



Building Consent Authority Complaint 2016/004

7 October 2016

COMPLAINT AGAINST THE BUILDING CONSENT AUTHORITY OF PALMERSTON NORTH CITY COUNCIL

1. The matters of complaint

- 1.1 This is a complaint under Part 3 Subpart 1 of the Building Act 2004¹ made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The complaint was lodged by G Hughes (“the complainant”) and received by the Ministry on 28 January 2016. It has been lodged under section 200 of the Act against the building consent authority of the Palmerston North City Council (“the BCA”).
- 1.3 Several matters were raised in a submission accompanying the complaint. Some of these matters relate to the land information memorandum (LIM) issued by the BCA in relation to the complainant’s property. LIM reports, and the BCA’s functions in relation to them, are governed by the Local Government Act 2002, and as such fall outside the scope of a complaint decision under the Building Act 2004 (“the Act”).
- 1.4 In addition, the complainant has raised matters related to the original building consent issued to a previous owner for the existing house on the complainant’s property. As the consent was issued on 11 March 2004, before the current Act came into force on 30 November 2004, it too is excluded from the scope of the complaint. However, I have taken into account some of the background information relating to this earlier consent where relevant.
- 1.5 The balance of the complaint relates to the BCA’s exercise of its functions in applying the natural hazard provisions in sections 71 to 74 of the Act when considering the complainant’s building consent application (No. 38031) for building works on the complainant’s property, and what the complainant considers is to be unreasonable delays as a consequence. I note here that the complainant was formally advised by me on 2 March 2016 that the question of whether the BCA reached the correct decision as to whether the building work is on land subject or likely to be subject to a natural hazard was a matter to be addressed by way of a determination²; this complaint considers the way in which the BCA processed the building consent application, including how it applied the natural hazard provisions.

¹ The Building Act, Building Code, past complaint decisions and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² A determination is a binding decision made by the Ministry providing a way of solving disputes or questions about the rules that apply to buildings, how buildings are used, building accessibility, and health and safety.

- 1.6 Accordingly, the matter for complaint under section 200(1) is the BCA's alleged failure, without good reason, to properly perform its functions in processing the building consent application No. 38031 and in particular in respect of the natural hazard provisions in sections 71 to 74 of the Act and the requirement for notification under section 73.
- 1.7 Unless otherwise stated in this complaint, all references to sections are to sections of the Act and all references to clauses are to clauses of the *Building (Accreditation of Building Consent Authorities) Regulations 2006* ("the BCA Regulations"). The relevant legislation discussed in this complaint decision can be found in Appendix A.

2. Background

- 2.1 In January 2013, the complainant was considering whether to purchase the subject property which has an area of approximately 3 ha. As part of the pre-purchase investigations, the complainant applied for a LIM report in respect of the property, and this was issued on 5 February 2013. The LIM report showed that the building consent for the existing dwelling had been issued on 11 March 2004, and that a code compliance certificate had been issued in respect of this. The report made no mention of the property being subject to slippage.
- 2.2 A registered engineer's ("the original engineer") 'Statement of Professional Opinion as to the Suitability of Land for Subdivision' was attached to the LIM report. This unsigned opinion was prepared on 28 June 2002 in relation to the original subdivision. It states, among other things, that most of the hillside sites created by the subdivision 'will require some degree of ongoing management by the owners', mainly by way of maintaining vegetation on the slopes to help prevent erosion; and recommended that '...some checks be required at building consent stage on those properties immediately adjacent to the steepest slopes in order that dwellings are constructed at safe distance behind any potential failure lines'.
- 2.3 The complainant subsequently purchased the property, and in June 2014 submitted plans and an application for a building consent to the BCA to enable the existing dwelling to be renovated and extended.
- 2.4 The BCA requested some further information, and there was a discussion between the parties about the location of the proposed effluent disposal field. This was resolved and a new layout for the proposed field approved on 3 July 2014. As part of this process, the BCA supplied the complainant with information about developable and undevelopable land within the Aokautere Development Area as set out in the Palmerston North City Council District Plan, and the complainant provided a copy of a letter dated 22 July 2003 from the original engineer that set out an appraisal of the location of a safe building platform on the complainant's property.
- 2.5 On 3 July 2014, the BCA sent a letter to the complainant advising that, in processing the application for a building consent the BCA had assessed the suitability of the complainant's property for building and identified that the land was 'subject to slippage'. The letter went on to state that:

Sec 71-74 of The Building Act refers to limitation and restrictions on building on land subject to natural hazards...Sec 72 states that [the BCA] must grant a building consent if [it] considers that the application for building consent will not accelerate, worsen or result in a natural hazard. The alterations you are proposing will not.

As a condition of your building consent application we are required to notify the Registrar-General of Land (LINZ) of this natural hazard. We are required to register a

Sec 72 certificate condition...Please advise [the BCA] in writing or email if you are in agreement to have this registered against your certificate of title, or if you would prefer to withdraw your building consent.

- 2.6 Following this letter, various correspondence and discussions passed between the parties about:
- whether the complainant's property was subject to a natural hazard (slippage)
 - whether a notice under section 73 of the Act ("a section 73 notice") would have to be registered against the property's certificate of title, or whether there were alternative options available for addressing the risk posed by the natural hazard.
- 2.7 In September 2014, the complainant instructed his solicitor to contact the BCA with a view to resolving the matter of the section 73 notice. From the copies of the correspondence that the complainant has provided, it would appear as if the BCA did not respond to the solicitor's emails.
- 2.8 On 13 October 2014, the complainant wrote a letter of 'formal complaint' to the BCA's Chief Executive, setting out the background to the dispute about whether or not his property was subject to slippage, and whether a section 73 notification was required. The letter raised 13 matters that the complainant requested answers to. On the same day, the chief executive advised by way of email that he had passed the matter to a senior officer to investigate and respond to.
- 2.9 In a letter on 23 October 2014, the BCA suggested that it instruct a geotechnical engineer to conduct a site inspection of the complainant's property to report on the 'matters raised in the building consent application'. In a letter dated 3 November 2014, the BCA clarified that suggestion, stating:
- The geo-technical engineers report will be limited to an assessment of the land, a determination of whether any of the exemptions in section 71(2) of the Building Act 2004 may be applicable, and the means by which any applicable exemptions may be achieved.
- The letter also stated that this inspection would be at the complainant's expense.
- 2.10 The complainant did not agree with this proposed course of action, and provided the BCA with several further documents that he considered relevant to the dispute. On or around 24 February 2015, there was a meeting between the BCA and the complainant to discuss the matter.
- 2.11 The complainant subsequently sought advice from the Ministry about the application of section 72, and an officer of the Ministry responded in an email dated 2 March 2015. The email explained the inter-relationships between sections 71, 72 and 73, and attached a copy of a determination which included a 'Building Sites Subject to Hazards – Decisions Tree' that authorities may use when making decisions about building consents for proposed building work on land that is subject to natural hazards ("the Ministry's decision tree").
- 2.12 On 5 March 2015, as no resolution had been reached, the complainant sent a further email to the BCA's chief executive following up on his formal complaint of 13 October 2014 and requesting a copy of the BCA's complaint procedure. Various correspondence subsequently passed between the parties, including an email on 9 March 2015 from the complainant to the BCA adding a further 10 matters of complaint (bringing the total to 23 matters of formal complaint).

- 2.13 On 5 March 2015, the complainant also sent a detailed email to the BCA setting out what he saw as the outstanding issues following the 24 February 2015 meeting, and attaching the Ministry's decision tree.
- 2.14 The BCA responded to this email and the matters raised in the February meeting in a letter dated 10 March 2015. The letter stated that the BCA had sought legal advice and given further 'technical consideration' to the various matters, and set out the BCA's position. This can be summarised as:
- 'The fact the LIM report did not disclose a natural hazard on the property has no impact on how the [BCA] applies the provisions of the Building Act 2004.' The decision-making process set out in sections 71 to 73 of the Act is not discretionary, the BCA must follow it.
 - The option of a covenant being registered against the property's title is not a 'viable option'. (Reasons were given for this.)
 - 'The LIM report does not indicate a building platform. The only reference in the LIM is to a building envelope in the architectural plans [for the existing dwelling]. No building envelope or platform was approved as part of the original building consent application for the property'.
 - The authority's concerns extend beyond the area indicated by the building envelope to the property as a whole. '[The BCA] considers that based on the proximity of the proposed building works to the natural hazard, the land subject to the natural hazard is intimately connected to the building.'
- 2.15 The BCA concluded that:
- On the information [the BCA] has received, it considers the land is subject to a natural hazard, namely slippage, however that section 72 applies and the building consent can be granted subject to a certificate being registered against the title to the property pursuant to section 72. However...it is prepared to consider further information provided by a geotechnical engineer to determine whether any of the exceptions in section 71(2) apply, which if they do will mean that no certificate will be necessary.
- 2.16 Following this letter, the complainant instructed a geotechnical engineer to carry out a survey of his property 'to determine whether the building site is stable and if not recommend remedial options to stabilise the property'. The geotechnical engineer provided a report dated 28 August 2015. The report classified the various areas of the complainant's property in terms of their risk of slope instability.
- 2.17 The assessment was carried out in accordance with the BCA's policy document, dated August 2005: "Development of Land Which is, or is Likely to Be, Subject to Erosion or Slippage – Policy Document" ("the BCA's policy document on erosion and slippage"). It found that 'All cross sections show that the house is located within the low risk zone however, the proposed extension lies close to the boundary of the low to moderate risk zone'. The report concluded (among other things) that:
- 4...The proposed extension is on land that is not subject to slippage...if the following provisions are carried out:
- a. No fill is placed beneath the proposed extension...
 - b. No water is discharged near the edge of the terrace slope...
- 2.18 On 16 November 2015, the BCA issued Building Consent No. 38031 for the building work on the complainant's property. The building consent was not stated to be subject to any conditions. However, the advisory notes in the appendix to the consent state:

VICINITY:

[BCA] records indicate areas of poor bearing in this vicinity. Further investigation and/or an engineer's report may be required prior to placement of reinforcing.

- 2.19 On 30 November 2015, the complainant wrote to the Palmerston North Mayor enclosing a draft of a complaint application to the Ministry and inviting the BCA's comment on it before it was submitted. In a letter dated 10 December 2015 the BCA declined to comment.
- 2.20 On 28 January 2016, the Ministry received the complaint. The Ministry acknowledged receipt of the complaint in letters dated 3 February 2016 to the complainant and the BCA and provided the BCA with the complaint details.
- 2.21 On 2 March 2016, the Ministry wrote to the complainant clarifying the matters that fell outside of the scope of a complaint under the Act (see paragraph 1.3). The letter also advised that if the complainant was seeking a decision as to whether his property was subject to a natural hazard then he should apply for a determination.
- 2.22 On 16 March 2016, the Ministry notified the parties that the complaint was accepted under section 200(2) of the Act.

3. Submissions**3.1 The complainant's initial submission**

- 3.1.1 The complainant made an initial submission setting out the background to the matter, as outlined in the paragraphs 2.1 to 2.19 above. In addition, the complainant described the steps he had taken to resolve the matter with BCA. The complainant listed the various outcomes he was seeking through the complaints process. Several of these outcomes relate to matters that do not come within the scope of this complaint (see paragraphs 1.3 and 1.4). The remaining matters relate to the BCA's processing of the building consent, which the complainant submits has '...caused excessive delays and extremely [sic] distress in what should have been a relatively simple process'.
- 3.1.2 The complainant provided copies of the following documents:
- The computer freehold register for the property, dated 28 January 2013.
 - The LIM report for the property dated 5 February 2013.
 - Correspondence and reports relating to the original subdivision of the property, and the 2004 building consent for the existing dwelling.
 - Various BCA information leaflets on building and planning matters, and applying for a LIM.
 - The BCA's policy document on erosion and slippage, dated August 2005.
 - Plans relating to the proposed building work, including the effluent disposal field.
 - Email and letter correspondence between the parties, and between the complainant and his advisors.
 - The Ministry's decision tree.
 - The geotechnical engineer's report dated 28 August 2015.
 - Building Consent No. 38031.

- Other miscellaneous documents related to the complaint.

3.2 The BCA's response to the complaint

3.2.1 The BCA responded in an email dated 29 April 2016. The BCA stated that it believed '...the processing of the building consent was carried out in accordance with the Building Act 2004, and with the current procedures and guidance available in regards to the matters of Section 71-74 of the Act.' It acknowledged that there had been 'many months of communicating' between the parties about whether there was a natural hazard on the land, and the effect this had on the building consent process. It also acknowledged that significant time had elapsed between when the complainant applied for the building consent and when it was eventually granted, but attributed this to delays in the complainant providing the requested information and the involvement of 'lawyers and specialist engineers' in the process.

3.2.2 The BCA summarised its view of the correct application of section 71 and 72 in this situation as follows:

[The BCA] was of the opinion that provided the building work was carried out wholly within a designated safe building platform (as determined by a suitably qualified person), and that platform was identified on a C/T plan and a suitable RMA consent notice description of the hazard was made, the consent could be granted under Section 71(2) of the Act. Without this, but with the appropriate suitable expert opinion, the consent could be granted under Section 72, and a registration on the C/T would be required...

Eventually, a geotechnical engineer provided (after several adjustments) a suitable report that satisfied [the BCA] that the consent could be granted without the need to register a Section 73 notice.

3.2.3 The BCA further advised that it had subsequently adopted a guidance document to help BCA officers when 'dealing with the subject of natural hazards when processing building consents and/or resource consent applications for subdivision'. The BCA provided a copy of this guidance, dated January 2016, entitled: "Natural Hazards Guidance Document: To be used for guidance when building on land which is, or is likely to be subject to a natural hazard" (hereinafter referred to as "the BCA's natural hazard guidance document").

3.3 The complainant's second submission

3.3.1 The complainant replied to the BCA's submission in an email dated 17 May 2016. The matters in the submission that are most relevant to the complaint can be summarised as follows:

- The complainant agreed that there were many months of communications between the parties, and added that '...it was the context of those communications, the lack of meaningful input from [the BCA] that now form part of this complaint'.
- The BCA should have been aware of the correct process to follow when making decisions about issuing building consents in relation to land that is subject to natural hazards, including the Ministry's decision tree and determinations on the topic.
- 'Sections 71 to 74 of the Building Act do not mention the need for registration of a designated building platform on the certificate of title, or the need for a suitable RMA consent notice.'

- The time between when the building consent was applied for and granted was ‘totally unacceptable rather than significant’, and was due to the BCA ‘changing their requirements’.
- While the BCA’s natural hazard guidance document ‘describes various methods to accommodate building works on sites subject to natural hazards, it does nothing for the [the BCA’s] implementation process’.

4. The draft complaint decision and further submissions

4.1 A draft of this complaint decision was provided to the complainant and the BCA on 29 June 2016.

4.2 The complainant responded on 5 July 2016, noting the following (in summary):

- The issues referred to in paragraph 1.3 have been raised and accepted for investigation by the Ombudsman.
- The complainant’s property falls outside the Aokautere Development Area and is therefore not covered by the developable/undevelopable land rule referred to in the District Plan.

4.3 The complainant’s response also included requests for clarification of some aspects of the analysis. I have amended the analysis as I consider appropriate.

4.4 The BCA responded on 22 July 2016, noting the following (in summary).

- There is no evidence that the BCA made an incorrect decision when applying sections 71 to 74 of the Act in granting the building consent.
- The BCA does not accept that there was an unacceptable delay.
- The BCA does not accept that its initial correspondence with the complainant was inadequate. The onus for proving compliance with the Building Code rests on the complainant. It is not for the BCA to advise him.
- The BCA had policies and procedures in place at the time for ‘receiving and assessing the building consent’. The ‘variability in communications is due to the ‘volume of communications’ from the complainant.
- The BCA does not accept that it failed to ‘take meaningful steps to respond to the complainant’s complaint’. There is ‘multiple correspondence’ between the parties on the matter, and a meeting was held.
- The BCA believes that its current policies and procedures relating to dealing with building consents for land subject to natural hazards are adequate and do not need further review.

4.5 The BCA’s response also clarified and made comment on some other aspects of the draft analysis. I have amended the analysis as I consider appropriate.

4.6 With its response the BCA also provided copies of:

- its procedure BCA T-19 relating to processing building consents, dated 8 April 2016³

³ I note here that this is relevant in terms of the BCA’s processing of current building consent applications, but that the complainant’s building consent application was lodged in June 2014

- its procedure BCA T-14 relating to building on land subject to natural hazards, dated 17 April 2014
 - its procedure BCA T-42 relating to building complaints, dated 22 May 2013
 - correspondence between the parties relating to the content of the geotechnical engineer's report (see paragraph 2.16)
 - correspondence between the parties relating to the complainant's formal complaint to the BCA.
- 4.7 The complainant responded to the BCA's response in an email dated 12 August 2016. I have also considered the points raised in this email in forming my analysis in this complaint decision.

5. Analysis

5.1 The Ministry's approach

- 5.1.1 I have undertaken enquiries on this matter including collecting evidence by providing the BCA with an opportunity to make submissions and provide a formal written response to the complaint, and providing the complainant with the opportunity to comment on any submission made by the BCA.
- 5.1.2 I have performed a careful and extensive review of the information collected and submissions provided to determine whether there is evidence of a failure without good reason and/or negligence on the part of the BCA in performing its functions under the Act.
- 5.1.3 I have allowed the complainant and the BCA the opportunity to provide further submissions on a draft of this decision prior to issuing the final decision.
- 5.1.4 I provided formal advice to the complainant about which of the matters raised in his complaint application fall outside the scope of section 200 of the Act, and the alternative avenues open to him to resolve these matters. This has included identifying those matters that would be best resolved by way of a determination.

5.2 General

- 5.2.1 Under section 200 of the Act, the Chief Executive may receive complaints alleging that a BCA has been negligent in or has failed or is failing, without good reason, to properly perform any of its functions. The functions of a BCA include issuing building consents, notices to fix and code compliance certificates, and inspecting building work for which it has granted consent.
- 5.2.2 Under section 203 of the Act, the Chief Executive has specified powers regarding a complaint. For a complaint to be upheld, after conducting an investigation and considering the submissions, I must be satisfied the BCA has failed without good reason to properly perform its functions or has been negligent in performing those functions.
- 5.2.3 In making this assessment, I can be guided by the provisions in the BCA Regulations, which set out various requirements that BCAs must comply with when performing their building control functions. Of particular relevance in the current case are the requirements in Clause 7 of the regulations in relation to the policies and procedures that BCAs must have, including in relation to receiving, checking and otherwise processing building consents. Clause 7(2) specifies that BCAs must have policies and

procedures covering how they provide information to people who want to apply for a building consent (clause 7(2)(a)), and how they check that applications for building consents comply with the Act (clause 7(2)(c)), and any relevant regulations made under it.

5.2.4 In considering whether or not the BCA has fulfilled its functions, I have taken into account the various submissions and documents provided by the parties, including their submissions on the draft complaint decision issued in this matter (see paragraph 4).

5.3 The performance of the BCA in assessing the building consent

The legislation

5.3.1 The matter of complaint concerns the BCA's performance of its functions in assessing an application for building consent for proposed building work on the complainant's land. The BCA took the view that the complainant's property is subject to slippage, and so applied the provisions in section 71 to 74 in assessing the building consent.

5.3.2 Accordingly, I must assess the BCA's actions in this context, that is, whether it has failed without good reason, or has been negligent in performing its functions in relation to assessing and granting the building consent for building work on land that is potentially subject to a natural hazard. The relevant legislation is sections 48 to 51, and 71 to 74 of the Act, and clauses 5 to 7 of the BCA regulations. The focus of the complaint is on the systems and processes that the BCA followed in exercising its functions.

5.3.3 Sections 71 and 72 of the Act set out the decision-making process that BCAs must follow when deciding whether or not to issue a building consent for building work on land that is potentially subject to a natural hazard. Essentially, sections 71 and 72 present a sequence of legal tests that BCAs must be satisfied are met before granting a building consent.

- Section 71 stipulates that a BCA must refuse to grant a building consent in certain cases for building work on land subject to natural hazards. The section only applies to consents for new buildings and major alterations to existing buildings.
- Section 72 provides an exception to section 71, and states that despite section 71, a BCA must still grant the building consent when certain conditions are met.
- Section 73 requires the BCA to notify, in this case, the Registrar-General of Land if the building consent is granted under section 72.

The issue that I must consider is how the BCA exercised its functions in following this process.

The information provided by the BCA

- 5.3.4 The BCA's letter of 3 July 2014 was its first notification to the complainant that it considered slippage to be an issue on his land. As the complainant has asserted, slippage was not mentioned in the LIM, so he had not been alerted to the issue via this mechanism.
- 5.3.5 The letter of 3 July 2014 presented the complainant with two options, namely to accept a section 73 notification with the record entered on the certificate of title or withdraw the building consent application. The letter makes no reference to the provisions in section 71(2) of the Act, which provide the complainant with a third option, namely to demonstrate to the authority that adequate provision has been or will be made to protect the land, building work, or other property from the hazard, or restore any damage to the land or property as a result of the building work. Subsequent correspondence from the BCA also did not raise this possibility, and does not provide substantive detail about the BCA's reasoning process. It appears that the first time that section 71(2) was raised by the BCA was in its letter of 3 November 2014, some four months after it had first identified the natural hazards issue.
- 5.3.6 In my opinion, the BCA should have taken this possibility into account and raised it with the complainant in the letter of 3 July 2014. Its presentation of only two options in that letter can easily be misconstrued as meaning there were only two options available to the complainant.
- 5.3.7 The next major written communication from the BCA that I have seen is the letter of 10 March 2015. This letter does set out in more detail the BCA's reasoning, and raises the possibility that one of the exceptions in section 71(2) could apply. The BCA states that:
- [It]...is prepared to consider further advice to determine whether any of the exceptions contained in section 71(2) of the Building Act may apply, and the means by which any applicable exceptions may be achieved to the satisfaction of [the BCA]. You may therefore wish, at your own expense, to obtain a report addressing these matters from a geotechnical engineer approved by [the BCA].
- 5.3.8 In my opinion, the BCA should have presented the complainant with this option in its letter of 3 July 2014. However, moving beyond the particular sequence of events in this case, I consider that the underlying issue is the quality of the information that the BCA provided about its decision-making processes, and the method by which it reached its decisions in this case.
- 5.3.9 If a BCA holds the view that a building consent must be issued under section 72 with a section 73 notification, then the BCA must clearly articulate its reasoning for coming to this position. I agree with the complainant that mere assertion that the building work is on land subject to a natural hazard is not enough, especially when, as is the case here, the LIM makes no mention of a natural hazard. The BCA must be able to substantiate its position to an owner.
- 5.3.10 The requirement to provide information is set out in Clause 7(2) of the BCA Regulations, which says that a BCA must have policies and procedures in relation to:
- (a) giving the following information, in writing or electronically, to a person who wants to apply for a building consent:
 - (i) how to apply for a building consent; and
 - (ii) how an application for a building consent is processed; ...
 - (b) checking applications for building consents; and

- (c) checking that the applications comply with the requirements that the act and any applicable regulations under the Act specify for applications, –

- 5.3.11 I consider in this case the BCA failed without good reason to properly perform its functions in this regard. Although I have not been provided with any information about how it reached the decisions expressed in its letter of 3 July 2014, it would appear that it initially failed to follow the decision-making process in section 71 correctly. In any event, the BCA did not provide adequate information to the complainant about how the decision had been reached, either in regard to the presence of a natural hazard, or the need for a section 73 notification. In communication to the complainant the BCA also initially overlooked the possibility of section 71(2) applying, instead presenting two options, neither of which takes into account the possibility of mitigating measures.
- 5.3.12 The letter of 10 March 2015 addressed the issue in more detail, but was provided some eight months after the building consent was applied for. It is notable that it was this letter that set the parties along a track that eventually led to resolution of the dispute, and in my opinion much of the delay and other matters underlying this complaint could have been avoided had the information been provided at the outset.
- 5.3.13 I also consider that the BCA should have alerted the complainant to the possibility of applying for a determination if he did not agree with the BCA's decision that the land was subject to or likely to be subject to a natural hazard.

The BCA's procedures and guidance document

- 5.3.14 With its response to the draft complaint decision dated 22 July 2016, the BCA provided me with a copy of its procedure for managing building consent applications for building work on land that is subject to natural hazards (BCA T-14). This procedure is dated 17 April 2014, so was in force for most of the time covered by this complaint. In its response, the BCA states that it considers this procedure 'sufficient'.
- 5.3.15 I do not agree that the procedure is sufficient for the stated purpose. Step 1 of the procedure involves identify if building is on land that is subject to natural hazards and states:
- 1.1 The planning officer will identify if a building on land is subject to natural hazards (i.e., erosion; falling debris; subsidence; inundation; slippage).
 - 1.2 If the planning officer considers the building work will not accelerate, worsen or result in a natural hazard on the land then building consent must be granted. A condition must also be put on the consent.

The procedure goes on to specify what happens next, including notifying the applicant that their land is subject to a natural hazard, and giving them the option of choosing not to proceed with their consent, or accepting a section 72 notification against the title of their land.

- 5.3.16 This is the procedure that was followed in the current case. However, there is no mention in the procedure to situations that come with section 71(2) of the Act: this is absent. As a result, there is no allowance for circumstances where hazards exist (or may accelerate, worsen or result due to the building work), but adequate provision has been, or will be, made to address them. This is a substantial omission, and in my opinion will lead to misapplication of the natural hazard provisions. I assume this procedure is still in place: if it is, the BCA should review and amend the procedure to ensure that it accurately reflects the provisions of the Act.

- 5.3.17 In response to the draft of this complaint decision, the BCA also provided me with its current procedure for processing building consents (BCA T-19). This procedure is dated 8 April 2016, so was adopted after the events in the current case. It includes provisions for processing consents in situations where a building site is subject to natural hazards. The BCA is of the opinion that this procedure is also 'sufficient'.
- 5.3.18 In my opinion, this procedure still fails to adequately communicate the decision-making process that the BCA should follow in these situations. While paragraph 2.6.8.1 of the procedure notes that the building officer will, among other things, determine whether adequate provision has been made to protect the land or other property, the following paragraphs (2.6.8.2 and 2.6.8.3) set out the procedure for a section 73 notification and the possibility of a building consent being refused. The fact that in certain situations neither of these options need apply and a building consent may still be granted is not specifically addressed.
- 5.3.19 In its initial submission, the BCA advised that it has now adopted a natural hazards guidance document for applicants to use in this situation. I commend the BCA for taking this step. I have been provided with a copy of this guidance, and note that it has been prepared by the BCA's solicitors. In my opinion, there is some information in this guidance that needs review. In particular, I consider the emphasis on shifting liability away from the BCA is not an appropriate or accurate representation of the purpose of the natural hazard provisions under the Act. I suggest that the BCA has the guidance peer reviewed by someone with the appropriate experience in this field. I note the Ministry is also able to peer review information that a BCA may wish to provide to the public.

The safe building platform

- 5.3.20 The complainant has raised the issue of the safe building platform or envelope, and what he saw as the BCA's failure to take this into account. I note that the opinion set out in the original engineer's letter of 22 July 2003 about a safe building platform was used by the designer in developing the original plans for the complainant's house: the same engineer's opinion verifying land stability was accepted by the BCA when issuing the subdivision consent. I also note that the original engineer was a practitioner with geotechnical expertise, and that he also specifically referred to, and made use of, the findings of another specialist geotechnical engineering firm in forming his opinion.
- 5.3.21 I agree with the BCA that in making subsequent and future decisions it is not bound by the original engineer's opinion. Although it would have been open to the BCA to take his opinion into account in assessing the complainant's application for a building consent, this would not have absolved the BCA of its responsibility for establishing the code compliance of the application. The BCA was correct to reconsider the provisions in sections 71 and 72 in regards to the complainant's building consent application.
- 5.3.22 I note that the BCA clarified its approach for the complainant in its letter of 10 March 2015. I broadly agree with the BCA's interpretation with respect to the decision-making process following the steps set out in the natural hazard provisions of the Act (refer paragraphs 2.14 and 2.15). However, I reiterate that had the BCA made the basis for its reasoning and decision-making clear to the complainant earlier in the process it would, in my opinion, have removed one of the main matters of contention.

Geotechnical report

- 5.3.23 The complainant's submission raised the matter of what he saw as the BCA's insistence that he obtain a geotechnical report. The BCA is correct that the onus of proving that proposed building work complies with the Act and Building Code rests with the applicant. I am of the opinion that the BCA's approach suggested in its letter of 10 March 2015 of appointing a geotechnical engineer to establish a means of fulfilling the requirements in section 71(2) was an appropriate option to offer. In my view, had the complainant adopted the BCA's suggestion at this point some of the delays and uncertainties associated with the matter could have been avoided. I note also that the BCA should have made the complainant aware that a determination could be sought if he disputed that the land was subject to a natural hazard.
- 5.3.24 I consider that the BCA's insistence, in its correspondence of November 2014, that it would instruct a geotechnical engineer of its choosing and at the complainant's expense, is outside the BCAs powers under the Act. While it may have been a suitable approach to offer, the BCA cannot force a building consent applicant to adopt a certain method or engage a particular engineer. It is for the applicant to propose a means, and for the BCA to accept or reject this.

Section 73 notice

- 5.3.25 The complainant raised the matter of the Section 73 notification and what he sees as the BCA's inconsistency in initially citing this as a requirement, but then not including conditions on the consent with regard to the placement of fill and discharge of water.
- 5.3.26 I have not reviewed the approved consent with respect to these items. However, under the Act the approved consent is required to adequately detail the proposed work, so that, when completed, the finished work will be code compliant. Substantive correspondence passed between the parties on the content of the geotechnical engineer's report and what measures this should contain in order to satisfy the BCA that the exception in section 71(2) applied.
- 5.3.27 In its submission, the BCA has clarified that as a result of the geotechnical engineer's report it was satisfied 'that the consent could be granted without the need to register a Section 73 notice'. Following the decision-making process laid out in sections 71 and 72 of the Act, this must mean that the BCA is now satisfied that adequate provision has been made in the consented plans to protect the land or building from the natural hazard under section 71(2)(a). In this case, there is no need to also include these provisions as a condition on the consent.

5.4 The BCA's complaints process

- 5.4.1 The complainant also raised concerns about the BCA's complaints process and what he sees as the BCA's failure to adequately address his and his advisors' queries and complaints.
- 5.4.2 The requirement to provide information is set out in Clause 7(2)(h) of the BCA Regulations, which says that a BCA must have policies and procedures in relation to 'receiving and managing complaints about building control functions'. In response to the draft of this complaint decision, the BCA provided me with its current procedure for receiving and managing complaints (BCA T-42) dated

22 May 2013. I note that, among other matters, this procedure sets timeframes within which complaints should be responded to.

- 5.4.3 The correspondence that I have seen shows that the BCA did take some steps to address the matters underlying the complainant's first formal complaint in October 2014, in particular by suggesting that a geotechnical engineer should be appointed to look into the matter. This approach was ultimately successful in resolving the complaint.
- 5.4.4 In response to the draft of this complaint decision, the complainant stated that the BCA failed to meet these timeframes. However, I accept that the current situation was a complex one for both the parties to resolve, and that in the circumstances the BCA has taken adequate steps in a sufficiently timely manner to resolve the complaint once it was made.
- 5.4.5 The complainant has also pointed out the BCA's complaints process '...fails to identify further avenues if the BCA is unable to resolve the complaint to the customer's satisfaction'. I agree with the complainant that this would be a useful addition to the procedure. In particular, the procedure should specify that complainants be alerted to the possibility of applying to the Ministry for a determination for matters that can be considered under section 177 or a complaint decision under section 200 of the Act, in situations where they are not satisfied with the outcome of their complaint to the BCA.

6. Decision

- 6.1 Under section 203 of the Act, I consider that in this instance the BCA failed, without good reason, to properly perform its functions in assessing the application for building consent No. 38031 for the complainant's property, in particular in respect of its communication with the complainant regarding the application of the natural hazard provisions in sections 71 to 74 of the Building Act 2004.
- 6.2 I consider the BCA should take into account the findings of this complaint decision and review its policies, procedures and systems for processing building consent applications on land that is, or is potentially, subject to natural hazards including natural hazards guidance. The BCA's focus should be on ensuring that its policies, procedures, systems, and information are in accordance with the *Building Act 2004* and the *Building (Accreditation of Building Consent Authorities) Regulations 2006*.
- 6.3 I require the BCA to provide me with a written report in six months' time detailing the results of the reviews in paragraph 6.2, and annexing copies of the relevant policies, procedures and systems. A copy of this report is also to be sent to the complainant for his information.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 October 2016.

John Gardiner
Manager Determinations and Assurance

Appendix A: The legislation and regulations

A.1 The Building Act 2004 – complaints

200 Complaints about building consent authorities

- (1) The chief executive may receive complaints alleging that a building consent authority—
- (a) has failed, or is failing, without good reason to properly perform any of the authority's functions under this Part or Part 2;
 - (b) has been, or is, negligent in performing those functions.
- (2) As soon as practicable after receiving a complaint, the chief executive must—
- (a) inform the building consent authority concerned of the complaint; and
 - (b) decide whether to accept or decline the complaint.
- (2A) The chief executive, in considering whether to accept or decline a complaint under subsection (2)(b), is not required to seek any information or submission from the building consent authority, and the building consent authority is not entitled to proffer any information or submission at that stage.
- (3) The chief executive must, immediately after making a decision under subsection (2),—
- (a) give written notice of the decision to the person who made the complaint and the building consent authority concerned; and
 - (b) if the chief executive decides to accept the complaint, proceed to investigate the complaint.
- (4) The chief executive may decline to accept, and is not required to investigate, a complaint that he or she considers vexatious or frivolous.

A.2 The Building Act 2004 – natural hazards

71 Building on land subject to natural hazards

- (1) A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if—
- (a) the land on which the building work is to be carried out is subject or is likely to be subject to 1 or more natural hazards; or
 - (b) the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.
- (2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—
- (a) protect the land, building work, or other property referred to in that subsection from the natural hazard or hazards; or
 - (b) restore any damage to that land or other property as a result of the building work.
- (3) In this section and sections 72 to 74, *natural hazard* means any of the following:
- (a) erosion (including coastal erosion, bank erosion, and sheet erosion);
 - (b) falling debris (including soil, rock, snow, and ice);
 - (c) subsidence:

- (d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding);
- (e) slippage.

72 Building consent for building on land subject to natural hazards must be granted in certain cases

Despite section 71, a building consent authority that is a territorial authority must grant a building consent if the building consent authority considers that—

- (a) the building work to which an application for a building consent relates will not accelerate, worsen, or result in a natural hazard on the land on which the building work is to be carried out or any other property; and
- (b) the land is subject or is likely to be subject to 1 or more natural hazards; and
- (c) it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned.

73 Conditions on building consents granted under section 72

(1) A building consent authority that is a territorial authority that grants a building consent under section 72 must include, as a condition of the consent, that the building consent authority will, on issuing the consent, notify the consent to,—

- (a) in the case of an application made by, or on behalf of, the Crown, the appropriate Minister and the Surveyor-General; and
- (b) in the case of an application made by, or on behalf of, the owners of Māori land, the Registrar of the Maori Land Court; and
- (c) in any other case, the Registrar-General of Land.

(2) The notification under subsection (1)(a) or (b) must be accompanied by a copy of any project information memorandum that has been issued and that relates to the building consent in question.

(3) The notification under subsection (1)(c) must identify the natural hazard concerned.

74 Steps after notification

(1) On receiving a notification under section 73,—

- (a) the Surveyor-General or the Registrar of the Maori Land Court, as the case may be, must enter in his or her records the particulars of the notification together with a copy of any project information memorandum that accompanied the notification;
- (b) the Registrar-General of Land must record, as an entry on the certificate of title to the land on which the building work is carried out,—
 - (i) that a building consent has been granted under section 72; and
 - (ii) particulars that identify the natural hazard concerned.

A.3 The Building (Accreditation of Building Consent Authorities) Regulations 2006.

7 Performing building control functions

- (1) A building consent authority must have policies and procedures for performing its building control functions.
- (2) The policies and procedures must cover the following:
 - (a) giving the following information, in writing or electronically, to a person who wants to apply for a building consent:
 - (i) how to apply for a building consent; and
 - (ii) how an application for a building consent is processed; and
 - (iii) how building work is inspected; and
 - (iv) how building work is certified; and
 - (b) receiving applications for building consents; and
 - (c) checking that the applications comply with the requirements that the Act and any applicable regulations under the Act specify for applications; and
 - (d) for applications that comply with the requirements that the Act and any applicable regulations under the Act specify for applications,—
 - (i) entering the applications in the building consent authority's building consent processing system; and
 - (ii) assessing the content of the applications; and
 - (iii) allocating the applications to employees or contractors to process; and
 - (iv) processing the applications to establish whether they comply with the requirements that the Act, the building code, and any other applicable regulations under the Act specify for buildings; and
 - (v) granting, refusing to grant, and issuing building consents; and
 - (e) planning, performing, and managing inspections; and
 - (f) issuing and refusing to issue code compliance certificates, compliance schedules, and notices to fix; and
 - (g) receiving and managing inquiries about building control functions, in addition to the inquiries that are received and managed under paragraph (a); and
 - (h) receiving and managing complaints about building control functions