

Determination 2025/020

Council's decision to issue a yellow placard under section 133BT of the Building Act due to a slip

10 Rona Avenue, Grey Lynn, Auckland

Summary

This determination considers a council's decision to issue a notice under section 133BT (a yellow placard) to restrict access to part of the property due to a slip. The determination considers whether the council had the power under the Building Act to issue the notice, and the issue of the notice in relation to a slip at the rear of the property.



Figure 1: The location of the slip and cordoned area at the rear of the property

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004.

The legislation referred to in this determination is available at www.legislation.govt.nz. Information about the legislation, as well as past determinations and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. Walbran Simon Investments Limited, the owner (“the owner”) of the property, represented by its director M Simon, who applied for this determination.
 - 1.2.2. Auckland Council (“the council”), who issued the notice.
- 1.3. The matter arises from the issue of a notice restricting access to part of the property due to a slip (referred to as a “yellow placard”).² The owner is of the view the issue of the notice was unjustified because the slip occurred on the adjacent property and the only impact on the owner’s property was partial collapse of a fence at the rear of the yard; the owner considers this did not meet the threshold for the issue of the notice.
- 1.4. The council has raised matters concerning the jurisdiction to make this determination under section 177(4A)(b). In particular the council noted the decision to issue the placard was not an exercise of a power of decision under section 133BT of the Building Act.
- 1.5. The notice stated that it was issued “under the authority of s133BT of the Building Act 2004”. As such, I am of the view the decision to issue the notice is an exercise or purported exercise of the power of decision under section 133BT by a responsible person under the Building Act, and therefore a determinable matter under section 177(4A)(b).

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² A yellow placard restricts access to part(s) of the property or restricts access to short term entry only (with or without supervision).

- 1.6. Accordingly, matter to be determined³ is the council's exercise of its power of decision or purported exercise of its power of decision to issue a notice under section 133BT on 31 January 2023. In making this determination, I will consider whether the council had the power under the Building Act to issue a section 133BT notice, and the issue of the notice in relation to a slip at the rear of the property.

2. Background events

- 2.1. Beginning on 27 January 2023, Auckland experienced an extreme weather event that is commonly known as the "Auckland Anniversary floods". This event resulted in severe flooding and numerous landslides around the Auckland region.
- 2.2. On 27 January 2023 the Mayor of Auckland declared a local state of emergency under the CDEMA⁴ which allowed powers to be exercised under that legislation.
- 2.3. On 30 January 2023, the Mayor of Auckland made the decision to designate an area under the Building Act.⁵ The designated area was the entire geographical region associated with Auckland Council and included Grey Lynn where the owner's property is located.
- 2.4. The notification of the designation⁶ stated the designation took effect on 1 February 2023.⁷

The notice

- 2.5. During the weather event, a slip occurred on the neighbouring property adjacent to the rear boundary of the owner's property. The slip affected a portion of the boundary fence between the owner's property and the neighbouring land (see Figure 1).
- 2.6. On 31 January 2023 a rapid building assessment was carried out at the owner's property under the authority of the council. The record of the assessment identifies land instability as external risks. It noted no damage to the dwelling, water supply, plumbing or drainage, but stated "slip at rear of the property, fence has fallen away

³ Under section 177(1)(b) and (4A)(b).

⁴ The declaration was extended on 3 February 2023 and again on 9 February 2023. The state of local emergency ended on 14 February 2023 when a State of National Emergency was declared. <https://www.civildefence.govt.nz/resources/previous-emergencies/historical-emergencies> (accessed 26 March 2025)

⁵ A designation refers to a designated area as referred to in section 133BC. Section 133BC(1) states that if a state of emergency or a transition period is in force for an area under the CDEMA, a relevant CDEMA decision-maker may designate the whole or a part of that area for the purposes of Subpart 6B of the Building Act.

⁶ As required under section 133BE.

⁷ <https://www.aucklandcouncil.govt.nz/recovery-extreme-weather-disasters/recover-disaster/Pages/designation-response-january-2023-storm.aspx#:~:text=About%20this%20designation,effect%20on%201%20February%202023> (accessed 26 March 2025)

in back lect (sic) corner". The outcome was recorded as "Y1 - Restricted access to part(s) of the building only". The suggested further actions included a recommendation that a further assessment by a geotechnical engineer be carried out, and requirements for a safety cordon or barricade were noted as "none required".

- 2.7. Caution tape was put up at the rear of the property (see Figure 1) and a yellow placard titled "Restricted Access" was placed on the dwelling ("the notice"). The notice was marked to indicate that it applied "to part(s) of the building only", and included the following statements:

There has been a quick visual inspection of this building:

- This building has been damaged and its structural safety is questionable
- Enter only at own risk
- Future events may cause more damage that may change this assessment

Description of hazard observed: slip at rear yard of the property

Restricted areas are: cordoned area at the rear of the property

Restriction on use: ... ☒ Other Geo tech to assess

- 2.8. The notice stated that it had been placed "on behalf of the CDEM Controller or other Responsible Person under the authority of s133BT of the Building Act 2004".
- 2.9. A subsequent assessment dated 2 May 2023 for the owner's insurer noted that a fence had been constructed to prevent access to the area of the slip, and that "the property has been yellow stickered however the slip itself appears to be outside the land holding so we see no health & safety concerns for the property". The report went on to note that the landslide occurred some "16+ metres from the dwelling".
- 2.10. On 16 June 2023 the council undertook a re-assessment and concluded that the damage had been mitigated to a degree where the "status of 10 Rona Ave had been resolved and [the notice] could be 'closed'."
- 2.11. A dispute between the parties then arose when the owner requested the entry relating to the notice on the property's LIM⁸ be removed because they believe it suggests damage had occurred to the dwelling when that was not the case. Subsequently the owner reached the view the notice should not have been issued.

⁸ A Land Information Memorandum (LIM) report provides information about a specific property, including land, building, environmental, and planning details. The LIM report helps inform property buyers, sellers, and developers about potential issues and characteristics of a property. The council's decisions about what is included in a LIM is not within the scope of matters that can be subject to a determination under section 177 of the Building Act.

3. Submissions

The owner

- 3.1. The owner disputes the council's decision to issue the notice for the following reasons:
- 3.1.1. The slip occurred entirely on the neighbouring property, posing no risk to life or property on 10 Rona Avenue. The partial collapse of a shared fence did not meet the threshold for issuing a notice.
 - 3.1.2. The council failed to meet the requirements of section 133BT, as there was no reasonable belief that the notice was necessary to reduce or remove the risk of injury or death.
 - 3.1.3. There was a failure to properly assess the risk to the buildings. No part of the slip threatened the structural integrity of any building on the property. The distance between the dwelling and the slip meant the dwelling was never at risk.
 - 3.1.4. The storm event had ended by the time the assessment was done, and no further adverse weather was forecast, meaning there was no ongoing or increasing risk.

The council

- 3.2. In raising concerns about the jurisdiction to make this determination under section 177(4A)(b), the council made the following points:
- 3.2.1. Section 177(4A)(b) applies to the power of decision of a responsible person to issue a notice under section 133BT. A local state of emergency was in place, but no designation under the Building Act was in force when the notice was issued.
 - 3.2.2. The council did not, and could not, rely on section 133BT to issue the yellow placard because no designation was in force on the date it was issued.
 - 3.2.3. The notice could only have been, and was only, issued in reliance on powers granted to the Controller under the Civil Defence Emergency Management Act 2002 ("CDEMA").
 - 3.2.4. Determinations are limited to decisions made (or not made) under the Building Act. The Ministry has no jurisdiction to make a determination relating to decisions under the CDEMA.

- 3.3. The council also submitted that “the decision to issue a placard was not the authority’s decision. Under subpart 6B of the Building Act, only a responsible person may issue a placard, under the delegation of the Controller.”
- 3.4. In regard to the issue of the placard, the council submitted the decision to issue the placard was justified on the basis there was clearly identified land slippage adjacent to the owner’s property with the potential the land would continue moving. The council considers the decision to issue the placard was an appropriate response in the circumstances.
- 3.5. The council further submitted:
- 3.5.1. While the placard referred to section 133BT, it did not have the effect of “prohibiting or restricting the use of a building” or “informing members of the public of the risks posed by the building” in terms of subsections (1) or (2). Instead, the placard advised of a slip at the rear of the property and appropriately cordoned off an area of land that was subject to risk.
 - 3.5.2. The issue of the placard relied on the general powers conferred by the CDEMA, including those under section 86(b), which provides for directions that can exclude persons from any premises or place.
 - 3.5.3. Irrespective of the wording on the placard, this does not and cannot alter the authority for issuing it, and the power or authority to issue the placard under the Building Act did not exist on 31 January 2023.
 - 3.5.1. The decision to issue the placard was justified in light of the emergency context, the rapid nature of the assessment, the existence and location of the slip, the potential for further land movement and risks to the property, building and lives of the occupants.
 - 3.5.1. To declare the placard a nullity (ie to say it should not have been issued in the first place) would require second-guessing decisions made in emergency circumstances with the benefit of hindsight. This has no value given that there is already a remedy which is to either downgrade or close the placard.

4. Discussion

Legislation for managing buildings in emergencies

- 4.1. The Civil Defence Emergency Management Act 2002 (CDEMA) and the Building Act both provide for the management of buildings in an area that is affected by an emergency. Below is a brief summary to provide context to the matter considered in this determination.

The CDEMA

- 4.2. The powers under the CDEMA are exercised when a state of emergency has been declared, either locally or nationally, or during a transition period.⁹ The powers are wide ranging to provide for the safety of the public or property and to reduce or overcome the harm or loss associated with emergencies.¹⁰ They include, but are not limited to, the power to close or restrict access to roads or public places, evacuate premises or places, remove or secure dangerous structures, and provide rescue, first aid, food and shelter.
- 4.3. In relation to managing buildings these powers include but are not limited to directing an evacuation of and exclusion of people from any premise or place,¹¹ carrying out work to remove or dispose of, or secure or otherwise make safe dangerous structures,¹² and issuing a notice directing an owner of a structure to obtain an assessment of the effect of the emergency on the structure.¹³
- 4.4. I note that section 7 of the CDEMA provides for a precautionary approach in exercising the functions under that Act:
- All persons exercising functions in relation to the development and implementation of civil defence emergency management plans under this Act may be cautious in managing risks even if there is scientific and technical uncertainty about those risks.

The Building Act

- 4.5. The purpose of the special provisions in subpart 6B of the Building Act (sections 133BA to 133BZA – “the special provisions”) is the management of buildings located in an area affected by an emergency.¹⁴ The powers under these provisions are only available when there is a “designation” of the area affected by the emergency¹⁵ and the powers are exercised by a “responsible person”.¹⁶
- 4.6. These powers include, but are not limited to directing an evacuation of a building to prevent the death or injury of any person,¹⁷ putting measures in place to keep people at a safe distance from a building,¹⁸ placing signs or notices on or near a

⁹ Refer CDEMA Part 4

¹⁰ Ibid Part 5

¹¹ Ibid s 86

¹² Ibid s 85(1)(a)(iii)

¹³ Ibid s 91(2) and s 91A

¹⁴ The Building Act 2004, s 133BA

¹⁵ Ibid s 133BC

¹⁶ As defined in s 133BJ and s 133BK, which includes CDEM officers during a state of emergency or transitional period.

¹⁷ The Building Act 2004, s 133BR

¹⁸ Ibid s 133BS

building prohibiting or restricting the use of the building,¹⁹ and carrying out works reasonably necessary to remove or reduce risks posed by the building.²⁰

4.7. The special powers under the Building Act to manage buildings in an emergency take precedence over the CDEMA when an area has been designated, unless the responsible person believes the risks posed by the building cannot be removed or reduced by exercising the powers available to them under the provisions of the Building Act.²¹

4.8. The principles for the exercise of these powers are set out in section 133BN:

A responsible person exercising a power under any of sections 133BQ to 133BX and 133BZA in relation to a building must, to the extent that is practicable in the circumstances, have regard to the following principles:

- (a) the paramount consideration in the exercise of those powers is the protection of human life and safety:
- (b) actions taken should be proportionate to the risks being managed:
- (c) actions should result in minimal restriction of the ability of an owner or occupier to continue to use and occupy property and any restriction of that ability should be for no longer than is reasonably necessary:
- (d) decisions should be based on—
 - (i) up-to-date information, including information about the possible occurrence of further emergencies or other relevant events and other changes in the type and severity of risks arising from an emergency:
 - (ii) information about possible future events.

Rapid building assessments and placards

4.9. Assessments of buildings in an area affected by an emergency, known as “rapid building assessments”, may be carried out under either the CDEMA or the Building Act.

4.10. A rapid building assessment is a brief evaluation of buildings and their immediate surrounds for damage, usability and hazards exposure to assess immediate risk to public safety. When carrying out these assessments, actual or potential land instability and geotechnical hazards are considered.

4.11. A rapid building assessment can result in a mark, notice or sign being placed on the building. This may be in the form of a placard as follows:

¹⁹ Ibid s 133BT

²⁰ Ibid s 133BV

²¹ Ibid s 133BL

- 4.11.1. A red placard stating the building is unsafe to occupy and entry is prohibited. The risk could be from the building itself, from adjacent buildings, or the building is at risk of being affected by an external hazard.
- 4.11.2. A yellow placard stating that entry is restricted, either to parts of the building or under supervision for a limited time. Part or all of the building may have sustained moderate damage, or a significant risk is posed by areas of the building, neighbouring buildings or land instability.
- 4.11.3. A white placard confirming the building can be occupied. It does not mean that the building is not damaged, but no significant hazards were found in the rapid building assessment.

Section 133BT

- 4.12. As the notice stated it was issued under section 133BT, the matter to be determined is the council's exercise of its power of decision or purported exercise of its power of decision to issue a notice under section 133BT on 31 January 2023 for a slip at the rear of the owner's property.
- 4.13. Section 133BT provides for the prohibition or restriction of access to buildings or parts of buildings that are affected in an emergency:
 - (1) A responsible person may place 1 or more signs or notices on or near a building in a designated area prohibiting or restricting the use of the building if—
 - (a) the responsible person believes that it is reasonably necessary to remove or reduce risks of injury or death; or
 - (b) an evacuation of the building has been directed under section 133BR.^[22]
 - (2) A responsible person may place signs or notices on or near a building informing members of the public of the risks posed by the building.
 - (3) A sign or notice under this section must—
 - (a) be in writing and in the form (if any) approved by the chief executive; and
 - (b) state—
 - (i) the nature and extent of any damage to the building; and
 - (ii) in the case of a sign or notice under subsection (1), whether, how, and to what extent the building can safely be used; and
 - (c) be visible to people approaching the building.

²² 133BR Evacuation provides "A responsible person or a constable may direct the evacuation of a building in a designated area if satisfied that evacuation is necessary to prevent the death or injury of any person in the designated area. ..."

- 4.14. To exercise the powers in section 133BT, a designation needs to be in place (133BC). Further, only responsible persons can exercise the power (133BJ and 133BK)²³ and then only if 'it is reasonably necessary to remove or reduce risks of injury or death' or an evacuation of the building has been directed (133BT(1)).

Responsible person

- 4.15. Section 133BJ sets out who may exercise powers under subpart 6B as a 'responsible person'. Subsection (1) provides "This section and section 133BK set out who may exercise the powers under sections 133BQ to 133BX and 133BZA **in a designated area**" [my emphasis]. This means the powers can only be exercised during the period the designation is in force and in relation to buildings that are within the designated area.
- 4.16. Under section 133BJ(2), if no state of emergency or transition period is in force at the same time as the designation, the powers may be exercised by the territorial authority that is either responsible for the designated area or that made the designation, or on direction by the Minister.
- 4.17. In this instance a state of emergency was in force on the date the notice was issued. Section 133BJ(3) provides "If a state of emergency or transition period is in force **at the same time as the designation** [my emphasis], the powers may be exercised by a person described in section 133BK".
- 4.18. Under section 133BK(2)(c) a territorial authority (Auckland Council in this case), may exercise powers under section 133BT under the authority of the Controller as a responsible person.

The designation

- 4.19. The provisions concerning the designation of areas for emergency management of buildings are set out in sections 133BC to 133BI. The provisions include who may designate an area and in what circumstances,²⁴ and the requirement that the public is notified.²⁵
- 4.20. Section 133BF(1) concerns the commencement of a designation, and provides: "A designation comes into force at the time and on the date that the designation is made."
- 4.21. In this instance, while the decision to designate an area was made on 30 January 2023, the record of that decision stated the "date of designation" was 1 February 2023. The subsequent public notification also stated the designation took effect on

²³ Who is deemed a "responsible person" depends on whether a state of emergency or transition period is in force at the same time as a designation.

²⁴ Sections 133BC and 133BD of the Building Act 2004 respectively.

²⁵ Ibid s 133BE

1 February 2023. I take this to mean that for the purposes of section 133BF(1) the designation was “made” on 1 February 2023.

- 4.22. The designation being made on 1 February 2023 means that at the time the notice was issued, on 31 January 2023, the powers for the management of buildings affected by the emergency were only available under the CDEMA; the council could not issue, or purport to issue, a notice under section 133BT of the Building Act.
- 4.23. I note that the area was under a state of emergency after 30 January 2023, and in issuing the notice without a designated area also in force, the notice could only be authorised under the CDEMA.
- 4.24. If I am wrong about when the designation was “made” for the purposes of section 133BF(1), the alternative is the provisions under section 133BT were available from 7pm on 30 January 2023. This would mean that at the time the notice was issued, the Council had the authority to issue a notice under section 133BT as a responsible person acting under the Controller’s authority. And so, in the following paragraphs I consider the decision to issue the notice with regard to the slip at the rear of the property as if the designation were in force when the notice was issued.

The notice

- 4.25. The provision in section 133BT is for the issue of notices prohibiting or restricting the use of buildings, and the notice is to inform members of the public of the risks posed ‘by the building’. As noted in paragraph 4.11.1, these risks may arise from structural damage to the building itself, from adjacent buildings, or because the building is at risk of being affected by an external hazard such as a landslide.
- 4.26. In this case the notice was issued to restrict access to a part of the backyard, rather than restricting access to the dwelling or another building on the property. There is no suggestion in the record of the rapid building assessment of concern that the head of the landslip was likely to regress 16+ metres or to such an extent that the dwelling would be affected by loss of ground support, or that there was some other risk posed to the building. Further, the area of the backyard that was cordoned was limited to the area closest to the slip and not the whole of the backyard. For those reasons I consider the notice was not issued for the purpose set out in section 133BT(1).
- 4.27. I consider it important to recognise the context in which this occurred, and this determination is not a criticism of the rapid building assessment or the decision to issue a placard and cordon off the area where the slip occurred. However, it is important to recognise that the purposes and principles of the CDEMA and the Building Act differ, as well as the offences and liability on conviction under the two pieces of legislation.

5. Remedy

- 5.1. Section 188 provides a determination must confirm, reverse or modify the decision or exercise of a power to which it relates (1)(a), or determine the matter to which it relates (1)(b).
- 5.2. The District Court, in *Estate Properties Ltd v Hastings District Council*²⁶ stated “The Chief Executive’s choice of remedy under s 188(1) is an exercise of discretion” and that it was open to the Chief Executive to not apply one of the positive steps required by section 188(1)(a).⁽²⁷⁾⁽²⁸⁾ Further, the court took the view that declining to reverse a decision did not have the effect of confirming the decision.²⁹
- 5.3. Had the notice been issued when the designation was in force, and therefore under the provisions of the Building Act, I am of the view it would be appropriate for me to reverse that decision on the grounds that the notice was not issued for the purposes set out in section 133BT(1).
- 5.4. However, because the notice stated it was issued under the authority of section 133BT of the Building Act, but the designation had not come into force at that time, I conclude there was no power for the Council to issue the notice under section 133BT of the Building Act.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine the council did not have the power to issue the notice as purported under the authority of section 133BT of the Building Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 April 2025.

Peta Hird

Lead Determinations Specialist

²⁶ [2021] NZDC 17000 at [21].

²⁷ The court dismissed an appeal against a decision of the Chief Executive that a code compliance certificate had been wrongly issued but declining to reverse the certificate (refer to Determination 2020/034 *Regarding the compliance of fire safety precautions in a motel* (16 December 2020).

²⁸ [2021] NZDC 17000 at [30].

²⁹ [2021] NZDC 17000 at [29].