



## Determination 2015/065

### Regarding the issue of a dangerous and insanitary building notice in respect of a building at 104 Waterfront Drive, Mangonui



#### Summary

This determination considers whether the building is dangerous with regard to the building's structure and the slope behind the building. The determination also discusses the application of sections 124 and 125, the subsection the notice was issued under, to whom the notice was served, and the content and wording of the notice.

#### 1. The matter 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, 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 owner of the subject property, M Powell, who is the applicant ("the applicant")
  - Far North District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 Given the concerns expressed by the adjacent neighbour to the north of the property ("the neighbour") in relation to the structural stability of the building and any impact on access to the neighbour's property, I consider the neighbour to be a person with an interest in the matter.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

- 1.4 This determination arises from the decision of the authority to issue a dangerous and insanitary building notice in respect of a building at 104 Waterfront Drive. In regards to the building being dangerous, the authority is of the view that the front veranda roof is not secured properly and is unsupported; the building is showing visible signs of collapse in progress; and the weight of debris building up on the rear of the building raises concern with regard to lateral forces being exerted on the building.
- 1.5 The applicant accepts the building is insanitary under section 123, but disputes that it is dangerous as defined in section 121(1).
- 1.6 The matter to be determined<sup>2</sup> is the authority's exercise of its powers of decision in issuing the notice under section 124(2)(c) in respect of the authority's view that the building is dangerous as defined in section 121(1).
- 1.7 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.

## **2. The building**

- 2.1 The site is rectangular in shape, with the existing building located on a level platform in the front and facing east. The building fronts on to a public footpath and is across from Mangonui Harbour. A moderately-steep to steep bank, approximately 12m in total height, is located to the rear of the building.
- 2.2 The building is a single storey 11m wide and 8m long timber-framed structure with a timber floor, weatherboard cladding and a lightweight corrugated iron roof. There is a 7.2m long by 2.4m wide veranda located along the southern two-thirds of the building frontage. The expert described the floor as approximately 500mm above the ground surface.

### **2.3 The cut face and slope**

- 2.3.1 The expert observed the cut face to the rear of the building, describing it as a steep cut face 6m in vertical height<sup>3</sup> and sloping at approximately 65° to the horizontal or greater. Within the southern half of the lot the cut face is located at a horizontal distance of 7m behind the rear wall; it angles closer to the building across the northern half of the site to within 2.8 from the northwest corner. The ground surface above the crest of the cut face slopes at approximately 37° to the horizontal for a vertical height of 3m. (See next page for a plan and section reproduced from the expert's report.)
- 2.3.2 At the toe of the cut face a moderately steep slope falls to the rear wall of the building at approximately 28° to the horizontal and for a vertical height of 3.7m. The lower part of the cut face comprises completely weathered basalt with relict rock structure, which is very stiff to hard soil strength (easily excavated with a spade). The upper part of the cut face comprises reddish-brown residual soil, which displays no relict rock structure.

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<sup>2</sup> Under sections 177(2)(d) and 177(2)(f) of the current Act

<sup>3</sup> All distances are noted in the expert's report as approximate

2.3.3 The lower slope is well vegetated, and the upper slope is sparsely vegetated except for a small area on the south part of the face which is bare where a recent small slip appears to have occurred.

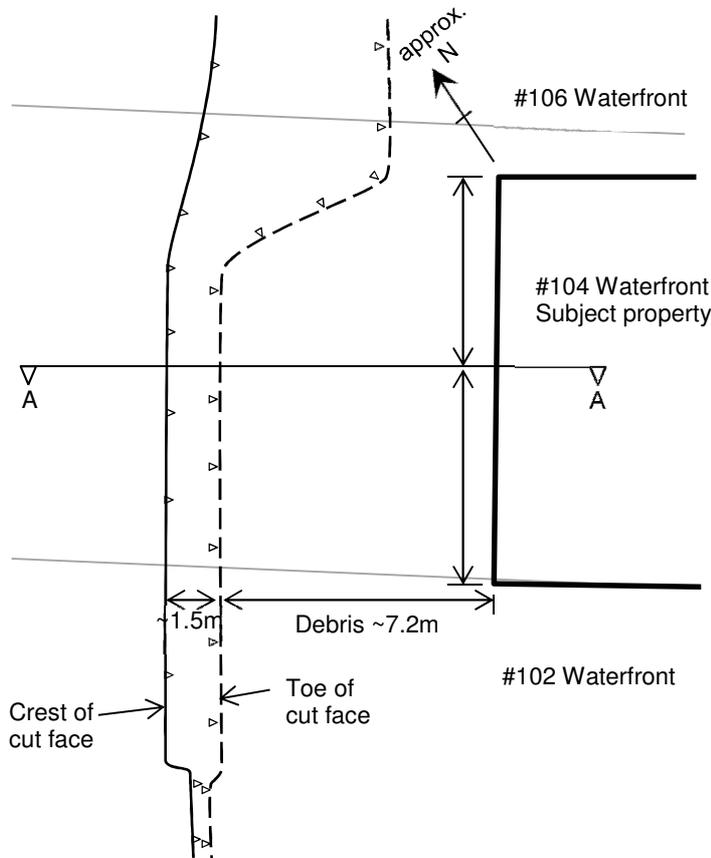


Figure 1: Plan showing location of bank at rear of property

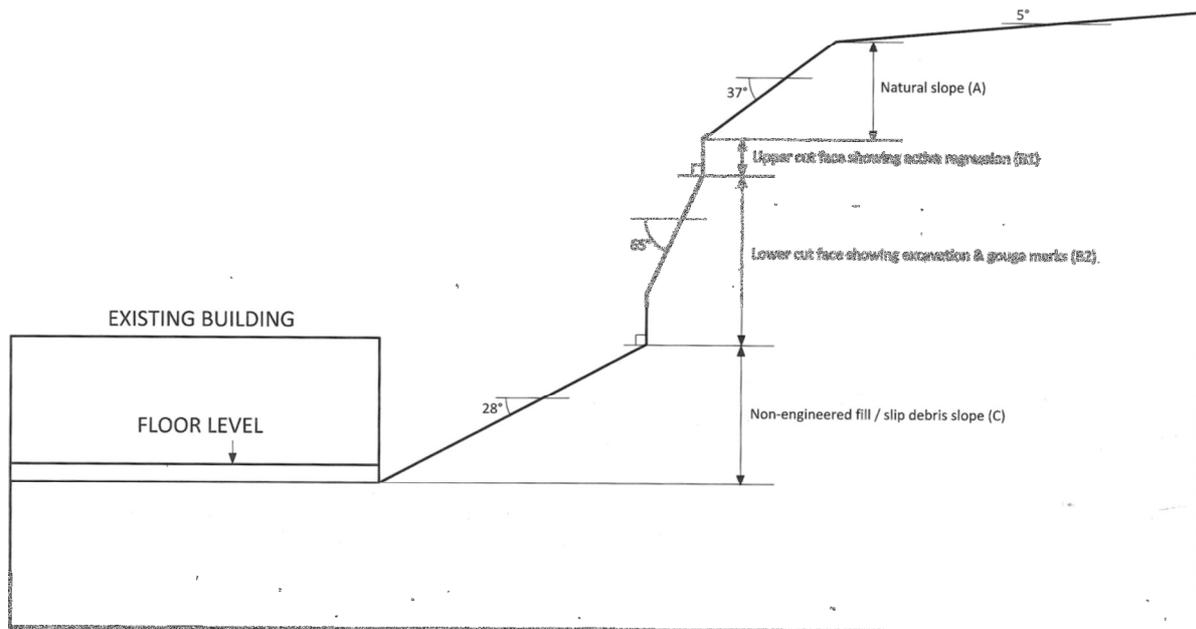


Figure 2: Cross section A-A

### **3. Background**

- 3.1 The building was originally constructed circa 1910, and the applicant purchased the property in 1998.
- 3.2 It is my understanding that a slip at the cut face at the rear of the property (“the slip”) occurred during the 2014 winter period.
- 3.3 The authority carried out a site visit in September 2014 to investigate the state of the property. The site visit was undertaken in response to concerns raised by the neighbour that:
- rain water from the roof of the subject property cascades onto his only access to his unit
  - surface water directed from slip debris built up at the rear of the subject property congregates on his access way
  - the slip is getting larger and closer to their boundary
  - the front right (north east) of the subject building is being supported by the framing of his access gate.
- 3.4 The authority was advised that a tree at the rear of the subject property had been removed as it was starting to lean towards the building. On reviewing the building status the authority noted that the building was not supposed to be occupied as it did not have sanitary facilities, and the authority had been advised by the owner in 2010 that it was vacant.
- 3.5 The authority’s site visit identified:

#### **The slip**

- The slip behind the subject property had not reached the boundaries but was close to the north boundary.
- Slip debris had moved to rest mainly on the ‘right hand side’ (north end of the rear of the building), blocking the rear door access and directing surface water under the building.
- Some slip debris, in the form of mud, was making its way onto the adjoining property to the north under the access stairs.

#### **The building**

- The building was occupied, and the tenant confirmed they did not have potable water supply, sanitary facilities, or energy supply, and that the building had multiple roof leaks, and although spouting had been installed to address the water cascading off the roof to the neighbour’s access it didn’t resolve the issue.
- The building was in ‘very bad condition’ with mould, holes, and structural subfloor and perimeter framing exposed to the elements.
- Exterior corner trim boards were missing, allowing direct moisture ingress to the inside of weatherboard cladding and framing.
- Trees and vegetation were growing and resting on the rear of the building.

- The roof was in very bad condition with large holes, rusting and badly pitted corrugated iron, with a lack of fixings and roof flashing, and some patching.
- The veranda roof at the front of the building is unsupported.
- Collection of water from the roof at the rear and sides was not working at all.
- The front right of the building (north end of street facing elevation) 'had very noticeable drop and foundations appear to have failed'.

3.6 At some later time the authority and the applicant met to discuss the status of the building. The authority set out its views, apparently including that an earlier geotechnical report the applicant had did not address the current situation.

### 3.7 The notice

3.7.1 On 15 October 2014 the authority issued the dangerous and insanitary building notice, stating that the building was deemed to be:

Dangerous within the meaning of Section 121 of the [Act], in that it is likely to cause:

- a. Injury or death (whether by collapse or otherwise) to persons in it, or to persons on other property. Section 121(1)(a)(i)
- b. Damage to other property. Section 121(1)(a)(ii)

...

Insanitary within the meaning of Section 123 of the [Act], in that:

- a. It is likely to be injurious to health because it is in a state of disrepair. Section 123(a)(ii).
- b. It does not have sanitary facilities that are adequate for its intended use. Section 123(d).

3.7.2 The notice set out the reasons the building was deemed to be dangerous and insanitary as follows:

A recent inspection of the property has confirmed that a land slip has occurred recently at the rear of the building. This landslip causes a risk of injury to persons within the Building. Section 121 (1)(a)(i) ...

It is likely to be injurious to health because it is in a state of disrepair. Section 123(a)(ii)

It has insufficient and defective provisions against moisture penetration so as to cause dampness in the building. Section 123(b).

It does not have sanitary facilities that are adequate for its intended use. Section 123(d).

3.7.3 The notice went on to set out the work required, including that the building was to be vacated as soon as possible, and set the time by which the work was to be completed as 30 January 2015. The notice also set out information on whether building consent would be required and that consultation with Heritage New Zealand would be required as the property is located within the Mangonui Heritage Precinct.

### 3.8 Continuing correspondence

3.8.1 In correspondence dated 19 February 2015, the applicant stated his view that the notice was 'unsubstantiated and factually incorrect' in regards the landslip, and that it was inconsistent with the geotechnical report the applicant had commissioned in 2009. (I have not seen a copy of that report.) The applicant also stated that the

building was unoccupied and accordingly there was no danger to anyone “within the building”.

3.8.2 The applicant noted he did not wish to restore the building and was intending to sell the property, and that in his opinion the notice should be revoked immediately.

3.8.3 On 25 February 2015 the authority responded to the applicant, noting that an inspection on 20 February confirmed the building was vacant. The authority said given Heritage New Zealand’s support for the proposal not to demolish the building that:

This has satisfied [the authority’s] concerns raised on the 124 Dangerous and Insanitary building notice, as long as the building remains vacant and the owner monitors the building and slip status to ensure public safety and risk of damage to neighbouring parties at all times.

3.8.4 On 4 April 2015 the applicant wrote to the authority regarding an application for a determination. The applicant set out his concerns that the notice, which he considered contained inaccurate and misleading information, would be included in any LIM report and would restrict his ability to sell the property. The applicant did however accept that the building was insanitary, but had been advised by an engineer that the building was ‘years away from structural failure’.

3.8.5 The applicant also referred to a 2009 engineering report (which I have not seen) that included subsurface investigations and stability analysis that was provided to the authority before the dangerous and insanitary building notice was issued.

3.8.6 The applicant furnished a description of the property as follows (in summary):

- In 1998 the foundations had already sunk on the right hand front of the building (north-eastern corner) and the building was in a poor state of repair.
- Behind the building there is a significant and steep bank that extends in both directions behind neighbouring properties. The distance between the back of the building and the bank is around 4m to 6m.
- The bank continues to fret and erode, creating a build-up of debris at the base of the bank. The debris has reached the back of the building.
- Access is very limited and the debris cannot be removed.
- The applicant estimated the slip as consisting of approximately one cubic metre of soil.

3.8.7 The applicant sought to have the notice removed from the property file together with any correspondence which refers to the property as dangerous. The applicant also held the view that as the notice was not served to the tenant and was not affixed to the building, the requirements of section 125 of the Act had not been met and the notice was therefore invalid.

3.8.8 On 16 April 2015 the authority responded to the applicant, noting that the building remained unsuitable and unsafe for occupation, and accordingly the notice<sup>4</sup> would remain on the file. The authority stated that the notice was issued to the owner and to the tenant at the time, and that the slip and related issues at the rear of the property are evident, and the authority has an obligation to note such matters on the property file.

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<sup>4</sup> The authority referred to “the Notice to Fix”. I assume this was an error and the authority was intending to refer to the dangerous and insanitary notice issued under section 124.

3.8.9 The matter remained unresolved between the parties and the Ministry received the application for determination on 30 April 2015.

## 4. The submissions

4.1 The applicant provided a covering letter dated 26 April 2015 with the application, stating that the applicant accepted the building was insanitary but not that it was dangerous. The applicant noted the authority's decision was based on a visual assessment only and had not been supported with any technical information, such as an engineer's report. The applicant's concern remained that reference to a landslip that causes the risk of injury to persons within the building suggests imminent and cataclysmic danger exists, and that will make it difficult to sell the property. The applicant sought to have the authority either substantiate the statement or remove it from the property record.

4.2 On 20 May 2015 I sought further information from the parties regarding the building and the site, and requested the authority confirm the basis on which the notice was issued, and provide any specialist technical advice if any had been relied on in making the decision to issue the dangerous building notice.

4.3 The authority provided a submission by letter dated 3 June 2015, including a number of photographs of the building and rear of the site, which set out some of the background (refer paragraphs 3.2 to 3.5). The authority stated that the parties had agreed to a remedy and that remedy was included in the notice. The authority noted that as a result of its investigation it considered that the integrity of the building's structure was compromised and there was a risk to occupants and other property.

4.4 The authority listed the following issues:

1. Ingress of water, and moisture, by way of failing or missing cladding and roofing components.
2. Building showing visible signs of collapse in progress, as front of building had dropped significantly.
3. Lack of protection to Structural elements of building being exposure of perimeter framing, studs, bottom plates, subfloor joists, and bearers to the weather, Building being located in Sea spray zone high-lights higher risk of failure to structural elements, nails, bolts etc.
4. Front veranda roof not secured properly and has no supporting roof frame. (Note this Veranda is accessible by the public as front of this building has open access to footpath.)
5. Weight of debris build up on rear of building raised concern with lateral forces that were being exerted on the building.
6. Surface water and roof water from property causing nuisance and damage to neighbouring properties (sic) access and personal safety as roof water would dump on owner of that property during their normal entering and leaving of their property in inclement weather.
7. Building was occupied, and there was a risk to [the occupants] as described under the Act under sections 123 and 121. No sanitary facilities, No potable water, possible further failure of structural integrity of the building and damage to other property.

- 4.5 In the authority's view the notice had been complied with; the authority went on to say:
- When agreement from Heritage NZ was presented that [the] building need not be demolished if it were to be restored, [applicant] agreed that they would look to sell property to a purchaser with restoration as a condition. Agreement was made that [the applicant] would monitor slip status, and failing building structure so as not to cause public risk and damage to other property. Also that building was not to be occupied.
- 4.6 The authority advised that to its knowledge no hoarding or fence has been erected to keep public away from the building, nor has the damage and water concern to the neighbours' access been addressed. The authority also confirmed that it had not instructed a structural engineer to assess the building, and that it considered the experience of the inspection officer was sufficient to deem the building dangerous and insanitary.
- 4.7 The applicant made a further submission by email on 3 July 2015 in response, noting that:
- the front of the building had dropped prior to his purchasing it in 1991, and has not moved over the last 25 years – it is not correct to say the building is in a state of progressive collapse
  - the notice issued under section 124 'demanding demolition' is inconsistent with the District Plan as the building is part of the Mangonui Conservation Zone, and the issue of the notice is *ultra vires*. For this reason alone the section 124 notice should be removed.
- 4.8 A draft determination was issued to the parties for comment on 7 September 2015 and to the neighbour on 25 September 2015.
- 4.9 The applicant responded by email on 7 September 2015, noting that the matter to be determined (refer paragraph 1.6) was wider than intended in that it refers to whether the building is dangerous, and that 'the intended issue for determination was the reason given by the [authority] for the building being deemed dangerous in the s124 notice, as I believed this was incorrect and misleading.' I address this issue at paragraphs 6.4.1 and 6.4.2.
- 4.10 The applicant's submission also reiterated the applicant's view regarding the property file records, submitting that:
- because of the seriousness of the negative inference that would be drawn from references there should be no record whatsoever on the property file relating to the property being dangerous
  - if the documents that refer to the property being dangerous remain on the property file, the determination should require the authority keep the determination on file also
  - the determination should also stipulate a timeframe within which the authority must comply with the determination.
- 4.11 In a response received on 21 September 2015, the authority accepted the draft without further comment.
- 4.12 The draft posted to the neighbour was returned unopened.

## 5. The expert's report

5.1 As mentioned in paragraph 1.7, I engaged an independent expert to provide an assessment of building. The expert is a Geotechnical Engineer. The expert carried out a review of the documentation and undertook a site visit on 10 July 2015. The expert provided a report in dated August 2015 which was forwarded to the parties on 24 August 2015.

5.2 The expert referred to the correspondence between the parties, and noted that the authority's letter referred to concerns not only with the landslip but also with the front of the building showing collapse, the veranda roof and the access by the public (refer paragraph 4.4). Given the authority's list of concerns the expert considered whether the building is dangerous in terms of section 121(1)(a)(i) and (ii) in respect of items 2, 4 and 5 of the authority's list.

### 5.3 The cut face, slope and slip

5.3.1 The expert described the cut face and slope, and I have included that description in paragraph 2.3. The expert made the following observations regarding the cut face and slope:

- No seepage was evident on the face.
- A recent slip feature was apparent on the upper part of the cut face adjacent to the southern boundary; estimated to be 3.5m wide x 2.5m high x up to 1m deep (an estimated volume of 2.5m<sup>3</sup>).
- Except where obscured by debris from the slip, the lower part of the cut face displays a "gouged" profile which is inferred to have been formed from the excavation (possibly when the building was constructed over 100 years ago); indicating that the lower part of the cut face has not been subject to slope instability since it was excavated.
- The upper 1m to 2m high part of the cut face, comprising residual soil, shows signs of active regression resulting in the formation of a subvertical head scarp. This regression is likely to result in only minor shallow-seated slips from the face, similar to the recent slip that is apparent at the southern lot boundary.
- The slope above the crest of the cut face is vegetated with small shrubs and grass and some small trees. A Pōhutukawa tree is located on this slope, adjacent the property to the south; the roots of the tree have been exposed by the recent slip.
- The cut face at the adjacent northern property is well vegetated and shows no signs of significant active instability.

5.3.2 The expert observed that the material underlying the moderate slope (between the cut face and the subject building) is exposed in a 2m high cut face located between the rear wall of the adjacent north property and the 3m blockwork retaining wall to the rear. The material comprises silt with some weathered basalt fragments, and is inferred to be non-engineered fill resulting from the cut earthworks undertaken to form the cut face on the subject property and/or slip debris. The toe is generally coincident with the rear wall of the subject building, except at the north end where it is banked against the rear wall to a maximum height of 0.6m, which is approximately 0.1m above the floor level.

5.3.3 The expert noted that, given there appears to be no significant active regression of the adjacent cut face, it is inferred that the debris comprises 'slope wash' material that has accumulated against the wall, or cut material derived from the excavation for the blockwork retaining wall of the adjacent north property.

5.3.4 The expert stated that in his opinion the debris from any future slip associated with regression of the upper part of the cut face would be unlikely to reach the rear wall of the building to any significant extent, and further that the risk of any such debris causing the rear wall of the building to collapse due to impact or lateral earth pressure loadings is very low. Noting that the rear door has been boarded up, the expert also concluded that given the area is not easily accessible from the building it is unlikely that slippage of the bank presents a significant risk of causing injury to a person in the rear yard.

## 5.4 The building

5.4.1 The expert carried out a level survey of the floor of the building, with the results showing:

- The floor in the north-eastern room (front right) falls towards the north-east corner at falls of between approximately 1/17 and 1/141
- The greatest fall, 1/17 (206mm over 3.6m horizontal distance) occurs along the front wall.
- The floor of the remainder of the building is approximately level.
- A detailed investigation of the floor was not undertaken; however the expert observed that some localised areas of the floor appeared spongy underfoot.

5.4.2 The expert noted that although the falls exceed the commonly accepted serviceability value of 1/200<sup>5</sup>, the fall, of itself, does not indicate that the building structure is about to collapse.

5.4.3 The expert made the following observations that he considered indicate the subsidence of the north-eastern corner has not created a significant risk of structural collapse of the building:

- (a) The verticality of the northern side wall was measured and found to be approximately vertical – ie although the floor has subsided, the side wall has not rotated to any significant extent.
- (b) It was observed that the ceiling in the north-eastern room had not pulled away to any extent from the northern and southern side walls of the room, which indicates that the rafters and ceiling joists remain supported on the side walls.
- (c) The ends of the bargeboards at the apex of the pitched roof on the eastern wall have not separated, which again indicates that the rafters remain supported on the side walls of the northeast room.

5.4.4 The expert concluded that in his opinion and based on the above observations the building is not at risk of imminent collapse as a consequence of the subsidence at the north-eastern corner.

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<sup>5</sup> Guidance: Repairing and rebuilding houses affected by the Canterbury earthquakes: Part A: 2. Indicator criteria for repairs and rebuilds, version 3, December 2012.

## 5.5 The veranda

5.5.1 In regards to the construction and support of the veranda roof, the expert observed:

- The outside edge of the veranda roof is supported on a horizontal timber beam which spans between two support posts (100mm sq) and the south-eastern corner of the northeast room.
- The corrugated iron roof cladding spans from the edge beam back to the front wall of the cladding.

5.5.2 The expert stated that:

The only potential safety issue relating to the veranda is whether the cladding is securely fixed to its supports. However, no signs of collapse of the veranda roof were observed.

5.5.3 In the expert's opinion the veranda roof, in its current state, does not present a significant risk of collapse so as to injure an occupant or a member of the public.

## 6. Discussion

### 6.1 Is the building dangerous?

6.1.1 In order to determine the authority's exercise of its powers of decision to issue a section 124 notice in regards to the building being dangerous, I must consider whether the building is dangerous in terms of section 121 of the Act.

6.1.2 Section 121 sets out the meaning of "dangerous building" as follows:

121(1) A building is *dangerous* for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; ...

6.1.3 Section 121(1)(a) establishes that a building is dangerous if, in the ordinary course of events, (excluding earthquakes) the building is "likely" to cause injury or death or damage to other property. The term "likely" has been considered in a number of judicial decisions regarding section 121 and its predecessor in the Building Act 1991 and means something that could well happen.<sup>6</sup>

6.1.4 The observations made by the authority on September 2014 in its inspection of the building and slip at the rear of the site and observations of the subsidence at the northeast corner of the building raised concerns regarding the forces imposed by the slip debris against the building and the structural stability of the building. The authority later added concerns regarding the veranda roof.

6.1.5 In making my decision I sought further evidence in the form of advice from the expert that would corroborate or contradict the evidence and opinions submitted to the determination by the parties in respect of those concerns.

6.1.6 I am of the view that the expert's findings confirm that the building, including the front veranda, is not dangerous as defined by section 121 of the Act. Although there is active regression of part of the cut slope behind the building, it is unlikely that

<sup>6</sup> See *Rotorua District Council v Rua Developments Ltd* DC Rotorua NP1327/97, 17 December 1999, and discussed in Determination 2006/119.

further slips would be of a volume or cause such pressure to the structure that would mean the building is likely to cause injury or death to any persons in or to persons on other property, or damage to other property. Nor is there evidence that the structure of the building itself is in such a state of damage or disrepair that it would meet the test under section 121 in terms of the likelihood to cause injury or death to any persons in or to persons on other property, or damage to other property.

- 6.1.7 Accordingly this determination reverses the authority's decision in respect of the references in the section 124 notice to the building being deemed to be dangerous.
- 6.1.8 I note here that the general disrepair of the building's envelope is allowing moisture into the timber framing and will be causing damage. The authority and the applicant have agreed to ongoing monitoring of the building's structure (refer paragraph 0) and I agree that is prudent in the circumstances.

## **6.2 The application of sections 124 and 125**

- 6.2.1 There is no dispute between the parties as to the issue of the notice in respect of the status of the building as an insanitary building for the purposes of the Act. The building was occupied at the time of the authority's site visit and had no potable water or adequate sanitary facilities, was in a state of disrepair and there was evidence of dampness in the building.
- 6.2.2 Following the authority's assessment of the building, section 124(2) provides for a number of actions that the authority may carry out, and the authority has discretion as to which action or combination of actions is appropriate in the circumstances. Those actions include:
- (a) putting up a fence or hoarding to prevent people approaching the building
  - (b) attaching in a prominent place on or adjacent to the building a notice that warns people not to approach it
  - (c) issue a notice requiring building work to be carried out to prevent the building from remaining insanitary
  - (d) issue a notice restricting entry to the building for particular purposes or to particular persons or groups of persons.
- 6.2.3 In this instance the authority has issued the notice identifying the building as both dangerous and insanitary. Although the heading of the notice refers only to sections 121 and 124(2)(c) and not to section 123 of the Act, the content of the notice confirms it was issued in respect of the insanitary status of the building and that it was issued under 124(2)(c); it describes both the reasons the authority considers the building insanitary and the options available to the owner to reduce or remove the danger and prevent the building remaining insanitary (section 124(2)(c)(i) and (ii)).
- 6.2.4 However, having regard to the content of the notice, I consider that it has also been issued under section 124(2)(b). Under the title "Work required to be carried out by building owner" the notice requires 'the building to be vacated as soon as possible'; while directing that the building be vacated is not a lawful requirement of a section 124 notice, it is the effect of a notice issued under sections 124(2)(a), (b) or (d). I note here that there is an unresolved dispute between the parties as to whether the notice was fixed to the building.

- 6.2.5 A notice issued under section 124(2) should always specify in the notice the relevant provision of section 124(2) the notice is issued pursuant to. It is not satisfactory to expect an owner to deduce the relevant power in section 124(2) that has been applied, even though that may be reasonably clear from the wording of the notice.
- 6.2.6 Section 125(1) sets out requirements for notices issued under section 124(2)(c); including that the notice be in writing, fixed to the building, and given to persons listed in section 125(2). In addition, subsections 125(1)(d) and (1)(e) require the notice state the time within which the building work must be carried out and whether the owner must obtain building consent. I address this aspect of the notice in paragraph 6.3 below.
- 6.2.7 The applicant has stated that the notice was not served to the tenant and was not affixed to the building; the applicant holds the view that the requirements of section 125 of the Act had not been met and the notice was therefore invalid.
- 6.2.8 The Act provides for the authority to do one or any combinations of actions listed in section 124(2). While section 125(3) addresses the matter of the validity of a notice that is not given to the persons referred to in section 125(2), I am of the opinion that it does not follow that a notice not affixed to the building means the notice is invalid.

### **6.3 Content of the notice**

- 6.3.1 The applicant has stated that the notice issued under section 124 ‘demanding demolition’ is inconsistent with the District Plan as the building is part of the Mangonui Conservation Zone, and the issue of the notice is *ultra vires*, and that for this reason alone the section 124 notice should be removed.
- 6.3.2 Section 4 of the notice set out the actions that were required, with 4(ii) requiring that the applicant advise the authority in writing the applicant’s response to the notice. The notice then went on to set out four options open to the applicant to remedy the dangerous and insanitary conditions, the last of which was ‘You may choose to demolish the building’. I consider the notice was clear in respect of setting out a number of options for the applicant to consider and while demolition was listed as one of the options there was no “demand” to demolish the building.
- 6.3.3 Regarding section 6 of the notice setting out whether or not a building consent would be required, I am of the view that clarification of the conditions in which building work can be undertaken without consent would have been appropriate with a direct reference made to section 41(1)(c)(i).

### **6.4 General comment**

- 6.4.1 I provide the following comment in response to the applicant’s submission on the matter being determined (refer paragraph 4.9) and references to the basis on which the authority made its decision (refer paragraph 4.1). A determination under section 177 of the Act is in respect of the authority’s exercise of its powers of decision, and section 188 provides that the determination must confirm, reverse, or modify that decision. Put more simply, the matter being considered is whether the authority’s decision was correct, as opposed to a ‘judicial review’ type assessment of how the authority reached that decision; and the determination must decide whether or not the authority’s decision should stand or not, or be modified in some way.

- 6.4.2 While the grounds on which the authority made its decision provide context to the decision, it is the decision itself that is the matter being determined. In some cases the outcome of an incorrect process by an authority may still reach a correct decision, in which case the determination would confirm or possibly modify the decision.
- 6.4.3 In seeking to have the dangerous building notice removed from the property file, the applicant holds the view that because the building is presently unoccupied there is no danger to anyone within the building. I note here that section 121(1)(a) also applies in respect of the likelihood of the building causing injury or death to persons on other property or damage to other property. It is not only the risk to an occupant that determines whether a building is dangerous under section 121.
- 6.4.4 The authority has stated that the insanitary notice has been complied with (refer paragraph 3.8.3) as the building is vacant and the applicant proposes to monitor it. I do not consider the insanitary status of the building in this determination and it is not disputed between the parties; however I note that whether or not it is occupied does not alter the status of the building as an insanitary building.
- 6.4.5 In regards to a dangerous building, it may be that vacating a building is sufficient in itself to reduce or remove the danger in some situations, for example where a dangerous building is in a remote and isolated location. However, in this case the building is immediately adjacent a footpath and has buildings immediately adjacent on two sides.
- 6.4.6 If the veranda or building were in danger of collapse, or becomes so in the future, additional measures beyond vacating the building would be required to reduce or remove the danger. If the building was considered dangerous, I do not accept that the danger is reduced or removed only by ensuring the building is unoccupied.

## **6.5 What happens next?**

- 6.5.1 The building was occupied at the time of the authority's site visit, there was no potable water or sanitary facilities, and the authority considered the general state of disrepair fell and moisture ingress meant the building was insanitary under section 123. The parties are not in dispute in respect of the building being deemed insanitary.
- 6.5.2 Given that I am reversing the authority's decision to issue the notice in respect of section 121, the authority must now reissue the notice under section 124(2)(b) in respect of section 123 only. I note that should future circumstances warrant further action, such as the building becoming dangerous under section 121, the authority retains the power to issue a further notice under section 124 at that time.
- 6.5.3 The applicant has made a number of references to the authority removing the notice and documents that refer to the property being dangerous from the property file. I note here that the notice refers to a decision made at a certain point in time; that decision has been disputed by way of a determination and the determination requires the authority reissue the notice with references to the building being dangerous under section 121 removed. I strongly suggest the authority record this determination on the property file and also on any LIM issued concerning this property.

6.5.4 The applicant has requested that I require the authority retain the determination on the property file and that the determination set a timeframe in which the authority must comply with the decision. While these requests are outside those which can be addressed by way of a determination, I note that section 216 of the Act sets out the information that a territorial authority must keep, and section 44A(2) of the *Local Government Official Information and Meetings Act 1987* sets out the information that must be included in the LIM.

## **7. The decision**

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building is not dangerous under section 121 and accordingly I reverse the authority's decision to issue the notice under section 124 in regards to the building being dangerous.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 October 2015.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

### A.1 Relevant sections of the Act

Subpart 6—Special provisions for certain categories of buildings

Definitions of dangerous, affected, earthquake-prone, and insanitary buildings

#### **121 Meaning of dangerous building**

(1) A building is dangerous for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

...

#### **123 Meaning of insanitary building**

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

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

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

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

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

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

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

#### **124 Dangerous, affected, earthquake-prone, or insanitary buildings: powers of territorial authority**

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, earthquake-prone, or insanitary building.

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(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) except in the case of an affected building, issue a notice that complies with section 125(1) requiring work to be carried out on the building to—

(i) reduce or remove the danger; or

(ii) prevent the building from remaining insanitary:

(d) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

(3) This section does not limit the powers of a territorial authority.

**125 Requirements for notice requiring building work or restricting entry**

(1) A notice issued under section 124(2)(c) must—

- (a) be in writing; and
- (b) be fixed to the building in question; and
- (c) be given in the form of a copy to the persons listed in subsection (2); and
- (d) state the time within which the building work must be carried out, which must not be less than a period of 10 days after the notice is given or a period reasonably sufficient to obtain a building consent if one is required, whichever period is longer; and
- (e) state whether the owner of the building must obtain a building consent in order to carry out the work required by the notice.

...

(2) A copy of the notice must be given to—

- (a) the owner of the building; and
  - (b) an occupier of the building; and
  - (c) every person who has an interest in the land on which the building is situated under a mortgage or other encumbrance registered under the Land Transfer Act 1952; and
  - (d) every person claiming an interest in the land that is protected by a caveat lodged and in force under section 137 of the Land Transfer Act 1952; and
  - (e) any statutory authority, if the land or building has been classified; and
  - (f) Heritage New Zealand Pouhere Taonga, if the building is a heritage building.
- (3) However, the notice, if fixed on the building, is not invalid because a copy of it has not been given to any or all of the persons referred to in subsection (2).