



Determination 2014/032

Regarding the authority's exercise of powers in issuing a notice under section 124 of the Act for a building considered to be earthquake-prone at 13 Leeds Street, Wellington

1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the Act") 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 parties to the determination are
 - the owners of the property at 13 Leeds Street, acting through the Body Corporate either as the owner of the building or as agent to the owners ("the applicant"), represented by legal advisers
 - Wellington City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority, represented by a legal adviser.
- 1.3 This determination arises from the decision of the authority to issue a notice under section 124(1)(c)² of the Act ("the earthquake-prone building notice") for a five storey building ("the building") because the authority was satisfied the building is earthquake-prone as defined in section 122 of the Act. The authority has not completed all the service requirements for the purposes of section 125, pending the outcome of this determination.
- 1.4 The matter to be determined³ is therefore whether the authority has correctly exercised its powers of decision in issuing the earthquake-prone building notice under section 124 of the Act.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute ("the expert"), and the other evidence in this matter. I have not considered any other aspects of the Building Act or Building Code.

2. The building

- 2.1 The building was constructed around 1910. It is a five storey building with a basement; the lower two levels are of concrete construction for parking, the higher levels are of timber and steel construction with a mixture of retail and residential use.

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

² In this determination, unless otherwise stated, references to 'sections' are to sections of the Building Act 2004, and references to 'clauses' are to clauses of the Building Code.

³ Under sections 177(1)(b) and 177(1)(f)

There is a truss style iron roof and brick exterior. The building has external load bearing walls constructed of un-reinforced masonry for the five levels.

- 2.2 In 1997 a structural engineering firm (“the applicant’s engineers”) prepared designs encompassing some refurbishment, strengthening and conversion of the building under two building consents issued by the authority; No. SR 32234 for the creation of 14 apartments, 5 office units and 1 retail space and No. SR 37181 for the internal partitioning of 14 apartments.

3. Background

- 3.1 In August 2006 the authority adopted its Earthquake Prone Buildings Policy (“the EQPB policy”) in accordance with the requirements of section 131 of the Act.

- 3.2 On 20 April 2007 the authority instructed a firm with structural expertise (“the authority’s engineers”) to assess the building using the Initial Evaluation Procedure (“IEP”)⁴. The building was assessed as having an IEP rating of 15.8% of New Building Standard (“NBS”). The statutory threshold is 33% NBS. The authority classified the building as potentially earthquake-prone. In its assessment (“the initial IEP”) the authority’s engineers, in summary:

- assumed the building had been strengthened to 60% of the 1965 structural design standard
- identified the soil type as category ‘C’ shallow soil
- noted the presence of concrete/brick frames on either side of the building
- applied an ‘F’ factor of 1.3 in both the longitudinal and traverse directions, on the basis of an expectation of ‘some nominal excess strength’ being available.

- 3.3 On 25 May 2007 the authority informed the applicant of the initial IEP result and advised they had six months to provide information for consideration that showed the building was not earthquake-prone. The authority stated:

The IEP for this building has been assessed with a score of less than 34. A copy of the assessment is attached. On the basis of the findings of these investigations, the [authority] advises that this building has been identified as potentially earthquake-prone...

Any information provided in this time frame [six months] will be considered by the [authority] before finally deciding whether or not the building is earthquake-prone

- 3.4 On 29 October 2007 the authority reminded the applicant of the six month timeframe and that no additional information had been received. The authority stated:

On 25 May 2007, [the authority] wrote to you notifying you that the building has been identified as potentially earthquake prone. This letter advised you that there was a 6 month timeframe to come back to [the authority] with additional information about the strength of the building or a detailed assessment of the structure for [the authority] to consider when deciding whether the building is earthquake prone....

If we do not receive any information to consider before Monday 26 November 2007, we will assume that you agree with our assessment that the building is earthquake prone

- 3.5 On 20 November 2007 the applicant requested an extension of time from the authority. This was granted until 31 December 2007. At some time the applicant

⁴ Initial Evaluation Procedure is an evaluation of a building’s seismic resistance carried out using standard methodology prescribed by the New Zealand Society for Earthquake Engineering

engaged their engineer's to assess the percentage NBS of the building. This report is dated 28 November 2007.

- 3.6 On 29 November 2007 the authority received the applicant's engineer's report. The report contained the following key points:
- The authority's engineer's report contained an incorrect IEP assessment; it assumed the building had been strengthened to two-thirds of the 1965 code whereas it had been strengthened to 60% of the 1992 code, and identified structural weaknesses (short columns) which were strengthened with braced frames that do not develop short-column type failures.
 - An alternative strength value of the building as 47% NBS was presented, this being above the 33% NBS threshold.
 - The brick veneer was not part of either the seismic or gravity structure but there will be significant damage to the brick veneer in an earthquake.
 - Soil type D was used in calculating the percentage NBS.
- 3.7 On 12 December 2007 a meeting was held between the applicant's engineers and the authority's engineers to discuss the applicant's engineer's report ("the meeting"). The contents of this meeting were not recorded by any party present.
- 3.8 On 7 April 2011 the authority emailed the applicant's representative, noting the following four points:
1. The x-bracing needed to be checked for section 12 of the steel code NZS3404
 2. Parts and portions of 1170.5 section 8 need to be used to check various bits and pieces of the building – particularly the brick veneer
 3. Diaphragms needed some explanation
 4. The displacements were high and needed checking with the code limits
- the [authority's engineer] believes the report was discussed with [the applicant's engineer's] at the time but full agreement was not reached
- 3.9 On 30 April 2011 the authority's engineers provided the four points noted in paragraph 3.8 and an additional fifth point to the authority ("the points for clarification"):
- It should also be noted that the soil type should have been type D in the assessment as we now have better information on that area.
- The authority considered this information needed to be provided prior to it deciding whether or not the building should be considered as being earthquake-prone.
- 3.10 On 3 May 2011 the authority notified the applicant and the applicant's engineers of the authority's points for clarification from a 'review of the file':
- At this point of time we do not have sufficient information to consider the building is not potentially earthquake prone
- 3.11 On 7 March 2012 the applicant re-sent their engineer's report to the authority.
- 3.12 On 23 April 2012 the authority noted that the applicant's engineer's report had been reviewed previously and emailed the applicant requesting further information regarding the points for clarification.
- 3.13 On 27 July 2012 the authority requested a response from the applicant regarding the authority's points for clarification, noting:

If we do not receive any information to consider before 30 September 2012, we will assume that you agree with the assessment that the building is earthquake prone

- 3.14 On 24 May 2013 the authority issued an earthquake-prone building notice to the applicant requiring the applicant strengthen the building or that some or all of the building be demolished so that the remaining structure is not earthquake-prone.
(It is noted this notice has not been affixed to the building for the purposes of section 125 of the Act.)
- 3.15 On 27 May 2013 the applicant's engineer contacted the authority and indicated he had discussed the 'outstanding matters' with the applicant at the end of 2012 but at that time the applicant had decided not to engage him to respond.
- 3.16 The applicant and the authority exchanged correspondence between 24 May 2013 and 9 July 2013. The applicant's legal advisers stated that, under section 183 of the Act the earthquake-prone building notice could not be affixed to the building due to the current determination application.
- 3.17 The applicant's engineers indicated to the authority that they had carried out extensive modelling of the building and were working to prepare responses to the initial IEP.
- 3.17.1 The Ministry received an application for determination on 9 July 2013. The following supporting documents were provided with the application for determination:
- the authority's engineer's report
 - the applicant's engineer's report
 - the earthquake-prone building notice
 - the authority's file notes on the building
 - the Computer Unit Title Register information and attached building plans
 - a table listing the owners of the units within the building
 - various correspondence between the applicant and the authority dated from 25 May 2007 to 31 May 2013
 - correspondence between the applicant and their engineers.

4. The expert's report

- 4.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a firm of consulting engineers, represented by the author of the report who is a Chartered Professional Engineer having qualifications in structural engineering. The expert provided a report dated 24 October 2013. This was provided to the parties on 29 October 2013.
- 4.2 In relation to the IEP process the expert states that this is a screening tool deliberately designed to be conservative and can only conclude whether a building is *potentially* earthquake-prone. The expert concluded that the authority's engineers did carry out the IEP assessment correctly to reach the 15.8% NBS rating and took appropriate consideration of the prior strengthening to the building.
- 4.3 In relation to the authority's points for clarification, these were reasonable and proper requests for the authority to assess the earthquake-prone status of the building:

- Checking the brick façade is essential if the principles of life safety, protecting neighbouring property, and disruption as a result of an earthquake are to be complied with. There will be a potential stiffness compatibility conflict between the original brick façade and the newly designed ductile bracing system due to the brick façade apparently not being upgraded in 1997.
- Questioning the sufficiency of the cross bracing is warranted due to their apparent small member size.
- There is insufficient detail on the drawings supplied in relation to the diaphragm.
- The expert is aware of documentation that supports the soil type being type D and estimates demands would be increased some 50% as a result of the soil type reclassification.

4.4 The expert could find no evidence that the owner had responded to the authority's points for clarification and concluded that the authority had followed its own EQPB policy in issuing the earthquake-prone building notice.

5. Submissions

4.1 The initial submissions

5.1.1 The applicant's legal advisers made a submission dated 15 November 2013 noting the following key points:

- The authority assumed that it had previously assessed the building as earthquake-prone and would formalise this assessment if the applicant did not convince the authority otherwise. However the authority had only identified the building as *potentially* earthquake-prone and could not be satisfied that the building was earthquake-prone.
- The applicant engaged their own engineers to assess the building resulting in an IEP of 47% of NBS. The report notes that the initial IEP assumed that in 1997 the building was strengthened to two-thirds of the 1965 Building Code, in fact it was strengthened to 60% of the 1992 Building Code.
- The authority did not exercise its power under s222 (1)(b)(ii) of the Act to enter the building to inspect the authority's points for clarification.
- The expert's report (refer paragraph 4) was a desktop study that did not involve any site visits, analysis or inspection, and does not give an opinion on the buildings percentage of NBS.
- The authority made two material errors in deciding to issue an earthquake-prone building notice:
 1. The factual error – the authority only ever identified the building as potentially earth-quake prone, and never reached the point of being provisionally satisfied that the building was earthquake-prone.
 2. Asking the wrong question – the authority asked if there was sufficient information to consider the building was not earthquake-prone. This puts an unfair burden on the applicant to satisfy the authority that the building was not earthquake-prone when no such burden exists under the Act. This is an error of law.

- Under section 124 of the Act the test provides that the authority can issue a notice only if they are satisfied that a building is earthquake-prone; ‘to be satisfied is to be free from doubt and convinced’.

4.2 The revised IEP

5.2.1 The authority prepared and sent a copy of the revised IEP (“the revised IEP”) to the applicant on 22 November 2013. The revised IEP responded to criticisms set out in the applicant’s engineer’s report and resulted in a NBS score of 20%. The main points of difference between the initial IEP and the revised IEP are that it:

- reflects the strengthening of the building to 60% of the 1992 structural design standard as advised by the applicant’s engineer’s
- identifies the soil type as “D” category soft soil
- applies an ‘F’ factor of 0.4 on the basis of the lack of strengthening of the concrete/brick frames, concern at the ductility factor of 4 used in the steel cross-bracing design and the change in soil classification.

5.2.2 The authority’s legal adviser made a submission dated 29 November 2013 noting the following key points:

- Section 124(1) of the Act requires the authority to be ‘satisfied that a building is...earthquake prone’ before it can exercise its discretion to give written notice requiring work to be carried out on the building. The authority submits that ‘satisfied’ is a subjective measure and means that a decision-maker must ‘make up its mind’ on the evidence before it.
- The authority’s EQPB is consistent with section 138(2) of the Act. It was adopted using the special consultative procedure provided in the Local Government Act 2002 and is a product of a rigorous, public consultative process. The EQPB policy is consistent with the Ministry’s Guide (“the guide”)⁵.
- The EQPB policy indicates that the authority will be satisfied that a building with an IEP score of less than 34% NBS will be regarded as earthquake-prone, subject to any information that an owner may choose to provide to the contrary.
- The authority’s engineers concluded an initial IEP of 15.8% and a revised IEP of 20%. It was appropriate to provisionally regard the building as earthquake-prone in the manner provided for in the EQPB policy.
- Determination 2010/133⁶ approves the conceptual approach of moving directly from an IEP assessment that a building is earthquake-prone, to the issue of an earthquake-prone building notice, if the owner is given the opportunity to provide further information that is properly considered.
- The authority has stated there was no ‘mistake of fact’ as it was ‘satisfied’ on the strength of the initial IEP that the building is earthquake-prone. The authority also submits it did not ‘ask the wrong question’ and it is appropriate to consult with the applicant to invite them to provide information in response.
- The authority submits that the applicant’s engineer’s report notes significant damage to the brick veneer is anticipated in a ‘design level earthquake’, however,

⁵ Earthquake-prone Building Provisions of the Building Act 2004: Policy Guidance for Territorial Authorities (*The Department of Building and Housing*) June 2005

⁶ Determination 2010/133 The exercise of the powers of an authority to issue a notice under section 124 of the Act regarding a building considered to be earthquake prone

the applicant's engineers do not consider the brick veneer to be part of the buildings seismic or gravity structures. The applicant's engineer's report does not displace the provisional view that the building is earthquake-prone.

5.2.3 The authority's legal advisor provided a detailed engineer's assessment dated 8 May 2014 ("the DEE"). The assessment expanded on the revised IEP and noted that structural codes have changed and seismic requirements have become more onerous as engineer knowledge has improved. The DEE confirmed the conclusion that the seismic lateral load capacity of the building is approximately 10 to 20% NBS.

5.2.4 The applicant's legal advisers made a further submission dated 12 May 2014. In summary:

- For the authority to be 'satisfied' required them to undertake an 'adjudicative process' in which relevant evidence was weighed to reach a judicial decision based on that evidence, and that a decision could not properly be made unless it was supported by sufficient proof or information.
- The production of the authority's revised IEP amounts to an acceptance that the initial IEP is wrong.
- The authority did not follow the correct statutory process and never put forward any evidence that it has carried out a adjudicative process to satisfy itself the building is earthquake-prone:

it is a well-established principle of administrative law that decision-makers entrusted with such powers must genuinely consider the exercise of the discretion entrusted to them and cannot simply rubber-stamp expert reports or recommendations.

- This determination cannot confirm an earthquake-prone building notice on a different basis to that on which it was issued.
- The submission details the alleged errors with the authority's revised IEP.

6. The hearing

6.1 I held a hearing in Wellington on Tuesday 13 May 2014 at the request of the applicant. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act, a legal adviser to the Ministry and an officer of the Ministry. Present at the hearing were

- two officers of the authority, the authority's engineer, and the authority's legal adviser
- the applicant, an owner, and two legal advisers for the applicant.

6.2 All of those present at the hearing had the opportunity to speak. The information presented enabled me to amplify and clarify various matters of fact and was of assistance to me in preparing this determination. As the parties' submissions have already been summarised, I have only noted further issues raised by those present below.

6.3 The applicant's legal adviser restated the main points from his submissions detailed in paragraph 5.2.1. Additional points raised were as follows:

- The serious consequences of an earthquake-prone building notice were stressed regarding the practical effect of a notice and the need for public safety. The applicant's legal advisers noted that there was no need for a quick response for this building given the 15 year timeframe.

- The applicant's legal advisers accepted that hypothetically, if the only evidence for a building is the initial IEP, the authority could be satisfied the building is earthquake-prone. However he stressed this is not the situation for this building as the applicant's engineers had disputed the initial IEP.
- Regarding the DEE, the applicant had not had sufficient time to respond.

6.4 The authority's legal adviser noted the following:

- The authority discussed its EQPB Policy, noting that its decision making process cannot be 'divorced' from the EQPB Policy.
- No response has been received from the applicant regarding the authority's points for clarification.
- The authority acknowledged the onus of proof cannot be reversed for an owner to prove that a building is not earthquake-prone; however, once a provisional view has been formed by the authority the owner is given a chance to rebut this view.
- The authority can produce evidence of the authority's officers having required delegations.

6.5 Technical issues were discussed by the authority's engineer present at the hearing. The applicant's legal advisers objected to the detail being provided, stating that the applicant had not heard some of the information being presented and it was not put to the applicant following the meeting in 2007.

6.6 The parties agreed that the language of 'provisional' and 'potential' had the same meaning.

6.7 The 2007 meeting was discussed at some length during the hearing (I note that none of those in attendance at the meeting were at the determination hearing):

- the authority's engineer stated he was not aware of what form of follow up flowed from the meeting
- there are no detailed written records about what was discussed at the meeting, and the points for clarification were not sent to the applicant until 2 May 2011
- the authority's legal adviser stated it would be best practice for the records of the meeting to have been given to the applicant at the time.

7. Further submissions and the draft determination

7.1 On 21 May 2014 the authority's legal adviser provided documentation relating to delegated authority of officers of the authority as requested in the hearing (refer paragraph 6.4) and a checklist of summary information dated 15 March 2013 relating to the building ("the checklist"). The authority's legal adviser states the checklist:

records the information taken into account when [the authority] officers evaluate whether they are satisfied that a building is 'earthquake-prone';

The second page relates to the process of issuing a notice under section 124 of [the Act], once a view has been formed that a building is earthquake-prone

7.2 The checklist noted that the key issues identified for the building are 'vertical irregularity, short columns, strengthening extensive but lightweight'. It also noted 'further information supplied relating to key issues - detailed assessment of building considering strengthening, 47% NBS' which I will take as a reference to the applicant's engineer's report. There are certain 'tick boxes' that have been ticked on

the checklist which is signed off by two officers of the authority. Those tick boxes are:

- the further information has been reviewed by consultant engineer and an officer of the authority
- the outcome of the information review is 'EQP – No Response to RFI'.

7.3 On 23 May 2014 the applicant's legal advisers responded to the checklist provided by the authority stating:

- the checklist is inconsistent with the principles of natural justice and has only been provided after the hearing
- the checklist confirms the earthquake-prone building notice was issued on the basis of the initial IEP result of 15.8%
- the checklist confirms the wrong code has been used, 1965 rather than 1992
- there are no reasons given on the checklist as to why the earthquake-prone building notice was given except for 'no response to [request for information]' and no record that the authority turned its mind to the errors in the initial IEP.

7.4 A draft determination was issued to the parties on 4 June 2014.

7.5 The applicant's legal advisers accepted the draft determination in a submission dated 18 June 2014 with two amendments that the references to 'intending to issue' an earthquake-prone building notice should be removed as the notice was formally issued to the building owners although it has not been affixed to the building, and the outcome should note that the notice is formally reversed.

7.6 The authority's legal adviser did not accept the draft determination in a submission dated 18 June 2014. In summary to the response said:

- The matter to be determined does not accurately describe the decision made by the authority, and the notice should be regarded as having been formally issued.
- There was a detailed reporting email dated 30 April 2011 from the authority's engineers who attended the meeting that records the purpose of the meeting was to discuss the applicant's engineer's report.
- The authority's legal adviser details evidence that the owners were aware of the 'matters arising from the meeting' on a number of occasions.
- The checklist confirms that the applicant's engineer's report did not overturn the authority's view that the building is earthquake-prone and that the points for clarification were not addressed.
- The sequence of events demonstrates that the authority had complied with its EQPB Policy.
- The expert's report supports the view held by the authority that its concerns are legitimate regarding the applicant's engineer's report.
- The draft determination does not directly consider any of the technical evidence as to the building's likely seismic performance, or in the context of the earthquake-prone building definition in section 122 of the Act. The authority requests either:

- a) a review of the technical information provided during the determination process and an independent view as to whether the building is earthquake-prone on the basis of this information; or
- b) reference to the technical information and an explanation why an independent view is not being provided.

7.7 The parties both agreed the matter to be determined should be amended to reflect that the earthquake-prone building notice was formally issued for the purposes of section 124 of the Act and I have amended the determination accordingly.

7.8 I have taken account of the parties submissions in response to the draft and amended the determination as I consider appropriate.

8. The authority's EQPB Policy

8.1 The Policy details

8.1.1 Section 132(1) of the Act requires that a policy under section 131 must be adopted in accordance with the special consultative procedure in section 83 of the Local Government Act 2002 and a territorial authority must review its policy at least every five years using the special consultative procedure. The Act provides for authorities to develop their own policies on how they will exercise their powers in relation to earthquake-prone buildings.

8.1.2 The authority adopted their EQPB policy in August 2006 in accordance with section 131 of the Act. As noted in Determination 2010/133⁷, the terms of the EQPB policy and the way in which the authority followed the steps of its policy is an important aspect in terms of whether the authority exercised its powers consistently with the requirements of section 124 of the Act.

8.1.3 The EQPB policy the authority has adopted contains four main steps prior to issuing an earthquake-prone building notice. These are summarised below:

Step 1 Desk top review

- A desktop review is undertaken by the authority to assess which buildings could be earthquake-prone

Step 2 Initial assessment

- The authority uses an IEP set out in the by the NZSEE in the NZSEE 'Assessment and Improvement of the Structural Performance of Buildings in Earthquake' recommendations⁸.
- Buildings with a score of less than 34 are considered to fall within the definition of an earthquake-prone building.

Step 3 Advisement of the initial assessment outcome

- The [authority] will write to owners of buildings with a standard IEP score of less than 34 and/or where there is other evidence, advising that their building is potentially earthquake prone.
- Notified owners will then have six months to consider this advice and either provide additional information about factors that may affect the strength of the building or a detailed assessment of the structure.

⁷ Determination 2010/033 The exercise of the powers of an authority to issue a notice under section 124 of the Act regarding a building considered to be earthquake prone

⁸ The NZSEE 'Assessment and Improvement of the Structural Performance of Buildings n Earthquake' recommendations are available at the NZSEE website <http://www.nzsee.org.nz>

Step 4 Issue notice to strengthen building

- Where EITHER
 - (a) after consideration of any further information provided in Step 3 above, the [authority] is still satisfied that the building is earthquake-prone, OR
 - (b) Where a building owner has failed to respond to the [authority's] letters under Step 3, and the [authority] is satisfied from the IEP process the building is earthquake-prone
- The [authority] will issue a written notice under section 124 of the Building Act 2004 requiring a building consent to be obtained and the structural strengthening work to be undertaken.

8.1.4 The main objective of the Act in respect of earthquake-prone buildings is to reduce the level of earthquake risk to the public over time and target the most vulnerable buildings as a priority.⁹ However, the impact of a building being classified as earthquake-prone has a strong effect on the parties, particularly financially.

8.2 The language used by the authority in the Policy and related correspondence

8.2.1 In relation to the authority's EQPB Policy the applicant's legal advisers had two main issues regarding the language used:

- The authority had only ever identified the building as *potentially* earthquake-prone as opposed to being *provisionally satisfied* the building is earthquake-prone.
- The authority asked the applicant the wrong question; asking for the applicant to provide information that the building *was not earthquake-prone*. The applicant's legal advisers submit that the authority has reversed the onus intended by the Act, instead by placing it on the applicant to prove the building was not earthquake-prone.

8.2.2 In relation to the first issue, the wording used by the authority, (refer paragraphs 3.3, 3.4, 3.10 and 3.13 of this determination), uses the term 'potentially' as set out in Step 3 of the EQPB Policy. In the context of the language used in the correspondence sent to the applicant, it is clear the authority was stating they had completed the initial IEP and were satisfied the building is earthquake-prone, subject to any further information the applicant was able to provide. I agree with the authority's submission that although 'provisional' may have been a better choice, the word 'potential' has the same common meaning in the context of the language and is not misleading.

8.2.3 In relation to the second issue I do not agree that the onus of proof has been reversed for the applicant to prove the building is not earthquake-prone. The authority has made a decision based on the initial IEP that the building is earthquake-prone, but will consider any information provided by the applicant that suggests otherwise. If however no information was forthcoming, the authority could declare the building earthquake-prone. The authority has already formed a view in relation to the building being earthquake-prone but allows an owner the opportunity to comment and provide evidence to dispute this view before the authority makes a final decision to issue the earthquake-prone building notice.

8.2.4 In my view the authority should look to review the language used so that it fits the wording of the Act, however, the terminology used has not affected the ability of the applicant to understand the decision-making process and what was required of them.

⁹ Determination 2010/133

8.3 The delegated authority

- 8.3.1 The authority's legal adviser provided documents, including warrants of authority and delegation instruments, relating to delegated authority for four officers of the authority involved in the decision making process for the building. This information was requested by me in the hearing.
- 8.3.2 I am satisfied from these documents the officers of the authority had the required delegations in relation to powers of decision made in respect of the building.

9. Discussion

- 9.1 In my view the requirement to be 'satisfied' under section 124 of the Act is not purely a subjective requirement. A subjective analysis requires a person (with the necessary delegated authority to make the decision) to be satisfied that the building meets the test of being earthquake-prone under the Act. I conclude there must be an objective element to be 'satisfied' in that there must be evidence to support the decision being made. The relevant evidence must then be weighted in order for a conclusion to be reached based on that evidence. I agree with the approach adopted in *Amor v New Plymouth District Council*¹⁰.
- 9.2 In relation to the IEP process, the NZSEE recommendations state:
- The IEP is designed as a largely qualitative process involving considerable knowledge of earthquake behaviour of buildings and judgement as to key attributes and their effect on performance.
- Due to the qualitative nature of the assessment it should not come as a surprise that in some circumstances assessments of the same building by two or more experienced engineer's will differ. This is to be expected, as the evaluation of seismic performance is not an exact science. However, it is also expected that experienced engineer's will be able to identify the critical issues that are likely to [affect] seismic performance and that, through discussion, a consensus position will be able to be agreed. For the same reason, an IEP assessment that has been independently reviewed is likely to be more robust than one based solely on the judgement of one engineer.¹¹
- 9.3 Step two of the authority's EQBP Policy states that buildings with a percentage NBS of less than 34% are considered to be earthquake-prone. The authority's engineers produced an initial IEP assessment of the building of 15.8% NBS and therefore the building was considered 'potentially earthquake-prone'. On 25 May 2007 the authority wrote to the applicant informing them of the initial IEP assessment and a six month period for the applicant to provide any information about factors that may affect the strength of the building or a detailed assessment of the structure. On 27 November 2007 the applicant provided their own engineer's report commenting on the initial IEP and providing an alternative strength value of 47% NBS.
- 9.4 The meeting held on 12 December 2007 (refer paragraph 3.7) was attended by the applicant's engineer, the authority's engineer and a representative of the authority. At the time of the meeting the authority's initial IEP assessment and the applicant's engineer's report had been circulated to both parties. The applicant's engineer informed the authority he had discussed the 'outstanding matters' with the applicant but was not engaged by the applicant to respond (refer paragraph 3.15). In my view it is reasonable to expect the applicant's engineer to have reported back to the applicant

¹⁰ HC New Plymouth AP3/00, 18 August 2000, Williams J [2001] NZRMA

¹¹ New Zealand Society for Earthquake Engineering Assessment and Improvement of the Structural Performance of Buildings n Earthquake at 3.2

- on the outcome of the meeting and I can assume the applicant was likely to have been aware of the outstanding issues following the meeting.
- 9.5 The checklist (refer paragraph 7.2) was provided to the applicant after the determination hearing was held. The checklist had not previously been viewed by the applicant. In my view the checklist contains little further information as to the decision making process of the authority. The checklist acknowledges the applicant's engineer's report and shows this was reviewed by a 'consultant engineer' for the authority and an officer of the authority. However the checklist does not show how the parts of the initial IEP challenged by the applicant's engineer were taken into account, reviewed, or how this affected the final decision making process. The checklist is not an adequate basis to defend a section 124 decision, given the significance of such a decision. I conclude that although the checklist brings the relevant information together it shows the inadequacies of the authority's processes due to the information it does not contain.
- 9.6 It is acknowledged by the authority there is no record from the 2007 meeting; however, the authority submits correspondence following the meeting between the applicant and the authority, the points for clarification and the checklist show a record of the meeting does exist and the material contents of that record was provided to the applicant on a number of occasions prior to the earthquake-prone building notice being issued. I accept the authority's latest submission that some record of the meeting exists and information has been provided to the applicant regarding the points for clarification (refer paragraph 3.10). However, in my view the records and information are not adequate or robust enough to show the authority's decision making process and support a decision under section 124 of the Act.
- 9.7 In my view it is unclear whether the authority has determined the building is earthquake-prone on the basis of the initial IEP, or the points for clarification on which the authority had sought further evidence from the applicant. The requirement to be 'satisfied' involves an adjudicative process where relevant evidence is weighed and a conclusion reached. In the context of the underlying policy objectives of determining if a building is earthquake-prone, if uncertainty exists this should be discussed with the affected parties in sufficient detail. In determining if a building is earthquake-prone or not, the authority can then be satisfied that the correct decision can be made having taken into account all the evidence at hand.
- 9.8 I do not agree that the authority has correctly followed its EQPB Policy. Step four of the EQPB Policy states after the authority has considered any further information; if it is still satisfied the building is earthquake-prone it will issue a notice under section 124 of the Act. The applicant's engineer's report contained factors that may affect the strength of the building; it has not been detailed how the authority dealt with this report when making the decision to be satisfied the building was earthquake-prone.
- 9.9 There is a potential failure of natural justice if the applicant was not informed of the basis on which their building was earthquake-prone. The authority has the burden to maintain records about significant meetings and points discussed, and to provide this information to the applicant for them to review if this is going to be relied upon when exercising decision making powers. The importance of keeping records is particularly crucial in large organisations where numerous staff members may be dealing with the one file. It is unclear in this situation whether the authority considered the comments from the applicant's engineer's report and was aware of how these concerns were addressed in relation to the initial and revised IEP's. The applicant has a right to know the basis for the decision that is being made. The

authority's own standard for advising owners as to the earthquake-prone status of their buildings can be found at Step 3 of the EQBP Policy (refer paragraph 8.1.3).

9.10 On the basis of the information presented to me I consider that:

- the authority did not adequately inform the applicant of the grounds on which the decision to issue the earthquake-prone building notice was made;
- it is unclear from the records and information on what basis the authority has determined the building is earthquake-prone;
- given the above, I consider the authority incorrectly exercised its powers of decision in issuing the earthquake-prone building notice under section 124 of the Act.

10. What happens next?

10.1 I acknowledge that there are technical issues to be resolved. The differences between the authority's engineer's report and the applicant's engineer's report will need to be addressed.

10.2 The applicant's legal advisers have asked me to provide reasons for declining to offer a technical view on whether the building is earthquake-prone. In my view, given the range of issues considered and discussed by engineers for both parties and the nature of the dialogue about the strength of the building, a technical review would involve considerable duplication and further delays if a third party provided a further view of the earthquake-prone status of the building.

10.3 The authority should consider whether the building is earthquake-prone under section 122(1) of the Act taking into account the evidence referred to in this determination, including the relevant technical information. If the authority is satisfied the building is earthquake-prone it should advise the applicant of this decision and provide reasons for the conclusion, inviting response from the applicant within a reasonable time frame.

11. The decision

11.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority has incorrectly exercised its powers of decision in issuing an earthquake-prone building notice under section 124(1)(c); accordingly I reverse the authority's decision to issue the earthquake-prone building notice, thus requiring the authority to make a new decision under section 122(1) of the Act as referred in paragraph 10.3.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 August 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A1 The relevant provisions of the Act are:

122 Meaning of earthquake-prone building

- (1) A building is earthquake prone for the purposes of this Act if, having regard to its condition and to the ground on which it is built, and because of its construction, the building—
- (a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); and
 - (b) would be likely to collapse causing—
 - (i) injury or death to persons in the building or to persons on any other property; or
 - (ii) damage to any other property.

...

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

- (1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—
- (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe;
 - (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building;
 - (c) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—
 - (i) reduce or remove the danger; or
 - (ii) prevent the building from remaining insanitary.

...

125 Requirements for notice requiring building work or restricting entry

- (1) A notice issued under section 124(2)(c) must -
- (b) be fixed to the building in question

...