

## Determination 2006/49

### Issue of a Building Consent Authority declining to issue a Building Consent at 25 Le Roy Terrace Birkenhead



#### 1 The dispute to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is Riley Consultants Limited (“the applicant”) acting on behalf of the owners, John Lewis and Heidi McClure, and the other party is the territorial authority, North Shore City Council (“the territorial authority”) which is the relevant building consent authority in this case.

1.2 The dispute to be determined is whether the building consent authority should issue a building consent for a proposed house to be built on this site which may be subject to a natural hazard of inundation, taking account of sections 71 and 72 of the Act.

<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz)

## 2 The building

- 2.1 The building work is two-storey light timber framed house supported by extended timber piles and spanning a small incised ephemeral waterway running through the site.

## 3 Submissions

- 3.1 The applicant made a written submission setting out their view of the matter in dispute and enclosed copies of:

- Drawings of the proposed construction and the site contours.
- The storm water discharge design details to ensure floor levels will achieve adequate clearance in the event of any flooding.

- 3.2 The territorial authority also made a submission in which the following points were outlined;

- The floor level of the building has been designed to be above flood levels and complies with E1 of the Building Code.
- The timber pole sub-frame has been designed to withstand possible erosion effects and therefore complies with B1.
- As the building complies with the Building Code a waiver is not required. This means section 72 of the Act does not apply and the consent cannot be granted under section 72 as sections 72(c) was not satisfied.
- If the consent cannot be granted under section 72 then as per section 71 it must be declined.

## 4 Discussion

- 4.1 The relevant sections of the Act are 71 and 72 relating to Limitations and restrictions on building consents: Construction of building on land subject to 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 of a building, if –**

- (a) the land on which the building work is to be carried out 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 property as a result of the building work.
- (3) In this section and sections 72 to 74, natural hazard means.....

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

Despite section 71, a building consent authority must grant a building consent if the building consent authority considers that-

- (a) the building work to which the 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 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 to the natural hazard concerned

4.3 In paragraph 3.2 above the territorial authority has said in effect that because the building work complied with the Building Code it was not reasonable or necessary to grant a waiver or modification of the Building Code and that therefore the territorial has no power to grant a building consent because section 72(c) is not satisfied.

I disagree and take the view that section 72(c) has no application unless the territorial authority is considering granting a waiver or modification of the Building Code because it is inconceivable that Parliament should have intended to prevent territorial authorities from granting building consents for building work that complied with the Building Code. Furthermore;

- (a) Section 71(1) prevents a BCA from granting a building consent unless section 71(2) applies.
- (b) Section 71(1) applies only when adequate provision has not been made to:
  - (i) protect the land, building work, or other property from the natural hazard, or
  - (ii) remedy any damage to the land or other property.
- (c) As to protecting the building work, the BCA must not require the building work to achieve performance criteria additional to or more restrictive than those prescribed in the Building Code, see section 18. The TA must therefore accept that building work complying with the Code is adequately protected.
- (d) If the work complies with the Code then section 71(2) can apply only in respect of the land or other property, but

- (i) The Building Code applies only to the building work and not to the land, so that section 72(c) has no application to the land; and
  - (ii) The building consent cannot apply to other property, so that section 72(c) has no application to other property.
- (e) If the building work does not comply with the Code, then the BCA may accept less than the Code by granting a waiver or modification, see section 67, and may accept that the building work is adequately protected against the hazard despite such a waiver or modification. If it does so, then section 72(c) prevents the TA from granting the building consent unless it is reasonable to grant that waiver or modification.

4.4 Although the design of the pile foundation system is not the subject of this determination I draw to the attention of the parties the apparent lack of clarity as to the precise locations of the piles. A note on drawing BC 04 indicates that the location of the piles is “to be co-ordinated with the existing water course on site”. I recommend the territorial authority takes care in interpreting that note which, while not entirely clear, is intended in my view to ensure that piles are located out of the flood plain, with suitable support members to span the watercourse. That approach would minimise the adverse effects that might be caused by piles located in or close to the watercourse in the event of a foreseeable flood event.

## 5 Decision

- (a) The territorial authority’s interpretation of the effect of sections 71 and 72 of the Act is incorrect.
- (b) I hereby reverse the council’s decision to refuse to issue a consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 25 May 2006.

John Gardiner  
**Determinations Manager**