

Surface water requirements for a residential development

1 THE MATTERS TO BE DETERMINED

1.1 The matters before the Authority are the validity of the following conditions attached to a building consent for the construction of two detached houses and associated carports:

- (a) A specified minimum floor level;
- (b) A specified outfall for the drainage system;
- (c) Certain landscaping requirements; and
- (d) An entry under section 36 of the Building Act to be made on the title.

(The word “conditions” used in the building consent is also used in this determination, although some of the so-called conditions are more properly described as amendments to the plans and specifications submitted with the application.)

1.2 The Authority takes the view that it is being asked in effect to determine whether those conditions are necessary for compliance with clause E1 of the building code (the First Schedule to the Building Regulations) and section 36 of the Building Act.

1.3 In making its determination the Authority has not considered whether the proposed building work will comply with any other provisions of the building code or of that Act.

1.4 The Authority has also not considered whether the conditions complained of are legitimate requirements under the Resource Management Act or any other Act except the Building Act. The Authority reads section 34(3) of the Building Act as a positive obligation on a territorial authority to grant building consent if satisfied on reasonable grounds as to compliance with the building code irrespective of requirements under other Acts. Section 35(3) makes it clear that issuing a building consent under the Building Act will not prevent the enforcement of any other Act.

2 THE PARTIES AND THEIR SUBMISSIONS

- 2.1 The applicant was the owner. The other party was the territorial authority.
- 2.2 Both parties made extensive submissions. Those submissions are referred to in relation to some of the disputed conditions but are not discussed in detail. However, they have been fully considered by the Authority and have been drawn on for the descriptions and discussions below. In particular, the Authority has relied on flood level estimates made by a consulting engineer who had been engaged by the territorial authority to prepare the drainage plan for the district. Those estimates were not disputed by the applicant.
- 2.3 Neither party made a clear statement as to whether it wished the Authority to hold a hearing at which it could speak and call evidence.
- 2.4 The Authority prepared a draft, but without following its usual practice of obtaining the assistance of expert consultants. The Authority issued that draft to the parties, asking them to indicate whether they accepted the draft or wished the Authority to hold a hearing, which would be confined to points raised in written submission on the draft. The applicant accepted the draft. The territorial authority, more than a month after the draft had been issued, replied that it “would prefer to make further submissions before making a choice between accepting your draft and proceeding to a hearing”. The territorial authority’s reply included submissions limited to the legal interpretation of section 36 (see 7 below).
- 2.5 The Authority had, of course, taken legal advice on that particular question of law in preparing the draft, and the Authority’s legal adviser confirmed that advice after studying the territorial authority’s submission. The Authority therefore decided that no useful purpose would be served by its holding a hearing on the question of law, and that in fairness to the applicant the determination should be issued in final form without further delay. Accordingly, this determination differs from the draft only in respect of this 2 and 7 below in respect of the section 36 notice.

3 THE BUILDINGS AND THE SEQUENCE OF EVENTS

- 3.1 The building consent is for the erection of two new detached houses and associated carports on a virtually level site which already contains an existing house.
- 3.2 One of the disputed conditions of the building consent is that the floor level of each of the proposed units shall be RL 59.1. The plans submitted for building consent show the floor level as RL 58.9, but in the course of the determination the applicant asked for a floor level of RL 58.52 to be approved.
- 3.3 The site is on an overland flowpath for surface water. Currently, during smaller events surface water from the local catchment flows across the site into a territorial authority drainage channel bordering one side of the site. The channel leads through a culvert under an adjacent road to a territorial authority drain. During larger events the culvert acts as a “choke”, restricting the flow from the channel and eventually causing it to overtop its banks. When that happens, surface water ponds on the site. That ponding eventually reaches a depth sufficient to overtop the crest of the road. Surface water

which overtops the road then flows to the territorial authority drain downstream of the culvert.

3.4 The territorial authority intends to alter its drainage system. The first stage of the alteration will be to construct a bund or embankment between the site and the channel. Removal of restrictions to the culvert entry will be undertaken at a later stage. The bund will prevent any overland flow across the site from discharging into the channel. If and when the intended alterations are completed, then during larger events there will be some reduction in the surface water level on the site, but in smaller events there will be a significant increase in that depth, see 3.6 below.

3.5 The Authority has no details of the proposed bund, but it seems likely to be a “building” for the purposes of the Building Act. If so, it will be required to comply with the building code subject to any waiver or modification issued by the territorial authority under section 34(4). The bund is described as collecting the overland flow of surface water until it ponds to a depth at which it flows over the road. Unless there is such a waiver, clause E1.3.1 would require the bund to be constructed so as to dispose of the surface water collected from the 10% storm “in a way that avoids the likelihood of damage or nuisance to other property”. The applicant did not raise that matter, and the Authority has received no submissions about it, so the Authority merely notes the point and has taken no account of it in this determination.

3.6 The depth of surface water on the site, and the corresponding level of surface water in each of the relevant circumstances, as estimated by the territorial authority’s consulting engineer, is:

(a) Currently:

10% storm:	30 mm	RL 57.93
2% storm:	300 mm	RL 58.2

(b) After the alterations:

10% storm:	200 mm	RL 58.1
2% storm	200 mm	RL 58.1

By “the 10% storm” and “the 2% storm” are meant the storms having a 10% and a 2% probability of occurring annually, also referred to respectively as “the 10% AEP” and “the 2% AEP” or “the 10 year flood” and “the 50 year flood”.

3.7 The applicant submitted that the territorial authority’s consulting engineer had advised that the bund “would fulfil no useful purpose and should not be built,” from which the applicant “assumed this project would be discontinued”. The territorial authority did not respond to that submission. The Authority considers that for the purposes of this determination it must assume that the territorial authority will in fact complete its intended alterations to its drainage system.

3.8 The Authority considers that all reasonably foreseeable circumstances must be considered in ensuring that the houses comply with the building code. In this case, therefore, the estimated surface water level is to be taken as RL 58.1 in the 10% storm and RL 58.2 in the 2% storm.

4 FLOOR LEVELS

4.1 The requirements of the building code

- 4.1.1 The relevant provision of the building code in respect of floor levels, in clause E1 “Surface water”, is:

Provision

E1.3.2 *Surface water*, resulting from a storm having a 2% probability of occurring annually, shall not enter *buildings*.

Limits on application

Performance E1.3.2 shall apply only to *Housing, Communal Residential* and *Communal Non-residential buildings*.

- 4.1.2 Neither party has suggested that clause B1 “Structure” or clause B2 “Durability” is relevant to this case.

4.2 The territorial authority’s condition

- 4.2.1 The territorial authority’s condition requires the floor level to be at RL 59.1, 200 mm higher than shown in the building consent application and 580 mm higher than subsequently proposed by the applicant.

- 4.2.2 That condition corresponds to a requirement in the territorial authority’s 1991 “Watercourse Guidelines” to the effect that the estimated surface water level in the 1% storm shall be 500 mm below the underside of the floor joists. As the territorial authority said:

Council has a regulatory role under the Building Act (Building Consents) and the Resource Management Act (Resource Consents). In some instances methods of complying with both Acts may not coincide. Customers are unlikely to appreciate having their attention drawn at a later time to an aspect of non-coincident criteria. In this particular case the governing criteria for floor levels is Resource Management Act not Building Act (ie. 500 mm above 1% AEP level).

- 4.2.3 The applicant disputed that 500 mm freeboard, submitting an opinion from a consulting engineer that:

In this situation, flow levels are relatively low and the flood is not in a confined valley situation. Consequently, 300 mm can be considered as adequate freeboard.

4.3 Discussion

- 4.3.1 The Authority considers that it is irrelevant to this determination whether the applicant’s proposed floor level complies with the territorial authority’s requirements under the Resource Management Act or any other Act except the Building Act. The Authority takes the view that section 34(3) of the Building Act prevents a territorial authority from refusing a building consent for work which complies with the building code even if it does not comply with requirements under any other Act. Such a requirement is to be enforced under the Act concerned, not by the refusal of a building consent under the Building Act.

- 4.3.2 The Authority considers that surface water does not enter a residential building until it reaches the floor level of the lowest habitable room in that building. In deciding whether water will enter a building, an appropriate allowance is to be made for:
- (a) Any uncertainties in the estimate of the surface water level; and
 - (b) Possible wave-type effects from water flowing around obstacles, vehicular traffic, wind, and other causes.

Such an allowance is generally referred to as a “freeboard”.

- 4.3.3 The Authority has had occasion to consider the practice of selected territorial authorities in this regard. Their required freeboards vary from territorial authority to territorial authority with a range of 150 to 500 mm. The necessary freeboard might well depend on the particular circumstances of the case concerned, so that any particular freeboard used in practice by any particular territorial authority should be subject to appropriate modifications to suit the particular circumstances of the building concerned.
- 4.3.4 In this case, the territorial authority has a policy of requiring a freeboard of 500 mm. The applicant’s consulting engineer suggests that 300 mm would be appropriate. However, that does not appear to take account of waves due to the movement of vehicles or other causes, and therefore cannot be accepted as being more appropriate than the 500 mm required by the territorial authority. Therefore, and for the purposes of this determination only, the Authority accepts that 500 mm as appropriate, while pointing out that other values might be appropriate in other circumstances.
- 4.3.5 The estimated surface water level in the 2% storm is to be taken as RL 58.2. Together with the 500 mm freeboard, that results in a minimum floor level of RL 58.7.
- 4.3.6 The Authority therefore considers that, in order to comply with clause E1.3.2 of the building code, habitable rooms in the houses are to have a minimum floor level of RL 58.7.

5 OUTFALL

5.1 The requirements of the building code

- 5.1.1 The relevant provisions for outfalls in the building code are:

E1.3.1 Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water, resulting from a storm 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.

E1.3.3 Drainage systems for the disposal of *surface water* shall be constructed to:

- (a) Convey surface water to an appropriate *outfall* using gravity flow where possible,
- (e) Avoid the likelihood of damage to any *outfall*, in a manner acceptable to the network utility operator . . .

Where “outfall” is defined as:

That part of the disposal system receiving surface water . . . from the drainage system. . . . For surface water, the outfall may include a natural water course, kerb and channel, or soakage system.

5.2 The territorial authority's condition

5.2.1 The territorial authority's condition is that surface water from the site is to be discharged under the road into the territorial authority's drain mentioned in 3.3 above instead of into the drainage channel bordering the site.

5.2.2 The territorial authority stated its reason for that requirement as follows:

The important point to note is that in the 10% AEP event the flood level in the [drainage channel] reaches the ground level at [the site]. As a result the site will flood more frequently than the 10% AEP event if the [drainage channel] is a drainage outlet, given the necessity to have outlets below ground level and pipelines to have sufficient fall. Accordingly site drainage discharging to [the drainage channel] is not considered an appropriate discharge point.

5.2.3 The territorial authority also said that the outfall into the drainage channel:

. . . could well act as a source of flooding waters as they backflow from the channel. This backflow can be alleviated to a degree by backflow prevention. However, these preventors have a history of regular blockage and inadequate maintenance.

5.2.4 The consulting engineer engaged by the territorial authority to design its drainage system said:

To discharge the 10%AEP flow from the site to the [territorial authority drain rather than to the drainage channel] would require about a 600 mm diameter pipe [approximately 100 m long], together with a large stormwater collection system. Conventional cesspits would not be adequate. A grated opening of the order of 1050 mm diameter would be required. . . . A 600 mm diameter pipe in this location would have minimal cover and therefore would require specific design.

However, the consulting engineer also said:

. . . the proposed development . . . will not exacerbate flooding conditions on the property, or (if ground surfaces are not disturbed) the adjoining properties . . .

5.2.5 There has been no suggestion that ground surfaces will be disturbed to such an extent as to exacerbate flooding on other property.

5.2.6 The applicant's consulting engineer said:

The [site] has been considered part of the catchment to the [territorial authority's] choke point. Diversion of the water to a point downstream of the choke is contrary to the purposes of the choke.

5.2.7 In a subsequent submission, the territorial authority said:

We are not aware that the B.I.A. has the power to direct a utility operator where and how someone is to connect to their network. Council operates the stormwater network in this area. To assist the customer, it is common practice to advise via a building consent condition or endorsement on an applicant's submitted plan of a satisfactory stormwater connection point if the one indicated on the submitted plan is not acceptable to Council (ie. Council as stormwater network operator). In this case, the approved connection is downstream of a [regional council] choke device. This is across the road from [the site concerned]. The applicant sought a connection upstream of the choke via a neighbouring property.

5.3 Discussion

5.3.1 Clause E1.3.3(a) requires the outfall to be "appropriate". The Authority considers that an outfall is not an appropriate outfall if it does not conform to the network utility operator's lawful management of its drainage system. That management will have to take account of other matters as well as of the requirements of the Building Act and the building code, see 1.4 above.

5.3.2 However, the Authority cannot simply wash its hands of the matter by saying say "it is the territorial authority's system, the territorial authority can do whatever it likes". For one thing, the Authority understands that a territorial authority can never "do whatever it likes", it can do only what it is authorised to do by statute. For another thing, the Authority is legally obliged to determine whether the applicant's proposed site drainage system, including its outfall, complies with the building code.

5.3.3 It is irrelevant to this determination whether the applicant's proposed outfall complies with the territorial authority's requirements under the Resource Management Act or any other Act except the Building Act. The Authority considers that section 34(3) of the Building Act prevents a territorial authority from refusing a building consent for building work which complies with the building code whether or not that work complies with a requirement under any other Act. Such a requirement is to be

enforced under the Act concerned, not by the refusal of a building consent under the Building Act.

- 5.3.4 The territorial authority has not mentioned any management matters under any other Act which would prevent the outfall from being appropriate. As to the building code, the territorial authority did not suggest that the proposed outfall would damage its drainage system in any way.
- 5.3.5 Clause E1.3.1 is concerned to safeguard “other property” from surface water in the 10% storm.
- 5.3.6 The territorial authority’s condition is concerned to ensure that the site does not “flood more frequently than in” the 10% storm (despite its consulting engineer’s statement that the proposed development would not exacerbate flooding conditions).
- 5.3.7 Clause E1.3.1 of the building code, on the other hand, refers to surface water resulting from a 10% storm “which is collected or concentrated by buildings or sitework”. In this case, the bund and the road will “collect” surface water from a 10% storm to a depth of 200 mm on the site whether or not the proposed building work is even undertaken. Any collection or concentration of surface water by the proposed buildings and sitework are therefore irrelevant unless it increases that 200 mm depth.
- 5.3.8 The matter before the Authority is whether, in the 10% storm, the applicant’s proposed outfall into the drainage channel will avoid damage or nuisance to other property as required by clause E1.3.1 of the building code. There has been no suggestion that there would be damage to the drainage channel in particular or the territorial authority’s drainage system in general.
- 5.3.9 In the 10% storm, surface water from the site cannot be discharged by outfall into the drainage channel because the water level in the channel will be at or above the general ground level of the site. However, the Authority has been given no reason to believe that an outfall into the territorial authority’s drain will do anything to safeguard other property against damage by surface water. After all, in the 10% storm the site and surrounding areas will be flooded in any case.
- 5.3.10 The Authority accepts the territorial authority’s point that back flow, from the drainage channel through the site drainage system to the site, is to be prevented. The Authority does not accept that “a history of regular blockage and inadequate maintenance” is reasonable grounds for refusing to consider provisions proposed for that purpose.
- 5.3.11 The Authority concludes that the outfall into the drainage channel is acceptable provided the site drainage system complies with the building code in all respects, including the provisions to prevent back flow. It is not for the Authority to design an appropriate site drainage system. That is a matter for the applicant to propose and for the territorial authority to consider. The territorial authority will need to be satisfied on reasonable grounds that the proposed system will avoid the likelihood of damage or nuisance to other property in the 10% storm.

6 LANDSCAPING

6.1 The requirements of the building code

6.1.1 The relevant provision of the building code is clause E1.3.1 set out in 5.1.1 above.

6.2 The territorial authority's condition

6.2.1 The condition attached to the building consent reads:

Landscaping on the site is to ensure the free flow of water across the site. ie: all fencing and similar features are to have a freeboard of 300 above the proposed finished surface level.

6.2.2 The applicant does not dispute the need to allow water to pass freely across the site, and proposes to use fences that are permeable. The applicant's consulting engineer said:

While this condition is in theory a good way to ensure the free flow of surface water, in practical terms it would be better to install permeable fencing which future owners are unlikely to compromise. Trellis fencing would be the most appropriate type in this situation. As overland flow rates are small and the flood depth is more in the nature of ponding, I consider permeable fencing would have no significant effect on the flood risk.

6.2.3 The territorial authority responded:

Trellis fencing to ground level would be liable to screen out and collect floating debris. In addition the land owners on either side may be encouraged to grow plants to effect a total screening.

6.2.4 The applicant also submitted that 300 mm freeboard on the bottom of the fences "will look stupid" so that "future owners will almost certainly close up the freeboard", so that it is more sensible to use a trellis design.

6.2.5 The territorial authority responded:

The purpose of the 300 mm freeboard on the bottom of fences is to ensure free passage of flood water, which the applicant calculated to have a 2% AEP velocity of 2 m/sec or less.

6.3 Discussion

6.3.1 In this case, "landscaping" appears to be confined to walls and fences, which are "buildings" for the purposes of the Building Act, but the term "landscaping" could also include "sitework" as defined in that Act. Both "buildings" and "sitework" are required to comply with the building code.

6.3.2 The Authority has been given no reason to believe that providing a 300 mm clearance below fences, rather than using trellis or the like, will do anything to safeguard other property against damage by surface water in the 10% storm (the 2% storm referred to in the territorial authority's submission is irrelevant).

- 6.3.3 The Authority concludes therefore that, as the applicant intends to use permeable fences, the condition requiring 300mm freeboard is not necessary for compliance with the building code and is therefore invalid.

7 SECTION 36 NOTICE ON THE TITLE

7.1 General

- 7.1.1 As mentioned in 2 above, the parties accepted a draft of this determination (“the draft”) in all respects except that the territorial authority did not accept the Authority’s view on the interpretation of section 36.

- 7.1.2 The Authority’s view as to the interpretation of section 36, adopted on legal advice, has been previously published¹ and was reiterated in the draft. The Authority recognises the force of the territorial authority’s submissions, but in the absence of case law the Authority is not persuaded that it should change its own established view. Because the matter is of general interest, the competing legal arguments are set out below in more detail than is usual in a determination.

7.2 The provisions of section 36

- 7.2.1 The relevant provisions of section 36 are:

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 . . . grant the building consent, and shall include as a condition of that consent that the territorial authority shall . . . notify the District Land Registrar [who] shall

¹ See the article “Section 36 ‘Building on land subject to erosion’” in the Authority’s newsletter *Building Industry Authority News* No. 32, April 1994. That issue included the usual disclaimer to the effect that binding legal interpretations can be issued only by the Courts, that interpretations published by the Authority were offered on a no-liability basis, and that in any particular case those concerned should consult their own legal advisers.

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. . . .

7.3 The territorial authority's condition

7.3.1 The territorial authority's condition attached to the building consent reads:

Appropriately worded Section 36 notices (Building Act), that the whole site floods and the site must not be developed to alter this flood flow, will be required to be registered on the titles of all properties comprising this consent . . . to Council approval. All costs to be borne by the applicant.

7.4 The Authority's jurisdiction to consider the matter

7.4.1 The relevant provisions of the Building Act are:

17. Matters of doubt or dispute relating to building control - (1) If any doubt or dispute arises in respect of-

(b) The territorial authority's decision in relation to-

(ii) Any condition attached to a building consent . . .

any of the parties may apply to the Authority for a determination in respect of the doubt or dispute.

18. Matters before Authority - An application to the Authority under section 17 of this Act shall be limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code, or to whether or not the exercise by a territorial authority of the powers referred to in section 17(1)(d) of this Act is unreasonable in relation to the provisions of the building code.

7.4.2 Whether an entry should be made on the certificate of title under section 36 is at least partly a question of law. The Authority is not a Court and cannot determine questions of law. However, in the course of making any determination the Authority must inevitably take particular views on questions of law, if only by implication as regards its own jurisdiction to make the determination concerned. In this case, the Authority considers that its jurisdiction to consider the validity of the condition arises out of the view that it takes of section 36.

7.4.3 Accordingly, in the draft the Authority addressed the requirement for a section 36 entry to be made on the title while drawing attention to the fact that to the extent that it purported to answer a question of law the determination would be subject to appeal under section 86.

7.4.4 In its submissions on the draft, the territorial authority said:

Where, as here, the jurisdiction of a body is expressly limited by its empowering statute, it cannot be right that such a limitation can be circumvented merely by the observation that if the Authority is not empowered to do so then there is a right of appeal. The proper course is for you to acknowledge and stay within your express statutory jurisdiction.

7.4.5 On the view taken by the territorial authority, that a section 36 notice is required simply because the land is subject to inundation, whether or not the proposed building complies completely with the building code, the Authority has no jurisdiction. However, the Authority takes the view that a section 36 notice is not required if the proposed building work complies completely with the building code. On that view, the matter for determination is whether or not the building work does comply completely with the building code, a matter which is clearly within the Authority's jurisdiction under section 18.

7.5 The territorial authority's interpretation of section 36

7.5.1 In its original submissions, the territorial authority said:

It is mandatory for Council to notify the District Land Registrar under Section 36 of the building code when issuing a Building Consent on land subject, inter alia, to inundation. In this case both Council and the applicant agree that the land is subject to inundation (flooding). We therefore are not able to agree to the applicant's request not to notify the District Land Registrar.

7.5.2 In its subsequent submissions on the draft, the territorial authority said:

The essence of section 36 is to do with the bearing of risk associated with building on land subject to a natural hazard. There is a significant body of case law, developed prior to the passage of the Act, placing heavy burdens on councils in relation to the granting of building permits in respect of land subject to natural hazards. Section 36 provides a relatively straightforward mechanism for that burden to be shifted to the owner of the building. As the High Court observed in *Coromandel Peninsula Watchdog Inc v Hauraki District Council* [1997] 1 NZLR 557:

"It is to a local authority's advantage to issue a consent under Section 36(2) rather than Section 36(1) because the effect of section 36(4) of the Act is to exempt the local authority from legal liability therefore . . . The result is that a permit (sic) can be granted under Section 36(2) with the limitation of liability of the Council, but a "blot" is registered against the title to the property to warn purchasers of the problem. What Parliament has done is that the risk is put firmly on the developer, but potential purchasers are warned of the risk."

As that passage highlights, the key concern for a council when determining whether to grant a building consent is whether section 36(1) or section 36(2) takes precedence.

At paragraph 7.4.1 of your draft determination, you say that section 36(2) applies only when a building consent is required to be refused under section 36(1). Furthermore you do not accept that a section 36 notice is required merely because the land concerned is or is likely to be subject to one of the relevant natural hazards.

In the Council's view, this approach is contrary to the plain words of section 36. We think that section 36(2) should be applied where the relevant circumstances occur: that the building work will meet the requirements of section 34 of the Act and will not accelerate, worsen or result in the natural hazard, but the land is nonetheless subject to that hazard. If, on the other hand, the building work is likely to accelerate, worsen or result in the hazard, then no consent should be granted unless adequate protective provisions are made in relation to the hazard or there is adequate restoration of any damage as a result of the building work.

The relationship of the two subsections is made particularly clear by the beginning words of 36(1):

“Except as provided for in subsection (2) of this section, . . .”

Potential confusion arises because subsections (1) and (2) appear to be in the wrong order. It appears to us that section 36(1) is relevant only in situations where section 36(2) is not applicable.

The distinction between the two subsections is in the effect of the building work. Where the effect will be to accelerate or worsen the condition of the land, section 36(1) applies. Where this is not the case section 36(2) applies. It follows, consistent with the purpose of the Act to provide necessary controls relating to building work, that where the building work will exacerbate a situation then consent should not be granted (section 36(1)), but where the work will not exacerbate the situation then consent shall be granted, but with a warning to the owner and all future owners of the hazard (section 36(2)).

In this case, all parties agree that the site is subject to the natural hazard of inundation or flooding, but that the proposed building work complies completely with the building code. It is clear that the building work will not of itself accelerate, worsen or result the condition of the land. However, as the land is subject to flooding, it comes within the ambit of section 36(2)(b). As a result section 36(2) does apply in this situation and so takes precedence over section 36(1).

As a result, the Council is satisfied that it is under a statutory duty to grant the building consent but subject to a condition which results in an entry being made on the certificate of title by the District Land Registrar warning that a building consent has been issued in respect of land which is subject to a natural hazard. We disagree with your draft determination that such a condition in this case is invalid.

- 7.5.3 The territorial authority also made submissions on certain comments in the draft as to the wording of the section 36 notice itself. In the light of those submissions, the Authority has omitted those comments from this determination.

7.6 The Authority's interpretation of section 36

7.6.1 The following is an expanded version of what was in the draft which takes account of the territorial authority's submissions set out in 7.5 above.

7.6.2 The Authority accepts that the essence of section 36 is to do with the bearing of risk associated with building on land subject to certain natural hazards. What is that risk? It is clearly identified in section 36(4) as being the risk to the territorial authority of:

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 land on which the building was situated was, or was likely to be, subject to damage arising, directly or indirectly, from [the listed hazards].

7.6.3 It is almost always possible, although frequently expensive, for buildings situated on such land to be designed and constructed so as to comply completely with the building code, which requires account to be taken of each of the listed hazards.

7.6.4 If the territorial authority is satisfied that the building complies completely with the building code, then the risk to the territorial authority is no different from that associated with any other building, namely the risk that the territorial authority did not in fact have reasonable grounds on which to be satisfied as to compliance, see section 34(3). It seems unlikely that Parliament would have intended territorial authorities to be protected against negligence in respect of the listed hazards but not in respect of other natural hazards, such as wind or earthquake, which are not listed in section 36.

7.6.5 It is only if the territorial authority grants a waiver or modification of the building code under section 34(4) that there is an additional risk related to the natural hazard. Therefore, in the Authority's view, the intention of section 36 is to protect territorial authorities against liability only if it has granted a waiver or modification of the building code on the condition that any risk arising from that waiver or modification is "put firmly on the developer".

7.6.6 A section 36 notice also serves as a warning to potential purchasers. That warning is identified in section 36(2) as being that:

a building consent has been issued in respect of a building on land that is described in [section 36(1)(a)].

7.6.7 There is no requirement to identify the particular hazard or hazards concerned, and the warning is required only if the building consent was issued in accordance with section 36(2). Thus the warning does not relate to the land itself so much as to the fact that the building is on hazardous land and that the building consent was issued under section 36(2). If the warning were intended to relate solely to the hazards of the land then why would it be given only when a building consent was issued? After all, the territorial authority is required to include similar warnings in project information memoranda issued under section 31 and also in land information memoranda issued under section 44A of the Local Government Official Information and Meetings Act, a section which is closely similar to section 31 of the Building Act and was enacted on the same day. The Authority understands that it is also common practice to include hazard maps in regional and district plans under the Resource Management Act.

7.6.8 As to the relationship between sections 36(1) and (2), the Authority's view is that section 36(1) requires the territorial authority to refuse building consent in certain circumstances except as provided for in section 36(2). In other words, if those circumstances exist, then a building consent must be refused under section 36(1) but may be issued under section 36(2).

7.6.9 The circumstances in which building consent must be refused under section 36(1) can be summarised as being that either:

- The land is subject to certain hazards and adequate provision has not been made to protect the land or the building work or any other property from those hazards, or
- The building work itself is likely to cause such hazards, and adequate provision has not been made to restore any damage to the land or to other property caused by the building work.

The word "land" is not defined, but there is legal precedent for considering that it means "the area of land on which it is proposed to erect or alter a building, the area enclosed by the perimeters of the proposed building work"².

7.6.10 In the Authority's view, building work which complies completely with the building code:

- Makes adequate provision to protect the land, the building work, and any other property from the hazards, and
- Will not itself cause such hazards (so that the question of restoring damage does not arise).

The territorial authority has no power to require anything more than compliance with the building code, see section 7(2). In other words, the territorial authority has no choice but to accept that compliance with the building code amounts to "adequate provision" in terms of section 36(1).

7.6.11 It follows, therefore, that if the building work complies completely with the building code then section 36(1) does not require the territorial authority to refuse building consent. On that view of section 36(1), section 36(2) provides for an exception in that a building consent refused under section 36(1) may be issued under section 36(2) but only if the work itself will not accelerate, worsen, or cause any of the listed hazards.

7.6.12 In practice, of course, it is often impracticable, if not impossible, to comply completely with the building code on land subject to those hazards. In the absence of complete compliance, section 34 prevents the territorial authority from granting a building consent except subject to a waiver or modification of the building code. If and only if such a waiver or modification is granted does it become necessary to consider whether a building consent required to be refused under section 36(1) can be issued under section 36(2). It is only if a building consent is issued under section 36(2) that a section 36 notice is required. In other words, a section 36 notice is not

² *Brooker's Building Law*, comment D36.09, written by Phillip Merfield, solicitor.

required unless the territorial authority grants a waiver or modification of the building code.

7.6.13 In this case, the proposed building work complies completely with the building code. No waiver of the building code is necessary and none has been suggested.

7.6.14 The Authority therefore concludes that a section 36 notice is not required and that the condition requiring such a notice is invalid.

8 CONCLUSION

8.1 The Authority concludes that the territorial authority's conditions attached to the building consent and disputed by the applicant are invalid for the reasons discussed above.

8.2 The Authority emphasises that its decision is made in terms of the Building Act only, and it makes no comment as to whether the conditions can be enforced under any other Act.

9 THE AUTHORITY'S DECISION

9.1 In accordance with section 20(a) of the Building Act the Authority hereby reverses the territorial authority's decision to attach the disputed conditions to the building consent.

9.2 The Authority determines that a building consent is to be issued for the building work specified in the building consent application subject to the following amendments:

- (a) The floor levels may be reduced to a minimum of RL 58.7;
- (b) The plans and specifications attached to the application for building consent are to be amended in respect of the site drainage system as discussed in 5.3.11 above;
- (c) Fences are to be permeable as discussed in 6.3 above; and
- (d) There is to be no entry on the certificate of title under section 36 of the Building Act in respect of the building consent concerned.

Signed for and on behalf of the Building Industry Authority on this 17th day of July 1998

W A Porteous
Chief Executive