaned up (sic)
Has [the authority] inspected the property? If so has it issued an uninhabitable / at risk / unsanitary notice? If so specify which	Yes

2.10 On 26 July 2007 the authority issued an insanitary building notice under section 124 of the Act ("the s124 notice") to the then owner. The s124 notice required the owner remedy the matter by 20 September 2007. The notice set out the following:

> 1. Reason(s) why building/property deemed to be insanitary
>
> The building is deemed to be insanitary because of:
>
> Flood Damage to house & septic system
>
> 2. Work required to be carried out by building owner
>
> The building owner shall carry out the following building work:
>
> Septic needs to be checked & drainage field. Any affected wall linings and electrical systems are to be repaired or replaced.
>
> …
>
> 4. Whether or not building consent required
>
> The owner of the building is required to obtain a building consent from [the authority] if any new work is required as opposed to flood rectification. All remedial work required by the report will need a Building Consent but may be done as emergency work under section 41(1)(c)(i) of the [current] Act, however, you may carry out this work without a building consent although you or your insurance company are required to supply a complete report of the works carried out.

[11] It is unclear from the records available whether the reference to a code compliance certificate was in relation to the 1994 consent, the 1997 consent, or both.
[12] Information on historic weather events can be found at https://hwe.niwa.co.nz/
[13] The date the form was completed is recorded as 13 July 2007, though the form is stamped as "received" on 1 July 2007.

2.11 The authority holds no record of building consents issued or documentation regarding remedial works carried out. I note here that Schedule 1(a) of the Act that was current at the time provided for repairs to be carried out without building consent first being obtained, subject to the use of comparable materials or replacement with comparable components or assemblies in the same position, subject to specific criteria (refer Appendix A).

2.12 On 13 May 2010 the authority wrote to the then owner, thanking the owner for complying with the s124 notice and advised that the notice had been removed. The authority holds no record of any inspection carried out prior to removing the s124 notice.

2.13 The applicant purchased the property in January 2013 and subsequently experienced flooding of the property in 2014. The applicant later raised concerns with the authority regarding inundation of the site and the removal of the s124 notice. Correspondence continued between the parties without resolution.

2.14 Earthworks were carried out on the site in 2015, which consisted of placement of fill between the building and the entrance at the roadside. The applicant advised that the earthworks were undertaken by contractors to the Regional Council who were carrying out other works in the area, and that the work was carried out at the request of the authority[14]. A permit had been obtained for the work[15]. The fill is at a level close to the floor level of the dwelling, providing dry access between the road and the building in most flood conditions. I note here that I have not considered the compliance of this sitework in this determination.

2.15 On 23 May 2016 the authority's in-house counsel wrote to the applicant regarding the removal of the s124 notice, and stated:

> Compliance with the notice was confirmed by a council Building inspector, who was part [of the] clean up operations after the flood with the local services group and they had local fire brigade come and wash out the house and remove all mud etc., cleaned the exterior and interior. As [the] building was native timber it was opened up and aired naturally to dry, there was no damage to septic system, it just need (sic) to dry out, there was no concern made to council of any electrical concern. The building inspector clearly remembers the matter but notes were mislaid …

2.16 The matter remained unresolved and correspondence continued between the parties. By email on 9 February 2018 the applicant advised that there was evidence of the remedial works not satisfying the insanitary building notice, including:

> A line of [plaster] over the "tide marks" to hide the fact.
>
> Removal of plaster board that is covered in black mould up to the flood level
>
> Internal spaces filled with dried sludge and black mould up to the flood line.
>
> Swollen doors up to the flood line.
>
> Swollen skirting boards.

2.17 In 2018 the applicant laid an official complaint with the authority regarding the removal of the s124 notice. In its response to the complaint, the authority stated:

> It is [the authority's] understanding that the previous owners provided the inspecting officer with information regarding the cleaning/sanitising of the affected parts of the

[14] In a submission from the applicant received on 28 August 2018 in response to the first draft of this determination the applicant advised that the works were completed in March 2018.

[15] Permit 3000588-LGAEWK issued 30 September 2015. The applicant is named as the applicant for the permit though the application was signed by an officer of the authority and the address for correspondence and billing were the authority's.

> building and that this led to their satisfaction that the building was no longer Insanitary.
>
> …it has not been possible to locate the information that was provided to the officer …

2.18 The authority wrote to the applicant on 19 February 2018, stating

> [The authority] believes, on reasonable grounds, that it acted appropriately in removing this Notice following the 1 in 100 year storm event of 2007 and that information had been provided by the previous owners to support that decision. It is regrettable that this supporting information is not available. [The author] believe[s] that due diligence was applied in the decision to remove the Notice.

The letter concluded with the advice that if the applicant considered the building was still insanitary from the 2007 flood event and that the authority's decision to lift the notice was incorrect, the applicant could seek a determination on that matter.

3. The submissions

3.1 The application and initial submissions

3.2 The Ministry received the application for determination on 9 April 2018.

3.3 Over the course of the determination I received a number of submissions and supporting information from the parties. The submissions and information provided relevant to the matter to be determined, including the three draft determinations issued to the parties for comment are recorded in Appendix B as below:

B.1 The initial application, documentation and correspondence.

B.2 The first draft determination issued on 14 August 2018 and submissions received in response.

B.3 The second draft determination issued on 19 October 2018 and the submissions received in response.

B.4 The third draft determination issued on 24 December 2018 and the submissions received in response.

3.4 The applicant's submissions are (in summary) that:

- The building consents should have been subject to notification of a natural hazard under section 36(2) of the former Act, and provision made for adequate protection to the house and property.
- The authority should not have removed the s124 notice without the required remedial work being done, and the notice should have required the building to be lifted and ground levels built up to provide a safe route off the property or the building demolished or relocated.
- The building can never be considered sanitary because of the regular flooding and the water levels in 10% AEP flood events.
- There are no records of remedial works having been consented, carried out, or signed-off as compliant after the 2007 flood event, and there is currently evidence of black mould 'up to the floor level', and insulation sagging and silt-laden. For the work to be carried out, a building consent would have been required, and this would have also triggered notification of the natural hazard.

3.5 The applicant's concerns regarding the current state of the building include:

- the location of the building on a site that is subject to inundation
- the adequacy of the access between the house and driveway in flood events
- the suitability of the raised driveway, which directs water towards the house
- the unpainted, contaminated porous wall linings
- the presence of silt in the cladding cavity and throughout the insulation, and the presence of mould
- the adequacy of the potable water supply, because of its condition and configuration
- the potential of damage to the wiring and electrical system from previous flood events.

3.6 The authority's submissions (in summary) are:

- The authority did not have adequate flood modelling data to accurately determine the presence of a natural hazard when granting either of the two consents, and the property's location near the river is not of itself sufficient for the authority to have reached that conclusion.
- The authority's inspection occurred as the owner at that time had engaged the authority to undertake the inspection, demonstrating a level of engagement with the authority, and an effort to obtain a code compliance certificate. The authority's records noted the defects and the owner was given written notification of the unresolved building work that required attention.
- Notwithstanding the lack of records, the authority's inspection before lifting the insanitary notice would have been non-invasive, and it can be assumed that the building was found to be clean and dry and thus not offensive or injurious to health and therefore not insanitary at that time.

4. The expert's report

4.1 As stated in paragraph 1.7, I engaged an independent expert who is a member of the New Zealand Institute of Building Surveyors to assist me in this determination. The expert conducted a site visit on 12 July 2018 to observe any evidence relating to remediation of the building after being subject to flooding in 2007, the items recorded in the failed final inspection (refer paragraph 2.7), and to assess the current state of the building.

4.2 The expert provided a report dated 29 July 2018. The parties were provided with a copy of the report on 31 July 2018.

4.3 The expert made the following observations resulting from the site investigation (in summary):

The carport

- The carport is the same structure that was in place in 2005. The applicant has replaced the timber purlins and roof sheeting.
- The rafter connection where it joins the house roof framing, the joint itself, the span of the rafters, and the junctions of the support post structure are unlikely

to comply with Clause B1 Structure of the Building Code and the structure is at risk of collapse in storm conditions or a seismic event.

The 2007 flood event and remedial works

- The tidemark on the door face of the bathroom/bedroom 1 was identifiable and was at 640mm above floor level.
- Photographs provided by the applicant in areas that have since been remediated also provide evidence of the flood level height through the building.
- Invasive investigations into the wall cavity in four locations found clear evidence of silt – within power outlet boxes, the wall cavity, and fibreglass insulation – and in at least one location the amount of silt was "extreme".
- The back of the cut-outs in two locations exposed minor mould spotting.
- In all locations the framing cavity and insulation was found to be dry and non-invasive moisture readings of internal and external walls were within a normal range. There was no evidence of significant interior dampness or mould.
- There was no evidence of any linings having been repaired and based on the invasive investigations it is clear no remediation work to lower wall linings to either open to dry out, undertake repair and silt removal, replace insulation or redecorate ever occurred.

2013 to 2018 flood events

- The applicant advised the expert that the property had been flooded a number of times after he purchased the house, including 2014 and 2015, with the worst event being in February 2018.
- The tide mark of the February 2018 event is clear and evident on the south elevation, with a height above ground level of 1365mm to 1380mm.
- The floor level is approximately 30mm above the tide mark, which supports the applicant's claim that water was seeping through the floor board joints.

Roadway water course

- The roadway water course (west boundary) does not discharge the surface water to the river or another water course and significant ponding is occurring on the applicant's property as a result.

The 2015 earthworks

- The introduction of the fill has significantly improved access from the road and has created a higher flood level protection to access via the driveway, with the fill level close to the floor level of the building.

General condition

- The exterior north and east elevation weatherboard cladding and timber joinery have been repaired and repainted. The applicant advised the expert that work is still in progress.
- The condition of other areas of the building supports the view that repairs and painting, that are referred to in the 2005 failed inspection notice (refer paragraph 2.7), had not occurred.

4.4 The expert considered the current state of the building, noting that in its present condition it is not insanitary insofar as being injurious to health or significantly damp, though the entrapped silt and silt laden insulation may well be considered insanitary. The expert also noted that as the exterior of the building was still in part in a state of disrepair, there is potential for weathertightness failure.

4.5 The expert also considered whether the building was dangerous, and concluded that in his view the carport structure does meet that test. The structure relies on inadequate connections to both the roof structure and support post system, and the expert considered in storm conditions or a seismic event the carport could collapse causing injury.

5. Discussion

5.1 As described in paragraph 1.6, the matters to be determined are:

- the authority's exercise of its powers of decision to remove the insanitary building notice on the basis the authority considered the notice had been satisfied and the building was no longer insanitary
- the authority's exercise of its powers of decision in granting building consents for the relocation of the building and for re-piling without notification under section 36(2)[16] of the Building Act 1991 ("the former Act")
- the authority's failure to exercise its powers of decision by not issuing a notice to rectify under section 42 of the former Act in relation to building work identified by the authority in 2005 as not being compliant with the Building Code and in respect of building work carried out without building consent when consent was required.

5.2 Removal of the insanitary building notice

5.2.1 The insanitary building notice was issued in July 2007 and lifted by the authority in May 2010. Due to the historical nature of the background events and the lack of records, it is not possible to conclude with certainty whether or not the authority inspected the remedial works prior to lifting the notice.

5.2.2 A building may meet the threshold of an insanitary building under section 123 of the Act after a flood due to contaminated water entering the building, and in the longer term in relation to severe mould growth over time if building elements remain wet.

5.2.3 The authority has previously advised the applicant that the local fire brigade had "washed" out the house and removed the mud, and the exterior and interior had been cleaned. The authority also stated that 'as the building was native timber it was opened up and aired naturally to dry'.

5.2.4 I note that in most instances, the scope of work required for the purposes of satisfying an insanitary building notice will differ from the scope of work required to repair or remediate the effects of flood damage for other purposes[17].

5.2.5 The work required to render the building no longer insanitary may only require removal of silt deposits, cleaning and disinfecting (whether by chemical treatment or exposure to sunlight), and providing the necessary ventilation to allow building

[16] Equivalent to notification now under section 73 of the Building Act 2004
[17] For more information see "Repairing flood-damaged houses" (BRANZ Build No. 144, Oct/Nov 2014) and "Protecting your health in an emergency: Floods and health" (Ministry of Health, www.health.govt.nz)

elements to dry out in order to prevent significant mould growth. Removing linings, skirting, electrical switch plates[18], cupboard kick-panels, and panels to showers and baths, allows for cleaning of cavities and additional ventilation to underlying building elements that will assist drying-out.

5.2.6 I note that for buildings where internal linings provide bracing, the effect of moisture ingress on the lining may mean that the lining would no longer provide adequate bracing and would require replacement; this is a matter related to the building's structure, not whether the building is insanitary.

5.2.7 As noted in paragraph 5.2.4, repair and remediation of the effects of flood damage for other purposes is likely to be more extensive than the work required to prevent the building remaining insanitary.

5.2.8 It is apparent from the expert's observations that in this case remedial work did not include the removal of linings to flood level or replacement of insulation that had been subject to the effects of flooding. The expert observed silt within the cavity and insulation laden with silt, which he described as "extreme" in at least one location.

5.2.9 In order to lift the insanitary building notice, the authority needed to have been satisfied that the condition of the house was no longer "offensive or likely to be injurious to health".

5.2.10 The authority submitted that any inspection before lifting the insanitary notice in 2010 would have been non-invasive, and "it can be assumed that the building was found to be clean and dry and thus not offensive or injurious to health" and therefore not insanitary at that time.

5.2.11 Given the lack of records available to establish the status of the building when the authority made its decision to lift the insanitary building notice, I can make no determination on the exercise of the authority's powers of decision in lifting the insanitary notice in 2010.

5.2.12 In order to decide under section 188(1)(a) of the Act whether the authority's decision to lift the insanitary building notice should now be confirmed or reversed, I have considered the current state of the building and whether it meets the definition of an insanitary building under section 123 of the Act. In making this decision I have considered whether the building:

- is offensive or likely to be injurious to health because—
  - (i) of how it is situated or constructed; or
  - (ii) it is in a state of disrepair; or
- has insufficient or defective provisions against moisture penetration through the external envelope so as to cause dampness in the building
- has an inadequate supply of potable water for its intended use.

5.2.13 In relation to the provisions against moisture penetration, I note the applicant has been carrying out building work to the external envelope and no evidence has been presented that the building has insufficient or defective provisions against moisture penetration that has resulted in dampness in the building. In addition, the expert noted no evidence of significant dampness in the interior spaces. I am of the view therefore that the building is not insanitary with regard to penetration of moisture.

[18] Ensuring the power supply is disconnected first.

5.2.14 In regards to the building being "offensive or likely to be injurious to health", the applicant has noted that the occupants, including the applicant, have suffered stress-related health issues and the decision should take this into account. It is clear from the information provided by the applicant that the flooding events and the consequences of these flood events occurring has caused distress.

5.2.15 The relevant test under section 123(a)(i) of the Act in relation to an insanitary building is that it is "likely to be injurious to health because of how it is situated or constructed". The term injurious means "inflicting or tending to inflict injury"[19] or in other words "causing or likely to cause damage or harm"[20]. I am of the view that the use of the term injurious in the test means there must be a direct relationship between the state of the building, its situation or its construction and the injury to health. That is to say, it is the state, situation or construction of the building that must directly cause the occupant or user's health to be damaged. In this case, it is the site being subject to regular inundation that is alleged to cause the injury to health. However, I do not believe the frequency or extent of the inundation in this case is sufficient to satisfy the test of "likely to be injurious to health" under section 123 of the Act as regards the stress-related health issues experienced by the occupants.

5.2.16 In relation to whether the building is likely to be injurious to health, I have also considered whether the following factors mean the building meets the test of an insanitary building under section 123(a):

- the silt that remains in the cladding cavity and throughout the insulation, and the presence of mould;
- the location of the building on a site that is subject to inundation and ponding under the building;
- the adequacy of the potable water supply.

Silt and mould

5.2.17 The expert noted that although there was silt and minor mould spotting present, the lining and insulation were dry. I am of the opinion that the mould spotting[21] and the presence of the silt in the cladding cavity and insulation is unlikely to be offensive or injurious to the health of the occupants.

5.2.18 In reaching this view I have taken into account that the hazards presented by silt are two-fold: small particulates could be lifted from the surface and inhaled, and people could be exposed to pathogens in the silt. I am of the view that the mitigating factors are that the silt is present in the cavity and in the normal course of occupation the silt will not be disturbed. While I accept that disturbance may occur during building, electrical, or plumbing work, I have anticipated that people carrying out that work will use personal protective equipment as part of their standard procedure and this will reduce the likelihood of inhalation and direct contact with the silt. In addition, the level of contamination and resulting pathogens in flood waters is likely to be relatively low given the water volume in the flood event, and as deposits dry out the risk becomes even lower as pathogens become inactive.

Location and ponding

[19] "Injurious." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Nov. 2018.
[20] "Injurious" Oxford Dictionaries. n.d. Web 27 Nov. 2018
[21] More information on how to identify mould, clean it up, and prevent it from growing can be found on the Ministry's website at: https://www.building.govt.nz/resolving-problems/resolution-options/weathertight-services/fap/fap-factsheets/mould/

5.2.19 In response to the first draft determination, the applicant submitted that the building was insanitary due to its location and the fact that the site is subject to regular flooding. The applicant's concerns largely relate to sewerage and other contaminants from upstream properties and from the septic tank on the site. The applicant is also concerned that the raised driveway directs floodwater under the building where the applicant contends it ponds.

5.2.20 In my opinion, the fact a site is subject to regular flooding doesn't necessarily equate to the building being insanitary. With durable building materials and adequate drainage and ventilation to mitigate the effect of floodwaters, a building may not be insanitary despite being located on a site subject to regular flooding.

5.2.21 The applicant has provided photographs of the ground under the building in support of his submission. A small area of ponding in the subfloor space is evident in the photographs and another small area with algae growth is apparent in a shaded area adjacent the building.

5.2.22 Though drainage could no doubt be improved, I do not consider that the evidence provided by the applicant is sufficient to establish that the building meets the threshold of an insanitary building under section 123(a). While the ground under the house may regularly be wetted, and in some instances during flooding it may become contaminated, the subfloor space is well ventilated to allow the drying of the soil. Drying of the soil and sediment deposits reduces risk from pathogens that may be present in sediment deposits[22]. In addition, based on the findings of the expert's report, the regular wetting of the ground under the building has not caused dampness or mould in the interior building spaces.

5.2.23 For completeness, I note that flooded septic tanks should be pumped out as soon as possible after flooding has subsided and disposal fields cleared of silt, and that this is the responsibility of building owner.

Potable water supply

5.2.24 In response to the first draft determination, the applicant submitted that the potable water supply to the building is likely to be contaminated in flood events due to the drain from the roof running underground and the general state of the tank being in disrepair. The applicant is concerned that the condition of the water tank and the configuration of the drainage lead to contamination of the water supply in flood events. In the applicant's view this means the building is insanitary under section 123(c).

5.2.25 Having drainage from the roof to the water tank running underground is a common configuration for this type of water supply system and it is common for water to be filtered and UV treated in this type of supply system. The general condition of the water tank is a matter of normal maintenance and is for the applicant to attend to. Water testing and treatment, and regular cleaning and desludging of water tanks is necessary and normal maintenance for this type of water supply system.

5.2.26 The Ministry of Health provides guidelines for drinking water quality management, including for small individual and roof water supplies.[23] The Ministry of Health advises:

[22] For more information, see *Restoring a house after flood damage,* (BRANZ Bulletin No. 455, Dec 2004)

[23] The following are all accessible through the Ministry of Health's website:
Guidelines for Drinking-water Quality Management for New Zealand Chapter 19: Small, individual and roof water supplies, Water collection tanks and safe household water, Drinking-water Standards for New Zealand 2005, and *Other useful drinking-water resources*

> Water supply owners should have the water being used for drinking, cooking and food preparation tested for microbiological indicator organisms (eg, *E. coli*) at least once every six months.

5.2.27 The building has a water collection and storage system that is adequate in terms of its size and configuration for the building's intended use as a dwelling. I have received no evidence from the applicant, such as water quality tests, that would indicate the water supply is not potable when the system is subject to normal maintenance and treatment. On that basis, I do not consider the building meets the test of being an insanitary building under section 123(c).

Conclusion

5.2.28 In conclusion, taking into account the factors discussed above, I am of the view that the building is not currently an insanitary building under section 123 of the Act; accordingly I confirm the authority's decision to lift the insanitary building notice.

5.3 Granting building consent without notification of a natural hazard

5.3.1 I have considered the authority's exercise of its powers of decision when it granted building consents for the relocation of the building and for re-piling without notification of a natural hazard under section 36(2) of the former Act.

5.3.2 When a building consent application was made under the former Act, in accordance with section 36 the authority was required to refuse to grant building consent if the land on which the building work was to take place was subject to a natural hazard (such as inundation), unless the authority was satisfied that adequate provision had been made or would be made to protect the land or building work from the inundation (36(2)). If the authority was satisfied of this and granted the building consent under these conditions, it was required to notify the District Land Registrar of the natural hazard, and an entry would be placed on the certificate of title. It is my understanding that there was no notification to the Registrar and there is no entry on the certificate of title.

5.3.3 There are three paths that could have led to an outcome whereby the authority granted the two building consents without notification of the natural hazard:

- the authority turned its mind to whether the land was subject to a natural hazard and concluded it was not; or
- the authority turned its mind to whether the land was subject to a natural hazard and concluded it was, but reached a view that the land and building work was adequately protected (which would mean the authority erred in not notifying the consent under section 36); or
- the authority did not turn its mind to whether the site was subject to a natural hazard, either because it had no awareness of the likelihood of inundation from the Pupuke River or for some other reason.

5.3.4 The Pupuke River is now listed as a priority river by the Northland Regional Council because it is prone to flooding (refer paragraph 2.2). However, while it is evident that the site is now subject to inundation, it does not necessarily mean that this was the case in 1994 and 1997 when the consents were issued.

5.3.5 The authority contends it did not have adequate flood modelling data to accurately determine the presence of a natural hazard in 1994 and 1997 when granting either of the two consents, and the property's location near the river is not of itself sufficient

for the authority to have reached a conclusion that the land was subject to a natural hazard.

5.3.6 With respect to historical data available; while a flooding event occurred in Northland in 1995, the NIWA data[24] available to me does not record any flooding event in the Whangaroa Harbour catchment, which includes the Pupuke River.

5.3.7 The applicant has referred to a report commissioned by the Waitangi Tribunal for the Te Paparahi o Te Raki (Wai 1040) inquiry, entitled 'A history of the Otangaroa, Te Pupuke, and Waihapa Blocks (Whangaroa 1874 – 1990)', June 2016[25]. With respect to the history of flooding in the area south of the Whangaroa Harbour, the report states:

> The lands that became included in the Otangaroa, Te Pupuke, and Waihapa blocks are located at the south of Whangaroa Harbour. The harbour itself has a number of steep rocky outcrops but stretches to flats covered in mangroves where the Waihapa and Te Pupuke lands meet the water. Due to this the low-lying lands on these blocks are prone to flooding.

5.3.8 To support the history of flooding, the applicant has also referred to a report commissioned by the Waitangi Tribunal entitled 'Crown Sponsorship of Mass Deforestation in Whangaroa and Hokianga 1840-1990', Dr Garth Cant, May 2005. I have not seen a copy of this report.

5.3.9 The applicant has also provided statements from a number of residents of the Pupuke Valley who have provided accounts of flooding in the Pupuke Valley from 1930s onwards.

5.3.10 In the first draft of this determination I reached a view that given the 1997 consent was for lifting the house 1000mm above ground level and taking into account the location of the site relative to the river, the authority would have been aware the site was subject to a natural hazard, or if it was not aware it should have sought more information from the building consent applicant.

5.3.11 I reconsidered this issue in the second draft determination. In that draft I reached the view that there are a number of reasons for an owner wishing to raise a house, and while in hindsight it has clearly reduced the impact of flooding on the building, I had insufficient information to establish the reason for lifting the house or that the site was prone to inundation prior to that work being carried out.

5.3.12 I have taken account of the information and arguments presented by the parties. I accept the authority's point that there was limited information by way of flood modelling available at the time the building consents were granted. However, I consider it is clear that there was, at the least, an established history of flooding in the Pupuke Valley.

5.3.13 With respect to the history of flooding at the site, I also note that the application for subdivision in 1994 (refer to paragraph 2.4) includes an assessment that states:

> existing house on terrace above Pupuke River and below road
>
> no anticipated flood risk to house when is raised up on piles

I consider this can be taken to mean that there would have been a flood risk to the house if it was not raised up on piles.

[24] Information on historic weather events can be found at https://hwe.niwa.co.nz/
[25] https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_108120896/Wai%201040%2C%20A057.pdf

5.3.14 On balance, I am therefore of the view that there was sufficient information available to establish that the land on which the building work was to be carried out was at risk of inundation at the time the consents were granted under the former Act and the test under section 36(1)(a) was met.

5.3.15 I turn now to whether the building consents, which have not been issued with code compliance certificates, should be subject to an amendment to include the condition that the consent is subject to notification to the Registrar-General of Land.

5.3.16 The issuing of a building consent is a statutory decision authorising building work to be undertaken. I am of the view there may be circumstances where a building consent that has already been granted can be modified to include notification of a natural hazard, for example when the time between the decision to grant the building consent and to notify the hazard is not great, or where the lack of notification was simply an administrative error. However I am also of the opinion that there will be circumstances when the consent should not be amended, such as when the consent has already been relied on and the building work completed, or if the circumstances have changed (i.e. there was no known likelihood of a natural hazard occurring when the consent was issued).

5.3.17 A building consent issued subject to notification of a natural hazard can only be issued if the authority is satisfied that adequate provision has been or will be made to protect the land or building work (or other property where applicable) from the natural hazard, or that any damage to the land (or other property) as a result of the building work would be restored, or the building work will not accelerate, worsen or result in a natural hazard.

5.3.18 One of the purposes of the natural hazards provisions is to notify an owner and all subsequent owners that the land on which a building is situated is subject to a natural hazard. Section 36(4) of the former Act[26] (and the equivalent section 392(3) of the current Act) has the effect of exempting the relevant authority from liability for issuing a building consent where a building suffers damage as a result of a natural hazard as long as the building consent authority issued the building consent subject to the condition under section 36(2) of the former Act (or section 73 of the current Act) that a notation must be included on the land title.

5.3.19 The condition also provides the owner with the opportunity to decide whether to proceed with the building work, subject to a notation on the title with the consequent exemption for the authority and the likely unavailability of insurance for damage caused by the natural hazard, or the owner could decide to alter the building or its location in such a way that the proposed building work is no longer subject to a natural hazard. That opportunity is no longer available to the owner in this case, and it would be unfair to now impose the consequences on the owner when they do not have the opportunity to avoid those consequences.

5.3.20 In this case:

- there was sufficient information available to the authority at the time the consents were granted to establish that the land on which the building work was to be carried out was at risk of inundation
- the building consents have already been relied on and the building work approved under those consents completed

[26] The equivalent of section 392(3) of the Building Act 2004 with regard to liability of a building consent authority

- it is apparent that the site is subject to a natural hazard and inundation will continue to occur
- if the test under section 36 were to be applied now, the owner will be deprived of the opportunity to choose whether to have a notation on their title, and the building consent authority will be exempt from liability.

5.3.21 For the reasons set out above, I am of the opinion that the authority's decision to grant the building consents should not now be modified to require notification of the natural hazard. I strongly suggest however that this determination be placed on the property file to inform any future purchasers of the property of the natural hazard on this site.

5.3.22 I acknowledge the situation the applicant now finds themselves in is a difficult one. In respect of the building work carried out under both consents, I note:

- there is no evidence that damage from earlier flood events is so extensive or of a nature that it is not able to be remediated
- if the applicant wishes to obtain a code compliance certificate for the two open building consents, the building work covered under those consents (i.e. the relocated building and the foundations) must comply with the Building Code that was in force when the consents were issued (to the extent required by the Act)
- the relocated building may not be compliant with Clause E1.3.2 in relation to flood levels resulting from an event having a 2% probability of occurring annually (commonly referred to as a 50-year event) entering the building; however it is feasible that work could be carried out that would bring the building into compliance with this clause
- the natural hazard provisions of the Act will apply in respect of any future building consent for construction of a new building on the site or major alterations to the existing building.

5.4 Failure to issue a notice to rectify

5.4.1 When a building consent is granted for the relocation of an existing building, any new building work carried out is required to meet the performance requirements of the Building Code current at the time the consent is issued, and the building as a whole after the relocation must comply to the extent required by the Act[27]. Usually the new building work carried out for a relocated house will consist of foundations, connection to services, construction of stairs and similar.

5.4.2 In addition, in Schedule 1 the Act sets out only certain types of building work that are exempt from the requirement to obtain building consent.

5.4.3 The documentation supporting the 1994 building consent for the relocation of the house onto the property consisted of a site plan, floor plan, and foundation details – there were no details concerning any work to be carried out, either inside or outside the building. Likewise the 1997 building consent for re-piling did not include any other building work, such as construction of the stairs at the entrance.

5.4.4 The final inspection carried out in 2005 failed on the basis that plumbing work was not compliant, the bathroom, kitchen and laundry were not completed, the carport structure was 'substandard', and barriers and handrails had not been installed to the

[27] See section 112 of the current Act and section 38 of the former Act.

front and back stairs. Arising from this inspection, the authority was faced with two separate matters –

- the compliance of building work carried out under building consent, and
- action regarding the building work that was not covered by a building consent.

5.4.5 The final inspection report notes, with respect to the foundations, that "This house was … set on foundation about 1m high with sub floor bracing completed" and does not record any non-compliance concerning the building work that was described in the building consent. Given the non-compliances identified by the authority in its 2005 inspection did not relate to building work covered by 1997 consent, I can see no reason why the authority was prevented from issuing a code compliance certificate for that work if the building work described in the consent was compliant and the building after relocation met the test in section 38 of the former Act.

5.4.6 The authority has no other records relating to completion or rectification of the building work carried out on site, no code compliance certificate was issued and no notice to rectify was issued for the breaches of the Building Code that had been identified by the authority or for the building work that was carried out without building consent that was not exempt.

5.4.7 The existing building after the relocation was required to continue to comply with the provisions of the Building Code to at least the same extent as before the relocation (see section 38 of the former Act). This applies to the weatherboards and the carport (if the carport formed part of the original building) identified in the failed inspection, and no remedial work was required in respect of compliance with the Building Code if it complied to the same extent as before the relocation. However, if the carport met the test of being a dangerous building under section 64 of the former Act, a dangerous building notice could have been issued in respect of that part of the building.

5.4.8 In relation to the items identified in the authority's final inspection of September 2005 (refer paragraph 2.7), there was new building work carried out to the relocated building that had not been described in the consent. This included: work to the bathroom, kitchen, laundry, plumbing work, and the steps (if the steps were not part of the original building). Based on the record of the 2005 inspection, it is apparent that there was building work that occurred that was not covered by a building consent and some of that building work did not comply with the Building Code. In this regard I conclude the authority failed to exercise its powers of decision to issue a notice to rectify[28] for breaches of the Act and Building Code.

5.4.9 The authority has submitted that it was taking a "graduated response" that it considered appropriate in the circumstances (see Appendix B, submissions 31 October 2018 and 17 January 2019). I disagree with the authority's view on this matter given the time elapsed prior to the inspection carried out in 2005 and subsequently once the authority was aware of the matters of non-compliance and of building work carried out other than in accordance with a building consent.

5.4.10 The building is now under different ownership, and the applicant was not the person who carried out or was responsible for the building work carried out prior to the 2005 inspection. In a number of previous determinations[29] I have discussed whether a

[28] Or a notice to fix under the Building Act 2004
[29] See for example Determinations 2014/035 and 2015/073

current owner can be issued with a notice to fix for non-compliant building work carried out by a previous owner.

5.4.11 I maintain the opinion set out in those previous determinations, that if the person who contravened or failed to comply with the Act or Regulations is no longer the owner of the building a notice to fix cannot be issued to a subsequent owner who did not contravene or fail to comply with the Act or Regulations. However, if the building (or part of the building) reaches the threshold of a dangerous building under section 121 of the Act, a dangerous building notice can be issued to a subsequent owner as it relates to the current condition of the building and it is not relevant to the issuance of that dangerous building notice how the building became dangerous nor whether an individual contravened the Act in putting the building into a dangerous state.

5.4.12 I note there is also an issue with roadside drainage directing surface water onto the applicant's property. Clause E1.3.1 provides:

> Except as otherwise required under the Resource Management Act 1991 for the protection of other property, *surface water*, resulting from an event having a 10% probability of occurring annually and which is collected or concentrated by *buildings* or *sitework*, shall be disposed of in a way that avoids the likelihood of damage or nuisance to *other property*.

5.4.13 In this case it is the applicant's property that is the "other property" for the purpose of Clause E1.3.1. While not part of the matter to be determined, I have raised this matter here to bring it to the authority's attention for the authority to address in due course.

5.5 Is the building a dangerous building?

5.5.1 The applicant has also requested I consider whether the building meets the definition of a dangerous building under section 121 of the Act. The applicant's concerns relate to leaving the property when it is inundated in a flood event and possible damage to the electrical systems from flood waters and silt deposits. In addition, the expert has also commented on the inadequate construction of the carport.

5.5.2 Under the definition in section 121, a building is dangerous for the purposes of the 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; …

5.5.3 The definition concerns only the building itself and whether, in the ordinary course of events, the building is likely to cause injury or death. I am of the opinion that for the purpose of the Building Act, this does not extend to the inundation of the site itself and whether the occupants of the building can or cannot leave the property during a flood event.

5.5.4 The expert has noted that the carport structure relies on inadequate connections and has expressed his view that it could collapse in storm conditions or a seismic event.

5.5.5 While this matter was not raised in the application for determination, I have considered whether the carport, as part of the building[30], is dangerous. While section

[30] Whether the special provisions for dangerous, earthquake-prone, and insanitary buildings in Subpart 6 of the Building Act that refer to a building can also be applied to part of a building was considered in Determination 2012/043

121(a) specifically excludes the occurrence of an earthquake, in my opinion "in the ordinary course of events" includes ordinary storm events.

5.5.6 Taking into account the expert's observations, I am of the opinion that the carport structure meets the definition of a dangerous building under section 121. I leave this matter for the parties to address.

5.5.7 In regards to the electrical systems, I note that wiring and conduits should be checked after flooding for damage and repaired if necessary. There is no information on whether or not this was done after the 2007 flood event, and no evidence has been presented to me[31] that the electrical system has suffered damage to the extent that it would meet the test of a dangerous building under section 121.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I determine:

- there is insufficient information available to establish whether the authority correctly exercised its powers of decision when it lifted the insanitary building notice in 2010; however as the building is not now insanitary I confirm the authority's decision
- the land is subject to inundation and the building consents were incorrectly issued without notification under section 36(2) of the Building Act 1991; however given the factors discussed in paragraph 5.3.20 of this determination the authority's decision to grant the building consents should not now be modified to require notification
- the authority was incorrect in failing to issue a notice to rectify under section 42 of the Building Act 1991 in relation to non-compliant building work.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 March 2019.

Steve Watson
GM Housing and Tenancy Services

[31] Such as results of testing to the requirements of Australian and New Zealand Standard AS/NZS 3019 section 5 Electrical installations periodic verifications.

Appendix A

A.1 Relevant sections of the Building Act 1991 (current at the time the consents were issued):

Building Act 1991

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, worsen, 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 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. [In any such case it shall not be necessary for the Registrar to record the like entry on the duplicate of the certificate of title.]

(3) Where the territorial authority determines that the entry referred to in subsection (2) of this section is no longer required, it shall send notice of the determination to the District Land Registrar who shall amend his or her records accordingly. [In any such case it shall not be necessary for the Registrar to record a like entry on the duplicate certificate of title unless that duplicate had had an entry recorded on it pursuant to subsection (2) of this section or pursuant to section 641A of the Local Government Act 1974.]

4) Where—

(a) Any building consent has been issued under subsection (2) of this section; and

(b) The territorial authority has notified the District Land Registrar in accordance with subsection (2) of this section that it has issued the consent; and

(c) The territorial authority has not notified the District Land Registrar under subsection (3) of this section that it has determined that the entry made on the certificate of title of the land is no longer required; and

(d) The building to which the building consent relates later suffers damage arising directly or indirectly from erosion, subsidence, avulsion, alluvion, falling debris, inundation, or slippage, or from inundation arising from such erosion, subsidence, avulsion, alluvion, falling debris, or slippage—

the territorial authority and every member, employee, or agent of the territorial authority shall not be under any civil liability to any person having an interest in that building on the grounds that it issued a building consent for the building in the knowledge that the building for which the consent was issued or the land on which the building was situated was, or was likely to be, subject to damage arising, directly or indirectly, from erosion, subsidence, avulsion, alluvion, falling debris, inundation, or slippage or from inundation arising from such erosion, subsidence, avulsion, alluvion, falling debris, or slippage.

…

38 Alterations to existing buildings

No building consent shall be granted for the alteration of an existing building unless the territorial authority is satisfied that after the alteration the building will—

(a) Comply with the provisions of the building code for means of escape from fire, and for access and facilities for use by people with disabilities [(where this is a requirement in terms of section 47A of this Act)], as nearly as is reasonably practicable, to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

42 Notices to rectify

1) The territorial authority may issue to the owner or to the person undertaking any building work a notice to rectify, in the prescribed form, requiring any building work not done in accordance with this Act or the building code to be rectified.

(2) A notice under this section may also direct that all or any building work shall cease forthwith until the territorial authority is satisfied that the persons concerned are able and willing to resume operations in compliance with this Act and the regulations.

(3) A notice to rectify only applies—

(a) To building work required during the period in which a building consent is operative; and

(b) In respect of building work for which a building consent should have been obtained; and

(c) In respect of building work for which a building consent was not required but where there was a requirement that the work meet the building code.

(4) The provisions of subsection (3)(b) of this section shall not be read as relieving the owner of the requirements of section 33 of this Act to obtain a building consent for building work for which a notice to rectify has been issued under this section.

A.2 Relevant sections of the Building Act 2004 current in July 2007:

123 Meaning of insanitary building

A building is insanitary for the purposes of this Act if the building—

(a) is offensive or likely to be injurious to health because—

(i) of how it is situated or constructed; or

(ii) it is in a state of disrepair; or

(b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or

(c) does not have a supply of potable water that is adequate for its intended use; or

(d) does not have sanitary facilities that are adequate for its intended use.

124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings

(1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—

(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) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary.

(2) This section does not limit the powers of a territorial authority under this Part.

…

A.3 Relevant clauses of Schedule 1 of the Building Act 2004 current in July 2007:

Schedule 1
Exempt building work

A building consent is not required for the following building work:

(a) any lawful repair and maintenance using comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, including all lawful repair and maintenance of that nature that is carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 1976:

Appendix B: Submissions received

B.1: The application and initial submissions

The applicant 9 April 2018	Application for determination, summary of events, and supporting documentation. Submitted: • The property is flooded three or four times a year, at depths greater than 1000mm above ground level and flood waters have come close to entering the building 'on several occasions' and in February 2018 seeped through the floorboards. • There are no records of remedial works having been consented, carried out, or signed-off as compliant after the 2007 flood event, and that there is currently evidence of black mould 'up to the floor level', and insulation sagging and silt-laden. • The authority should not have removed the s124 notice or allowed the building to continue to be occupied and has refused to act on information regarding the status of the building and inundation to the property. After the 2007 flooding the notice should have required the building to be lifted and ground levels built up to provide an escape route or the building demolished or relocated. Provided copies of: • the completed 'damage and needs assessment' form as described in paragraph 2.9 • the s124 notice • correspondence between the parties, including photographs of flooding in February 2018 • the authority's Policy #3119 – Dangerous, Insanitary, and Earthquake-Prone Buildings (reviewed October 2016).
The authority 18 April 2018	Submission setting out the background to the events. Advised that one of the then joint owners of the building in 2010 sought documentation regarding the removal of the 124 notice and that a relative of the other joint owner 'had all details relating to the remedial works carried out'. Advised that it now assumed the information was passed to a building officer who then assessed the building prior to removing the notice, but that historic information regarding removal of the notice has not been located. Submits that notwithstanding the lack of records, it would be unlikely the notice would have been removed without an inspection. Provided copies of: • building consent 940433 and supporting documentation for relocation of the building onto the site • the completed 'damage and needs assessment' form • the s124 notice • correspondence between the parties relevant to the matter.
The Ministry 24 June 2018	Information sought from the Northland Regional Council regarding information about flooding from the Pupuke River and when this was available. The advice received was that current river flood modelling was available from September 2012. Prior to that, at around 2005/2006, flood susceptibility was based on soil mapping that was coarse and indicative at regional plan scale. Information also sought from the authority about whether the authority was aware of the land being subject to inundation in flood events prior to the 2007

	event, and if so what knowledge the authority had of flooding prior to issuing the 1994 and 1997 building consents. No response was received to that request.

B.2: The first draft determination and submissions in response

The Ministry 14 August 2018	A first draft was issued to the parties for comment. The draft concluded: • The authority incorrectly exercised its powers of decision in removing the insanitary building notice without adequate remedial work having been carried out to expose wet timber and without replacement of affected linings and insulation. • Though silt is still present in the lining and insulation the building elements are dry and there is limited mould, accordingly the building does not meet the test of an insanitary building under section 123 of the Act and therefore the determination does not reverse the authority's decision to lift the insanitary building notice. • The authority did not correctly exercise its powers of decision in granting the second building consent without notification under section 36(2) of the former Act, because there was sufficient information at that time to establish that the site was subject to inundation; the authority is to modify the consent and notify the Registrar-General of Land in respect of the natural hazard. • The authority failed to correctly exercise its powers of decision to issue a notice to rectify under the former Act in respect of building work carried out without building consent first having been obtained and for building work that did not comply with the Building Code. • The test of whether the building is dangerous under section 121 of the act does not extend to consideration of whether the occupants can or cannot leave the property during a flood event; however part of the building, the carport structure, meets the test of a dangerous building under section 121 of the Act.
The applicant 16 August 2018	Contested the decision regarding whether the building met the tests of being a dangerous and insanitary building in regards to the siting of the building on a property regularly subject to inundation.
The applicant 28 August 2018	Submitted: • It was four years after the applicant purchased the house before it was dry, and the authority was able to observe evidence of flood damage that had not been remediated when it visited the site on 23 February 2015. • Although the earthworks have improved access during flood events, it has also directed flood water under the house, which then ponds. The applicant is not aware of any inspection having been carried out in relation to compliance of the sitework. • Access between the house and the driveway during flood events still requires the occupants to negotiate deep floodwaters, which presents a danger to the occupants as the flood waters carry debris and sewerage. • The building can never be considered sanitary because of the regular flooding and the levels in 1-in-10 year flood events (10% AEP), particularly given the impact of flood waters on the low-lying septic tank on this property as well as raw sewerage and other contaminants from other upstream properties. • The water tank that supplies potable water to the house is prone to ingress from contaminated water due to its location and plumbing. • Notification of the natural hazard on its own would not have been

	sufficient for granting consent – what was required was adequate protection, which the applicant contends would have required lifting the building "at least another 1300mm[32] and ground work… to reduce the flow and water height". • The danger of fire from flood damage to wiring and electrical systems (corrosion) has not been addressed in the draft determination – the power box is located below the 2007 flood height and "it would be reasonable to assume it has never been checked for compliance or water damage."
The authority 29 August 2018	Did not accept the findings of the draft. Submitted: • Notwithstanding the lack of records, the authority's inspection before lifting the insanitary notice would have been non-invasive, and it can be assumed that the building was found to be clean and dry and thus not offensive or injurious to health and therefore not insanitary at that time. The finding in the determination that the building is not now insanitary supports a conclusion that the authority did in fact exercise its powers correctly when it lifted the insanitary building notice. • No determination was made in respect of the authority's exercise of its powers of decision in granting the first building consent. • The authority did not have adequate flood modelling data to accurately determine the presence of a natural hazard when granting either of the two consents, and the property's location near the river is not of itself sufficient for the authority to have reached that conclusion. In this respect the conclusion in the draft determination is based on the benefit of hindsight. • Modification of the consent issued some 21 years prior to this determination to require Notification to the Registrar-General of Land will negatively impact upon the applicant. • The authority's inspection records noted the defects in the building work and the then owner was given "written notification". • The authority agrees that a notice to fix cannot now be issued to the applicant in relation to the works carried out without building consent and for work done that was not compliant. However, the authority is of the opinion the applicant should receive "notification of the unresolved building work requiring attention". • The authority accepts the finding with regard to the carport structure being dangerous, and the authority intends to issue a dangerous building notice in respect of the carport if it remains in a dangerous condition. The authority also noted that under section 41(b) and Schedule 1, the construction of a carport would be exempt from the requirement to obtain building consent.
The Ministry 5 September 2018	Advised the parties the applicant had raised three new issues relevant to the matter to be determined, namely: the potable water supply being contaminated in flood events, the electrical system potentially being damaged from earlier flood events, and ponding under the building and floodwaters directed under the building from the raised driveway. Requested the applicant provide evidence or relevant information to support the submission on those issues.
The applicant 5 September 2018	Provided photographs of the ground under the building and adjacent the building, the water tank and the electrical meter box and submitted: • The supply to the water tank runs underground in a "U" configuration, and

[32] Presumably the applicant is referring to lifting the building to a height of 1300mm above ground level, as opposed to lifting the building an additional 1300mm from its current height.

	the tank is in poor repair with cracks. • The level of water in the tank is often below flood levels, which would lead to ingress into the tank. • The expert's report shows photographs of outlets with a build-up of silt on the termination points as a result of flooding. • Though it has dried considerably since February, the photographs under the house show water still under the house and algae present. • Due to the presence of sewerage and other contaminants deposited under the house in flood events, "the house is insanitary [for] more time than its not".

B.3: The second draft determination and submissions in response

The Ministry 19 October 2018	A second draft was issued to the parties for comment. The draft concluded: • A determination could not be made on the exercise of the authority's powers of decision in lifting the insanitary building notice in 2010, because of the lack of records available to establish the status of the building when the authority made its decision. • The building does not meet the test of an insanitary building under section 123 of the Act and therefore the determination does not reverse the authority's decision to lift the insanitary building notice. None of the issues identified or evidence provided (the mould spotting and presence of silt, the drainage at the site, the supply of potable water) are sufficient to establish that the building meets the threshold of an insanitary building under section 123(a). • A determination could not be made on the exercise of the authority's powers of decision in granting the building consents without notification under section 36(2) of the former Act because of the lack of records to establish the basis on which the authority granted the consents, and whether or not the site was subject to a natural hazard at that time and whether this would have been apparent to the authority. There are a number of reasons for an owner wishing to raise a house, and while it has clearly reduced the impact of flooding on the building, there is insufficient information to establish this was the reason for lifting the house or that the site was prone to inundation prior to the work being carried out. • The test of whether the building is dangerous under section 121 of the act does not extend to consideration of whether the occupants can or cannot leave the property during a flood event; however part of the building, the carport structure, meets the test of a dangerous building under section 121 of the Act.
The applicant 29 October 2018	Contested the findings that the building is not an insanitary building under the Act and that a determination could not be made on the authority's decision to lift the insanitary building notice, submitted: • The insanitary building notice clearly required building work to be carried out. • Leaving the unpainted porous wall linings in place to dry naturally does not comply with the notice. • Placing the burden on the applicant to provide evidence of insanitary conditions, suspect electrical and plumbing services is unjust, when these conditions have been shown to exist by the insanitary building

	notice and the authority's code compliance inspection. • The conclusion of the determination that cleaning and drying, in a building with known unresolved weathertightness issues, and leaving contamination is not acceptable and goes against the intent of the Act.
The authority 31 October 2018	Did not accept the findings of the draft. In respect of the finding that the authority failed to issue a notice to rectify, submitted that the authority's inspection occurred as the owner had engaged the authority to undertake the inspection, demonstrating a level of engagement with the authority, and an effort to obtain a code compliance certificate. As such, the authority took a graduated response to the non-compliance. The authority's records noted the defects and the owner was given written notification of the unresolved building work that required attention.
The applicant 3 November 2018	Submitted the authority's statement that it was taking a graduated approach to compliance contradicts previous correspondence from the authority which shows the authority was not taking any action. Provided an email from the authority setting out its view of whether there were outstanding matters to be resolved.
The applicant 8 November 2018	Submitted: • The work required to comply with the insanitary building notice was not carried out. A building consent for this work was required, and this would have triggered notification. • Allowing unpainted, contaminated porous wall linings to dry out naturally as an alternative to removal and replacement is not acceptable and sets a precedent for flood affected buildings. • The authority had a responsibility to ensure the requirements of the insanitary building notice were met. The authority failed to enforce the Act and Building Code. The authority has also changed its version of events numerous times. • The authority is aware of the history of flooding, and there are records of the events. It is an unmonitored area, so it is not surprising that there is little data. Flooding in the area has been documented for over 100 years, and the Government, Whangaroa County Council (predecessor to the authority) and the authority are aware of flooding in the area. Other houses in the valley have suffered similar damage, and were required to be raised, and fully repaired, and there was a Government fund to assist with this work. • The applicant has suffered from stress-related illness related to concerns of injury or death that may result in a flood event. • Provided a submission containing observations about the 2014 and 2018 floods.

B.4: The third draft determination and submissions in response

The Ministry 24 December 2018	A third draft was issued to the parties for comment. The draft maintained the conclusions in the second draft in relation to the exercise of the authority's powers of decision in lifting the insanitary building notice; as the building is not currently insanitary the decision is confirmed; the land is subject to inundation and the consents were incorrectly issued without notification of the natural hazard; the authority failed to issue a notice to rectify in relation to non-compliant building work and work carried out without building consent; the carport structure meets the test of a dangerous building.
The applicant 7 January 2019	Reiterated that none of the remediation required in the insanitary building notice was carried out.
The authority 17 January 2019	Maintains the view that a graduated response was appropriate in relation to the failed final inspection.