



Determination 2021/027

Regarding the authority's refusal to grant building consents for the construction of new residential dwellings at 66, 66A and 66B Elizabeth Street, Tuakau

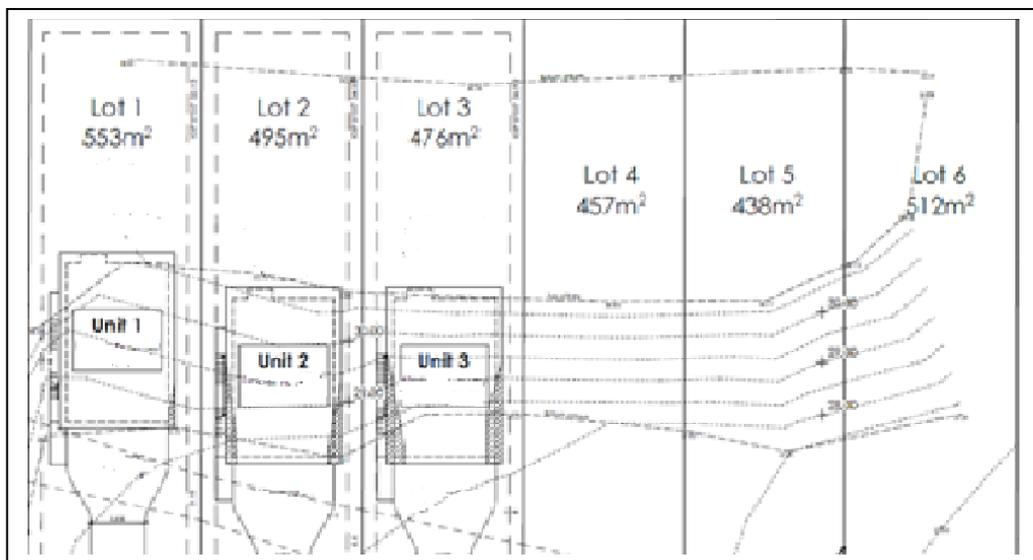


Figure 1 – site plan (not to scale)

Summary

This determination considers whether the authority was correct in its purported refusal of three building consent applications for proposed dwellings under sections 49 and 50 of the Building Act 2004. The determination discusses the authority's reasons for refusal, and whether the authority was correct to refuse the applications for the reasons given.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹

1.2 The parties to the determination are:

- the owner of the three properties, 62 Elizabeth Street Trustee Company Limited (“the owner”)
- Waikato District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the authority’s proposal to refuse to grant three building consents, namely:

- BLD 0290/21 for 66 Elizabeth Street (66);
- BLD 0295/21 for 66A Elizabeth Street (66A); and
- BLD 0297/21 for 66B Elizabeth Street (66B), (collectively “the building consents”).

The building consents were for the construction of new dwellings (“the proposed new dwellings”) on lots 1, 2 and 3 respectively of a subdivision (“the lots”). The authority considers:

- the stormwater design for the lots does not comply with the resource consent notice dated 23 June 2020 (“the consent notice”) issued under section 221 of the Resource Management Act 1991 (“RMA”)
- the requirement for retaining of the site cut on the western side of the lots (“western site cut”) has not been addressed.

1.4 Accordingly, I consider the matter to be determined² is whether the authority was correct in purporting to refuse the building consents for the proposed new dwellings. In making this decision, I will consider the authority’s purported reasons for refusal outlined in its letter dated 7 October 2020.

1.5 The relevant sections of the Act are contained in Appendix A. Unless otherwise stated, references in this determination to ‘sections’ are to sections of the Act, and references to ‘clauses’ are to clauses of the Building Code.

Matters outside the determination

1.6 I have not considered any issues under the RMA when making this determination, specifically any issues surrounding the subdivision of the six lots.

2. The building work

2.1 The subdivision site is located on the northern side of Elizabeth Street. The subdivision comprises six lots (Lots 1 to 6 – see figure 1) of between 438m² and

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

² Under section 177(1)(b) and (2)(a) of the Act.

553m². Each of the lots have a flat building site, with a gently sloping topography from the western boundary towards the eastern boundary.

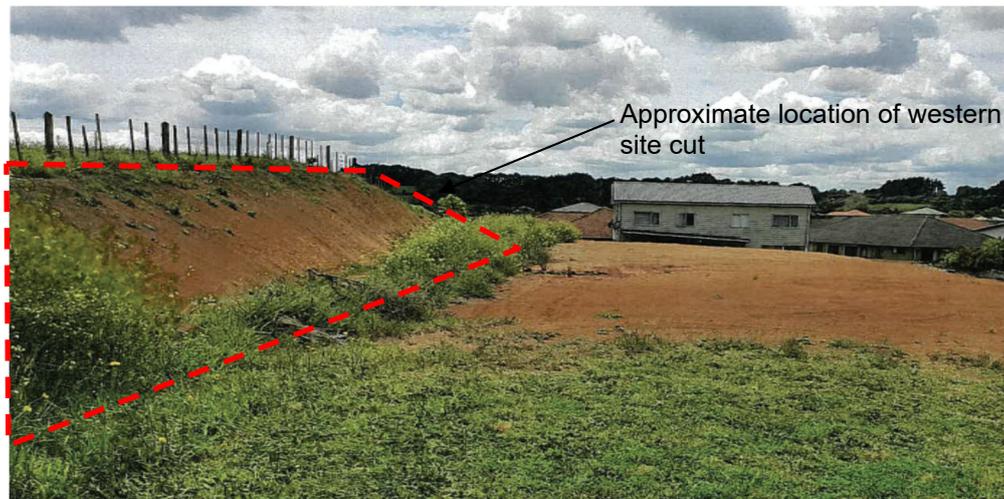


Figure 2 – Photograph of the western site cut

- 2.2 The subdivision site has been subject to earthworks, involving the piping of an overland flow path and a wastewater line installation. There is a site cut on the western boundary of the subdivision site, which I will refer to as the western site cut (see figure 2).
- 2.3 The proposed new dwellings are two storey, timber framed buildings of approximately 60m², with a garage on the ground floor and living areas and bedrooms on the first storey level.
- 2.4 The proposed stormwater system comprises downpipes from the roof area and a driveway sump (shown on the plans as a ‘Type 1 Sump as per Acceptable Solution E1 Surface Water (E1/AS1)’) all connected to a controlled outlet soakage subsurface drainage system with a filter inlet. The plans note that the contractor will confirm the exact depth and location of the controlled outlet with the engineer.

3. Background

- 3.1 As a result of an application for resource consent for the subdivision of six lots, the authority granted resource consent for the subdivision on 23 June 2020.
- 3.2 A geotechnical assessment report (“the geotechnical report”), dated 4 February 2019, and prepared by an engineering consultancy firm with geotechnical expertise, was included in the resource consent application. It covered the building platform ground condition, suitability and stability, foundation design considerations, stormwater controls and wastewater limitations.
- 3.3 The geotechnical report states the building sites for the lots are “safe and stable in their current state” and “Each of the building platforms [have] been assessed with no large scale stability issues”. The detailed discussion about slope stability states:

The location of the building sites are within an area which is not affected by soil instability or subsidence. The building sites are mostly flat with a gently sloping topography from the western boundary towards the eastern boundary on the Lots.

No further analysis is required for these building sites. Should the building be moved outside of the approved building sites as shown on the attached site plan, then the site may require further analysis.

There is a site cut on the western boundary behind Lots 2, 3, 4, and 5. This site cut is starting to fritter and shall need retaining. A retaining wall can be designed with the parameters mentioned within this report.

- 3.4 The geotechnical report also sets out the design parameters for the stormwater management system for the roof and ground areas that require collection of stormwater runoff. The report states as a recommendation:
- Stormwater runoff from roads and impermeable areas must be collected onsite. Correct stormwater design shall be designed by a suitably qualified Engineer.
- 3.5 In granting resource consent for the subdivision, the authority issued a resource consent notice. The resource consent notice granted consent to the proposed subdivision subject to the condition:
- Any earthworks, foundation design and stormwater management for an application for building consent on [the Lots] must be undertaken either in accordance with the restrictions and recommendations in the [geotechnical report] ... or in accordance with an alternative report, undertaken by a suitably qualified and experienced Engineer (Geo Professional), approved in writing by [the authority]...
- 3.6 The resource consent notice also stated:
- Stormwater disposal to be in accordance with the [geotechnical report].
- a) Stormwater tank to be connected to the stormwater line
 - b) [Infiltration tank] to be used. Geotechnical engineer to make comment on the suitability of the proposed [tank].
- 3.7 On 19 August 2020, the owner lodged applications for the building consents for the construction of a new dwelling on each of the lots. The building consent applications included plans and specifications and the geotechnical report.
- 3.8 On 9 September 2020, the authority issued a request for further information. In respect of the building consents for 66A and 66B, the request stated:
- B1
- Review [geotechnical report] and requirements for retaining wall to be designed and constructed on the western [site cut]. Engineers (sic) design required.
- In respect of building consents for properties at 66, 66A and 66B, the request stated:
- E1
- Supply a suitable stormwater design from a registered engineer as per the recommendations of the [geotechnical report] and [the consent notice].
- 3.9 The authority's 9 September 2020 request for further information contains a standard note as follows:
- “... planning information requested will not stop [the] Building Consent from being issued, but no building work is to start and no inspections will be carried out until the required Resource Consent is granted or revised plans received”.
- 3.10 On 7 October 2020, the authority issued a second request for further information in relation to all building consent applications. Specifically, the authority requested the following in relation to each application:

66, 66A and 66B

- 3.10.1 The authority requested the owner “supply a suitable stormwater design from a registered engineer as per the recommendations of [the geotechnical report] and the [resource] consent notice”.

66A and 66B

- 3.10.2 The authority requested the owner “review [the geotechnical report] and requirements for a retaining wall to be designed and constructed on the western [site cut]”. The authority went on to say an engineered design was required.

66A

- 3.10.3 The authority noted the information for the stormwater system was outstanding and an engineered designed system was required. The request also noted the requirement for a retaining wall needed to be addressed. The authority noted from previous conversations the retaining wall for lots 2 to 5 would be designed and applied for under the current building consents and Producer Statement – Construction Review (PS4) supplied at completion.
- 3.11 On 16 October 2020, the owner responded to the authority’s second request for further information, and in respect of the retaining wall on the western site cut, noted the following:
- [The geotechnical report] does not state that a wall is required. It says that the bank needs retaining. This can be done at any time and without consent. The report states clearly that the sites are suitable for building in their current state. Hence titles were issued without any consent notices...
- [The geotechnical report] states “If the site cut ... requires a retaining wall then it shall be designed within these parameters.’ However, [the geotechnical report] does not state that a wall is required. It only mentions retaining will be required. To ‘retain’ does not automatically assume a wall. This can be achieved in many other ways. Some of which will not require engineering design and/or [Producer Statement – Construction Review (PS4)].
- 3.12 In their 16 October 2020 response, the owner noted the stormwater design solution, which was provided by the tank manufacturer using the geotechnical report that had been previously accepted and approved by the authority in relation to the subdivision.
- 3.13 The authority subsequently wrote to the owner on 9 October 2020 outlining the options the owner had to be granted building consent.
- 3.14 The Ministry received an application for a determination on 13 November 2020.

4. The submissions

The owner

- 4.1 The owner submitted that the stormwater design is the same design as used for the subdivision of the lots and has been carried out by a geotechnical engineer. The parameters from the geotechnical report have been used by the tank manufacturer for the proposed stormwater system.
- 4.2 With respect to the western site cut, the owner submitted:
- the authority was incorrect in its decision to refuse the building consent applications on the basis it had not received “stormwater design” information or that “a retaining wall was required”. These items do not demonstrate the proposed building plans were inadequate
 - the issue of the western site cut is not relevant to the building consents and the authority should not hold up the issuing of the building consents for this reason

- a “stormwater design” had been supplied to the authority by way of the geotechnical report
- the geotechnical report mentions the western site cut being 20m away³ and should be retained; however, the report does not state the western site cut will impact the building or site stability
- while the parameters for retaining the western site cut are provided in the report, it does not state a *retaining wall* is required prior to or as part of a building consent; rather, the report states “retaining” can be achieved in many ways (emphasis added)
- the geotechnical report states the subject sites are within an area “not affected by soil instability or subsidence” and the risk classification of the site is “low”, and
- the authority had advised that the boundary bank should have been addressed as part of the subdivision, and it now wanted this to be addressed prior to the issuing of the building consents.

The authority

4.3 The authority noted the owner had not provided a valid reason for not complying with the requirements of the geotechnical report or the consent notice associated with the lots. The authority considers there are two main issues in respect to the application:

- the stormwater design does not comply with the resource consent notice, and
- the requirement for retaining to the [western] site cut, as indicated in the geotechnical report, has not been addressed.

4.4 With respect to the stormwater design, in its letter dated 21 December 2020, the authority noted:

- The resource consent notice stated the earthworks, foundation design and stormwater management for the building consent application for the lots “must be undertaken either in accordance with the restrictions and recommendations in the [geotechnical report] ... or in accordance with an alternative report undertaken by a suitably qualified and experienced Engineer ... approved in writing by the Council”.
- The recommendations of the geotechnical report stated “correct stormwater design shall be designed by a suitably qualified Engineer”.
- “...the proposed stormwater design in the [geotechnical report] seems appropriate, [however] it does not comply with the requirements of the resource consent notice, so cannot be accepted”.

4.5 With respect to the western site cut and retaining requirements, in its letter dated 21 December 2020, the authority noted:

- The geotechnical report stated “the [western] site cut is starting to fritter and shall need retaining”.
- The statement that the western site cut shall need retaining “is not ambiguous in the slightest [and] it would be negligent of the [authority] to ignore this

³ I note the consented plans show this distance as 17.19m (refer paragraph 5.12).

sentence without requesting further comment from a suitably qualified person as a minimum”.

- Options were presented to the owner of:
 - Including “a retaining wall design as part of the building consent [applications]”
 - Providing “a letter of intent from a suitably qualified engineer to observe the re-contouring of the area to negate the need for any retaining walls”
 - Providing “an updated geotechnical report confirming the retaining walls will not be required”.
- The authority had noted the owner was not limited to the options presented, and it would consider any “suitable alternative” but the owner has “yet to provide a valid reason for not complying with the requirements of the soil report or the consent notices associated with the lots”.

Draft determination

4.6 A draft determination was issued to the parties for comment on 2 September 2021.

4.7 The owner accepted the draft without substantive comment.

4.8 The authority did not accept the draft and provided comment as follows:

4.8.1 The draft determination suggests the authority was to ignore the expert opinion of the geotechnical engineer in favour of its own assessment.

4.8.2 Requiring comment from the author of the geotechnical report, to confirm the frittering of the western site cut was not an issue, is not an unreasonable or onerous request on the owner.

4.8.3 The amount of information the authority provided to the owner, as reasons for refusing to grant the building consents, was in line with guidance previously issued by the Ministry⁴, specifically as follows:

When refusing a building consent as a result of processing, it is adequate for a BCA to state:

- it is not satisfied on reasonable grounds that the building work would comply with the Building Code
- the relevant Building Code clause where the application is deficient.

5. Discussion

General

5.1 In order to consider the authority’s exercise of its powers of decision in refusing to grant the building consents, I need to take into account the requirements for building consent applications in terms of section 45 and section 49 of the Act.

5.2 Section 49 of the Act states:

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the

⁴ <https://www.building.govt.nz/building-officials/bca-accreditation/detailed-regulatory-guidance/7-perform-building-control-functions/granting-refusing-to-grant-issue-building-consent/#jumpto-refusing-a-consent-and-providing-reasons> : 7 December 2021

building work were properly completed in accordance with the plans and specifications that accompanied the application.

5.3 Put another way, if the authority is satisfied on reasonable grounds that the proposed building work would comply with all the relevant provisions of the Building Code, the authority must grant a building consent for that work.

5.4 In terms of the basic information required to support an application for a building consent, section 45 of the Act states:

45 How to apply for a building consent

- (a) An application for a building consent must—
- (b) be in the prescribed form; and
- (c) be accompanied by plans and specifications that are –
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and
- (d) contain or be accompanied by any other information that the building consent authority reasonably requires;

...

5.5 The Act provides for an authority to set reasonable requirements for the documentation that accompanies applications for building consents. An authority is entitled to set minimum requirements to ensure that the proposed building work is clearly documented and require designers to clearly demonstrate and document how Building Code compliance is to be achieved.

5.6 The Ministry has issued guidance⁵ under section 175 of the Act (see Appendix A) that described the minimum documentation that should be supplied with an application to demonstrate compliance with relevant clauses of the Building Code (“the Ministry’s guidance”).

5.7 Therefore, the Act makes requirements of both the applicant to a building consent, as well as the authority, when a building consent is being sought. The applicant is required to provide sufficient relevant information to clearly describe the proposed building work and provide evidence of compliance with the Building Code. If the application is not adequate, then under section 50 of the Act (see Appendix A), the authority must provide written notice and give the reason(s) why an application is being refused. That notification should be sufficiently clear so the applicant can submit specific information on specific matters of doubt over compliance with the Building Code to allow the consent to be issued.

The stormwater design

5.8 The authority holds the view that the resource consent notice required the management of stormwater, for the building consent application, to be in accordance with either:

- the restrictions and recommendations of the geotechnical report, which stated stormwater design shall be designed by a suitably qualified engineer; or
- an alternative report, undertaken by a suitably qualified and experienced engineer, approved in writing by the authority.

⁵ <https://www.building.govt.nz/assets/Uploads/projects-and-consents/guide-to-applying-for-a-building-consent.pdf> : 7 December 2021

- 5.9 The owner considers a design for the stormwater management system has been provided using the recommendations of the geotechnical report, and the geotechnical report contains calculations and design information.
- 5.10 Drawings, specifications and calculations were provided to the authority in support of the building consent applications under section 45 of the Act. However, the authority limited its consideration of the proposed stormwater design to the requirements of the resource consent notice instead of identifying any non-compliances of the design with the performance requirements of Clause E1. If the authority has specific concern with compliance, it should have identified that concern and related it to the requirements of Clause E1 rather than requiring adherence to a resource consent notice.

The retaining of the western site cut

- 5.11 The authority considers it cannot ignore the fact the geotechnical report states the western site cut is starting to fritter and needs retaining. It says it cannot ignore this because it has a “duty of care”. It considers the frittering of the bank needs to be addressed by way of further information, or a retaining wall design, as part of the building consent applications.
- 5.12 The owner considers the western site cut is not relevant to the building consents as it is 17.19m from the closest proposed new dwelling as per the building consent plans. Additionally, while the western site cut will require retaining in the future, this does not necessarily mean retaining works need to be done presently.
- 5.13 I note the wording the engineer has used in the geotechnical report is “shall need retaining” and the phrase “a retaining wall can be designed”. This language does indicate the engineer is raising a critical issue with the design. By contrast, the geotechnical report also states the building sites are “not affected by soil instability or subsidence” and “each building platform has ... no large scale stability issues”.
- 5.14 While the authority is relying on the information provided in the geotechnical report, it does not appear to have made its own assessment of whether the frittering impacts on the compliance of the building work or presents a hazard. The authority has not presented information indicating there is a hazard as defined by section 71 (see Appendix A). It is not my view that the authority should ‘ignore’ comments in a report provided to them, rather, that it make its own assessment of compliance with the Building Code and the Act.
- 5.15 In my opinion, the 17.19m distance from the nearest building is relevant to the appropriateness of the council’s requirement. No specific compliance concern has been raised by the authority. I note also that the location of the building sites are:
- within an area which is not affected by soil instability or subsidence
 - mostly flat with a gentle sloping topography from the western boundary to the eastern boundary, and
 - not within close proximity to the western site cut, and therefore the site cut would not cause structural stability issues for the proposed buildings or expose them to any risk from potential erosion.
- 5.16 I therefore consider it was incorrect for the authority to request further information about the western site cut on solely on the basis that it has a duty of care. The

authority has not identified a Building Code compliance issue with respect to the proposed building work, or identified a hazard on the site.

S50 and the amount of information provided

- 5.17 The authority submits that the amount of information given in support of their refusal is in line with Ministry guidance. The amount of information given is not in dispute – what is in dispute are the reasons given and whether they are adequate. This issue has been considered in previous determinations in relation to section 95A of the Act (see Appendix A), which requires an authority to give reasons for refusing a code compliance certificate. The relevant requirements of section 50 are the same as section 95A, that is; the building consent authority must give an applicant written notice of the refusal and the reasons for the refusal.
- 5.18 I hold the same view as discussed in determination 2020/005⁶ regarding what is expected of a building consent authority when giving reasons for a refusal. In my opinion, the requirement to give reasons for a refusal applies regardless of whether it is in relation to the refusal of a building consent or a code compliance certificate. I emphasise the following key points:
- The reasons given by an authority will need to consider aspects of the design the authority believes do not comply with the Building Code or the Act.
 - The requirement an authority provides reasons in writing for refusing to grant a building consent, is so an owner is made aware of any shortcomings with the plans and specifications in order to obtain a building consent.
 - It is important “an owner be given sufficiently explicit, specific and clear reasons why [an authority] believes the building work does not comply with the Building Code. The owner can then consider the work required to remedy the situation⁷”.

Conclusion

- 5.19 The authority was incorrect in its approach to the requirements of section 49, in that its reasons for refusal did not relate to the requirements of the Building Code or the Act. In raising concerns with the stormwater design and the retaining of the west slope, the authority did not identify any concern with the compliance of the building work with Clauses E1 *Surface Water* or Clauses B1 *Structure* respectively. Related to this, I do not consider the authority provided sufficiently clear reasons for refusal under section 50.

6. The decision

- 6.1 In accordance with section 188 of the Act, I determine that the authority was incorrect in its purported refusal to grant building consents for 66, 66A and 66B Elizabeth Street, Tuakau. I reverse the authority’s refusal, thus requiring the authority to make a new decision taking into account the findings of this determination.

⁶ Determination 2020/005, dated 7 May 2020 – Regarding the refusal to issue a code compliance certificate for a 22-year-old house at 63b Thirteenth Avenue, Tauranga – section 5.2 “The authority’s regulatory actions”.

⁷ Determination 2020/005, at paragraph 5.2.5

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 December 2021.

Katie Gordon
National Manager, Building Resolution

Appendix A

A1. The relevant provisions of the Act are:

37 Territorial authority must issue certificate if resource consent required

- (1) This section applies if a territorial authority considers that—
 - (a) a resource consent under the Resource Management Act 1991 has not yet been obtained; and
 - (b) the resource consent will or may materially affect building work to which a project information memorandum or an application for a building consent relates.
- (2) The territorial authority must issue a certificate, in the prescribed form, to the effect that until the resource consent has been obtained—
 - (a) no building work may proceed; or
 - (b) building work may only proceed to the extent stated in the certificate.

...

45 How to apply for a building consent

- (1) An application for a building consent must—
 - (a) be in the prescribed form; and
 - (b) be accompanied by plans and specifications that are—
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and

...

- (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and

...

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

50 Refusal of application for building consent

If a building consent authority refuses to grant an application for a building consent, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

71 Building on land subject to natural hazards

- (1) A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if—
 - (a) the land on which the building work is to be carried out is subject or is likely to be subject to 1 or more natural hazards; or
 - (b) the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.

- (2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—
 - (a) protect the land, building work, or other property referred to in that subsection from the natural hazard or hazards; or
 - (b) restore any damage to that land or other property as a result of the building work.
- (3) In this section and sections 72 to 74, natural hazard means any of the following:
 - (a) erosion (including coastal erosion, bank erosion, and sheet erosion):
 - (b) falling debris (including soil, rock, snow, and ice):
 - (c) subsidence:
 - (d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding):
 - (e) slippage.

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of –

- (a) the refusal; and
- (b) the reasons for the refusal.

175 Chief executive may publish guidance information

- (1) The chief executive may publish information for the guidance of –
 - (a) any of the following persons to assist them in complying with this Act:
 - (i) territorial authorities
 - (ii) building consent authorities
 - (iii) owners
 - (iv) persons who carry out building work, and

...

- (2) Any information published by the chief executive under this section –
 - (a) is only a guide; and
 - (b) if used, does not relieve any person of the obligation to consider any matter to which that information relates according to the circumstances of the particular case.

183 Decision or exercise of power suspended until determination made

- (1) Until the chief executive makes a determination on the matter, any decision or exercise of a power by any person referred to in section 177 that relates to that matter is suspended unless and to the extent that the chief executive directs otherwise.
- (2) However, the following decision are not suspended until a determination is made:
 - (a) a requirement in a notice to fix issued under section 164 to cease building works for safety reasons;
 - (b) any decision under section 133BS or 133BT