

Revisited surface water requirements for a residential development

1 INTRODUCTION

1.1 The matters to be determined

- 1.1.1 This determination is in respect of an amended proposal for the construction of two new detached houses, carports, and associated sitework previously considered in Determination 98/003. The sequence of events since then leading to this determination is outlined in 1.3 below.
- 1.1.2 The applicant submitted the following matters to the Authority for determination:
- (a) The validity of an endorsement on a building certificate to the effect that backflow preventers are to be provided in the applicant's drainage system at each connection to a recently constructed pipe drain ("the new drain") which carries surface water from other property across the applicant's property to discharge into an adjacent territorial authority watercourse ("the watercourse").
 - (b) The validity of a condition on a building consent dated 21 October 1998 requiring an entry under section 36(2) of the Building Act to be made on the certificate of title to the applicant's property.
 - (c) The validity of a decision by the territorial authority to construct a bund between the applicant's property and the watercourse.
- 1.1.3 In written submissions (see 4.1.2.3 below) the territorial authority said in effect that it wished the 21 October 1998 building consent to be amended so as to require the applicant's drainage system to discharge into a territorial authority open drain ("the open drain") some distance away, instead of into the new drain.
- 1.1.4 As to the proposed bund, the Authority does not consider that it has the power to determine that the bund cannot be constructed. However, the Authority takes the view that it does have the power to determine, on the information available to the Authority, whether the

proposed bund will comply with the building code if it does not include provisions to dispose of surface water collected by the bund on the applicant's property.

1.1.5 The Authority therefore takes the view that it must determine:

- (a) Whether backflow preventers in the applicant's drainage system are necessary for compliance with clause E1.3.1 of the building code.
- (b) Whether the proposed bund will comply with clause E1.3.1 of the building code.
- (c) Whether a section 36(2) entry is to be made on the title to the applicant's property.

1.1.6 In making its determination the Authority has not considered whether the applicant's drainage system and the bund will comply with any other provisions of the building code or the Building Act.

1.1.7 The Authority has also not considered whether the territorial authority's disputed requirements may be imposed under the Resource Management Act, the Local Government Act, or any other Act except the Building Act. The Authority reads section 34(3) of the Building Act as a positive obligation on a territorial authority to grant building consent if satisfied on reasonable grounds as to compliance with the building code irrespective of requirements under other Acts. Section 35(3) makes it clear that issuing a building consent under the Building Act will not prevent the enforcement of any other Act.

1.2 The parties

1.2.1 The applicant is the owner of the land on which the houses, carports, and associated sitework are proposed to be constructed. The other parties are the building certifier (in relation only to the endorsement as to backflow preventers) and the territorial authority.

1.3 Determination 98/003 and the events leading up to this determination.

1.3.1 Determination 98/003 concerned essentially the same proposed development. In that previous determination the Authority decided that a building consent issued on 19 March 1998 was to be modified, in particular by omitting conditions requiring:

- (a) That the applicant's proposed surface water disposal system (referred to in this determination as "the applicant's drainage system") was to discharge into the open drain some distance away instead of into the watercourse adjacent to the applicant's property; and
- (b) That an entry was to be made on the certificate of title under section 36(2) of the Building Act.

1.3.2 The territorial authority chose not to appeal against Determination 98/003 in the High Court. Thus Determination 98/003 was an unchallenged statement of the view the Authority took on section 36 and the other points at issue. The modified building consent was never uplifted however, because the applicant amended the proposed development and applied to the territorial authority for a new building consent.

- 1.3.3 The only significant physical difference from the previous proposal is that the applicant's drainage system, instead of discharging directly into the watercourse alongside the boundary to the applicant's property (referred to in Determination 98/003 as "the territorial authority drainage channel" but referred to in this determination as "the watercourse" to correspond to the territorial authority's public drainage map), is now shown as discharging into a recently constructed new surface water pipe drain ("the new drain") which crosses the applicant's property and discharges into the watercourse. The practical effect remains that surface water from the applicant's property flows into the watercourse.
- 1.3.4 The only significant administrative difference is that the applicant engaged a building certifier and attached to the application for building consent a building certificate from that building certifier in respect of all building work covered by the application. The certificate was endorsed with a requirement for backflow preventers described in 4.1.1.1 below.
- 1.3.5 A building consent was duly issued on 21 October 1998 and again included a condition requiring an entry to be made on the certificate of title under section 36(2). The application for this determination followed.

1.4 The processing of the application for this determination

- 1.4.1 In the processing of the application for this determination, the applicant, the building certifier, and the Authority each had difficulty in obtaining information from the territorial authority. Eventually, the Authority issued to the parties a draft determination in which it set out various assumptions about matters of fact which the Authority considered were or should have been known to the territorial authority. The parties were given the choice of accepting the draft as the final determination, but with the assumptions treated as unchallenged facts, or of attending a hearing before the Authority.
- 1.4.2 The applicant and the building certifier accepted the draft but the territorial authority requested a hearing, which was duly held on 28 April 1999. The building certifier chose not to appear. The applicant and the territorial authority both appeared, with the territorial authority represented by counsel who called evidence from a drainage engineer who is the territorial authority's manager of utility planning ("the manager").
- 1.4.3 In its draft determination, the Authority had addressed the question of which outfall the applicant's drainage system should discharge into. At the hearing, the applicant objected to the inclusion of that question because it had not been raised in the application. The Authority noted the point but did not exclude submissions and evidence on the question. The Authority's consideration of those submissions and evidence is described in 4.1.2 below.
- 1.4.4 In the course of the hearing, it became apparent that:
- (a) Counsel for the territorial authority had been misinformed as to certain aspects of the case, and in particular significant parts of his submissions related to the 19 March 1998 building consent of Determination 98/003 and not to the 21 October 1998 building consent which is the subject of this determination;

- (b) The manager was familiar with the over-all planning of the territorial authority's drainage system but was not familiar with relevant details of that system and its relationship to the applicant's system;
- (c) The manager had not been involved in, and was not well informed about, such day-to-day territorial authority operations as the issuing of the building consent and the authorising of the new drain, both of which were crucial to the determination;
- (d) The manager had no explanation for the fact that a land information memorandum in respect of the applicant's land issued by the territorial authority on 25 March 1999 included the statement "no flood risk recorded"; and
- (e) As regards section 36, the territorial authority's main concern was with avoiding liability and not with ensuring that those likely to be affected were warned of identified hazards, which could be done not only under section 36 but also by way of land information memoranda under the Local Government Official Information and Meetings Act and hazard maps in the district plan under the Resource Management Act.

1.4.5 Since the hearing, the Authority has carefully considered the submissions and evidence which came before the hearing together with the earlier written submissions which had led to the draft determination. In preparing this final determination, the Authority was assisted by its technical staff. The Authority also obtained from its in-house legal adviser a legal opinion on the interpretation of relevant provisions of the Building Act which differed in several respects from the submissions made by counsel for the territorial authority. Legal arguments have been omitted from this final determination, suffice it to say that the Authority thought it proper to act on the legal opinion of its in-house legal adviser rather than that of counsel for the territorial authority.

2 THE BUILDING WORK

2.1 The applicant's drainage system

2.1.1 The building consent is for the construction of two new detached houses, carports, and associated sitework on a virtually level site which already contains an existing house.

2.1.2 The site is on an overland flowpath for surface water. Currently, during smaller events surface water from the local catchment flows across the site into the watercourse. The watercourse flows into a culvert under an adjacent road and discharges into the open drain. There is currently a "choke" on the culvert which, in larger events, restricts the flow from the watercourse and causes it to overtop its banks and flow onto the applicant's property. The surface water level on the applicant's property eventually reaches a depth sufficient to overtop the crest of the adjacent road and flow overland to the open drain downstream of the culvert.

2.1.3 Surface water collected or concentrated by the development is proposed to be piped into the new drain, which discharges into the watercourse.

2.2 The bund

- 2.2.1 The proposed bund is understood to be a 500 mm high stopbank between the watercourse and the applicant's property. In evidence at the hearing, the manager said that the details of the bund had not been decided but it "could well be a low concrete block wall" and "we have no intention of installing backflow preventers".

3 THE RELEVANT LEGISLATION

3.1 The applicant's drainage system

- 3.1.1 The relevant provisions of the building code for the disposal of surface water collected or concentrated by the houses, carports, and associated sitework are:

E1.3.1 Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water, resulting from a storm having a 10% probability of occurring annually and which is collected or concentrated by buildings or sitework, shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.

E1.3.3 Drainage systems for the disposal of *surface water* shall be constructed to:

- (a) Convey surface water to an appropriate *outfall* using gravity flow where possible,
- (e) Avoid the likelihood of damage to any *outfall*, in a manner acceptable to the network utility operator . . .

Where "outfall" is defined as:

That part of the disposal system receiving surface water . . . from the drainage system. . . . For surface water, the outfall may include a natural water course, kerb and channel, or soakage system.

3.2 The bund

- 3.2.1 Whether the provisions of the building code apply to the bund depends on whether the construction of the bund is "building work" as defined in section 2 of the Building Act:

"Building work" means work for or in connection with the construction, alteration, demolition, or removal of a building, and includes sitework:

While "building" is defined in section 3 as follows:

the term "building" means any temporary or permanent movable or immovable structure (including any structure intended for occupation by people, animals, machinery, or chattels); and includes any mechanical, electrical, or other system, and any utility systems, attached to and forming part of the structure whose proper operation is necessary for compliance with the building code; but does not include—

- (a) Systems owned or operated by a network utility operator for the purpose of reticulation of other property; or . . .

The Third Schedule treats the construction of a stopbank as being "building work" by providing that:

A building consent shall not be required in respect of the following building work:

- (c) Any dam that retains not more than 3 metres depth, and not more than 20,000 cubic metres volume, of water, and any stopbank or culvert:

Section 7(1) provides that:

All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

3.3 Section 36

3.3.1 The relevant provisions of section 36 are:

36. Building on land subject to erosion, etc - (1) Except as provided for in subsection (2) of this section, a territorial authority shall refuse to grant a building consent involving construction of a building or major alterations to a building if-

- (a) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
- (b) The building work itself is likely to accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property-

unless the territorial authority is satisfied that adequate provision has been or will be made to-

- (c) Protect the land or building work or that other property concerned from erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
- (d) Restore any damage to the land or that other property concerned as a result of the building work.

(2) Where a building consent is applied for and the territorial authority considers that-

- (a) The building work itself will not accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property; but
- (b) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; and
- (c) The building work which is to take place is in all other respects such that the requirements of section 34 of this Act have been met-

the territorial authority shall, if it is satisfied that the applicant is the owner in terms of this section, grant the building consent, and shall include as a condition of that consent [the making of] an entry on the certificate of title to the land that a building consent has been issued in respect of a building on land that is described in subsection (1)(a) of this section. . . .

4 THE SUBMISSIONS AND THE AUTHORITY'S RESPONSES

4.1 The applicant's drainage system

4.1.1 Backflow preventers

4.1.1.1 The applicant disputed the endorsement on the building certificate to the effect that backflow preventers are to be provided in the applicant's drainage system at each connection to the new drain.

4.1.1.2 The applicant submitted:

On the previous consent the stormwater from the property was going to be drained directly into the [watercourse]. In this consent it is going into [the new drain]. If any backflow preventers are required then the only logical place to have one is where [the new drain] joins the [watercourse].

4.1.1.3 The applicant also submitted a report from a consulting engineer which included:

1. The [watercourse] is expected to be full to the adjacent ground level in a 10% AEP (10 year) storm event. Therefore, with existing conditions, backflow preventers on each connection will be of no value as flows in excess of the 10% AEP flowrate will travel overland to [the adjacent road].

4. If a bund is constructed at a future date, backflow prevention would then be considered an integral feature of the bund's function. Rather than individual preventers on each private connection, a logical feature of the bund design would be to provide a backflow preventer at each pipe outlet into the [watercourse].

4.1.1.4 In response to a query from the Authority, the building certifier explained the reason for the endorsement:

. . . The requirement of backflow prevention for the private stormwater drainage system servicing the property was noted as a condition to the Building Certificate in order to fulfil the item noted (5.3.11) in the determination.

The reference is to the following paragraph in Determination 98/003:

5.3.11 The Authority concludes that the outfall into the drainage channel is acceptable provided the site drainage system complies with the building code in all respects, including the provisions to prevent back flow. It is not for the Authority to design an appropriate site drainage system. That is a matter for the applicant to propose and for the territorial authority to consider. The territorial authority will need to be satisfied on reasonable grounds that the proposed system will avoid the likelihood of damage or nuisance to other property in the 10% [10 year] storm.

4.1.1.5 The Authority regrets any misunderstanding. That paragraph was not intended as a decision that backflow preventers were required but as an observation that the need for backflow prevention would have to be taken into account by the applicant when designing its drainage system and by the territorial authority (or a building certifier) when checking that design.

4.1.1.6 The territorial authority advised that, after the bund has been constructed, in a 10 year flood the surface water level in the watercourse could be sufficiently high that, without backflow preventers, water from the watercourse could flow up the applicant's system and flood the applicant's property and adjoining other property. The manager also raised the possibility that water in the new drain from upstream properties could cause flooding on the applicant's property and adjoining other property. However, there was no evidence that such flooding would affect other property, nor that it would be worse than is currently experienced. That being so, the Authority accepts the applicant's consulting engineer's opinion that backflow

preventers where the applicant's drainage system discharges into the new drain are not required.

4.1.2 *Whether the new drain is an appropriate outfall*

4.1.2.1 The documents accompanying the application described the new drain as "the new Public Stormwater Drain" but gave no details of that drain.

4.1.2.2 The project information memorandum said:

Stormwater must be discharged into the public stormwater drain through a direct connection to that drain.

Attached to the project information memorandum were a map showing the "maximum probable development flood plain" under the territorial authority's stormwater management plan and a public drainage map showing the watercourse, the culvert, and the open drain but not the new drain.

4.1.2.3 The territorial authority did not make any specific submissions about the use of the new drain as an outfall when the application for this determination was made. On 25 November 1998 the Authority requested the territorial authority to supply details of the "new public stormwater drain". That request was repeated on 3 December 1998 and on 21 and 28 January 1999. On 5 February 1999 the territorial authority responded that:

The Network Utility Operator has previously granted the applicant permission to connect to its stormwater system downstream of the flow restricted culvert. Discharging the applicants private drainage stormwater to any public system upstream of the flow restricted culvert will not be authorised by the Network Utility Operator.

I presume that the reference to the "new public stormwater drain" is the drain recently installed by a neighbouring developer through [the applicant's

property]. This drain is not a suitable connection point for . . . private stormwater [from the applicant's property]. The principal reason for the non-suitability is that the drain is upstream of the flow restricted culvert, and any connection to it will have a similar adverse effect on [the applicant's property] as connection direct to the culvert.

4.1.2.4 The Authority took that submission to imply that in the project information memorandum the words "the public stormwater drain" referred to the open drain and not to the new drain. However, at the hearing it became clear that was not the case, and that the territorial authority officers who issued the project information memorandum and the building consent had in fact intended to approve the new drain as the outfall for the applicant's drainage system.

4.1.2.5 The applicant obtained (not from the territorial authority) and copied to the other parties and to the Authority (received 25 March 1999), a copy of the plan for the new drain stamped as having been processed and approved by the territorial authority. On the face of it, that plan should have been held by the territorial authority in its records. Nevertheless, on 1 April 1999 counsel for the territorial authority advised the Authority that he had still not seen that plan and asked the Authority to send a copy, which it did.

4.1.2.6 Before the hearing, the territorial authority submitted in effect that the Authority had no jurisdiction to override the territorial authority's decision, in its capacity as network utility operator, as to what was the "appropriate" outfall required by clause E1.3.3(a) of the building code. No specific submissions as to jurisdiction were made at the hearing, but counsel for the territorial authority submitted that the new drain was not an appropriate outfall because it "does not comply with the network utility operator's system requirements".

4.1.2.7 The manager then gave evidence in support, and stated that, after considering the three possible outfalls for the applicant's drainage system, namely the new drain, the watercourse, and the open drain, it was his considered technical opinion that the open drain was the only one which was "appropriate".

4.1.2.8 The manager conceded that the territorial authority had in fact approved the new drain. He had not been personally involved in that approval, but described it as having been "a sub-optimal decision". Under questioning, he agreed that he meant that in his opinion the approval had been a mistake.

4.1.2.9 In the course of his evidence, the manager produced a site plan and two longitudinal sections showing his preferred method for discharging surface water from the properties served by the new drain into the open drain instead of into the watercourse. The plan included notes to the effect that the applicant's drainage system (which the Authority understands has not yet been connected into the new drain) was to be re-laid and that the new drain (which the Authority understands is currently serving other properties) was to be abandoned. Those drawings were dated 27 April 1999, the day before the hearing. Water levels shown on the drawings did not correspond to the water levels identified in previous territorial authority documents and in its evidence to a hearing before the Environment Court.

- 4.1.2.10 Under questioning, the manager conceded that the drawings had been prepared hurriedly for the hearing, that they needed an engineering check, that they might be changed, and that they had no formal status whatsoever. He had no involvement with the issuing of the project information memorandum or the building consent. He outlined the relevant business units through which the territorial authority conducted its business, and explained that he was an officer of one business unit but a different business unit had been responsible for approving the new drain and issuing the project information memorandum and the building consent.
- 4.1.2.11 The Authority has always considered, as it said in Determination 98/003, that an outfall is not an appropriate outfall if it does not conform to the network utility operator's lawful management of its drainage system. In Determination 98/003 the Authority decided that the watercourse was an appropriate outfall. It was not disputed that the applicant's drainage system would comply with the building code in all other respects, and the territorial authority had not mentioned any management matters which would prevent the outfall from being appropriate.
- 4.1.2.12 In this determination, the Authority must consider conflicting evidence from the territorial authority. On the one hand territorial authority officers have formally approved the new drain and, by way of the project information memorandum, designated the new drain as an appropriate outfall for the applicant's drainage system. That was done through the business unit responsible to the territorial authority for the day-to-day operation of controls under the Building Act. On the other hand, the manager, an officer in the business unit responsible to the territorial authority for the overall planning and management of its drainage system has given evidence to the effect that the new drain does not conform to that management. On the one hand are documents formally issued under the Building Act, on the other hand are hurriedly prepared documents which have not been checked and have no formal status but representing the considered technical opinion (presumably subject to checking) of the manager.
- 4.1.2.13 The Authority cannot decide that evidence from one business unit of the territorial authority takes precedence over evidence from another. That is something which the Authority would have expected the territorial authority to have addressed well before the hearing. Giving equal weight to all items of the conflicting evidence from the territorial authority, the Authority is unable to accept that there is anything in the current management of the territorial authority's drainage system which prevents the new drain from being an appropriate outfall for the purposes of clause E1.3.3(a) of the building code.

4.2 The bund

- 4.2.1 The applicant asked the Authority to "determine that the bund cannot be built", and submitted that the bund "contravenes the Building Act as it would exacerbate the one in ten year flood".

4.2.2 The consulting engineer's report mentioned in 4.1.1.3 said:

The proposed low earth bund is likely to make local flooding worse in a 20% to 10% AEP [5 to 10 year] storm, and is considered to be of limited value in a 1% AEP event [100 year storm].

4.2.3 Before the hearing the territorial authority submitted in effect that the bund was excluded from the section 3(a) definition of "building" (see 3.2.1 above) because it was part of a system owned and operated by the territorial authority in its capacity of network utility operator for the purpose of reticulation of other property. The draft determination did not accept that, saying:

In the Authority's view, [the relevant words of section 3] say that a building's utility system is regarded as part of that building for the purposes of the Building Act, but only up to the point where the system serving the building joins the larger system which also reticulates other property. . . . it would be surprising if the Building Act, which binds the Crown, does not bind network utility operators.

The Authority also notes that the Third Schedule exempts from the need for building consent the construction not only of "stopbanks" but also of various "simple structures owned or controlled by any network utility operator", including power pylons and telecommunication aerials. There would be no need for those exemptions if structures owned and controlled by network utility operators were excluded from the definition of "building".

4.2.4 At the hearing, counsel for the territorial authority submitted that

[The Authority's interpretation of section 3(1)(a) as] not excluding buildings owned or operated by network utility operators from the definition of building . . . is erroneous, and the question of whether or not the bund is building work must be determined by the section 2 definition [of "building work"].

No reasons were given as to why the Authority's interpretation was erroneous, it was simply asserted that the bund was not a building and that the construction of a bund, not being associated with the construction of a building and therefore not being sitework, was not building work.

4.2.5 Giving evidence at the hearing, the manager referred to the bund as possibly being a "concrete block wall". If so, it can properly be described as a "structure" in the ordinary and natural meaning of that word. It therefore comes within the section 3 definition of "building" unless excluded. In the absence of anything more than mere assertion that it comes within the section 3(a) exclusion, the Authority has been given no reason to change its view that for the purposes of the Building Act the bund is a building and its construction is building work which is required to comply with the building code subject to any waivers or modifications which the territorial authority may grant itself under section 34(4).

4.2.6 The relevant provision of the building code is clause E1.3.1, which relates to the disposal of surface water collected or concentrated by the bund. The bund collects or concentrates

water in the watercourse and also collects or concentrates water on the applicant's land which would otherwise flow from the applicant's property into the watercourse.

- 4.2.7 The territorial authority advised that in a 10 year flood, the surface water level in the bunded watercourse could be higher than the applicant's property. Thus there are three possible scenarios to be considered:
- (a) Water in the watercourse below the level of the applicant's property and surface water flowing across the applicant's property. In that scenario the bund would act as a dam causing flooding on the applicant's property unless provision was made for surface water to flow through the bund into the watercourse.
 - (b) Water in the watercourse above the level of the applicant's property and no surface water flowing across the applicant's property. In that scenario backflow preventers are needed to prevent water from the watercourse from flooding the applicant's property.
 - (c) Water in the watercourse above the level of the applicant's property and surface water flowing across the applicant's property. In that scenario there will be flooding of the applicant's land whether or not backflow preventers are installed.

4.3 Section 36

- 4.3.1 Counsel for the territorial authority submitted extensive legal argument in support of the propositions that:
- (a) The Authority has no jurisdiction to consider the validity of a section 36(1) condition on a building consent, but
 - (b) If the Authority does have jurisdiction, the Authority erred in law when it took the view, expressed in Determination 98/003 and the draft determination, that a section 36(2) condition is required only if the building work does not comply with the building code, in other words, if the territorial authority has used its powers under section 34(4) to waive or modify the provisions of the building code.
- 4.3.2 The Authority recognises that the interpretation of section 36 raises difficult questions not yet specifically addressed in case law. However, it has not been persuaded to change its views as previously expressed on the interpretation of section 36 and its own jurisdiction to determine whether a 36(2) condition is required.

4.3.3 The Authority accordingly repeats what it said in 7.1.2 of Determination 98/003:

The Authority's view as to the interpretation of section 36, adopted on legal advice, has been previously published The Authority recognises the force of the territorial authority's submissions, but in the absence of case law the Authority is not persuaded that it should change its own established view.

5 CONCLUSIONS

5.1 The applicant's drainage system

5.1.1 Backflow preventers

5.1.1.1 As discussed in 4.1.1 above, it was not established that backflow preventers where the applicant's drainage system discharges into the new drain would be of any value and the building certifier's endorsement is therefore unnecessary.

5.1.2 Whether the new drain is an appropriate outfall

5.1.2.1 As discussed in 4.1.2 above, the evidence from the territorial authority was so conflicting that it was not established that the use of the new drain as the outfall for the applicant's drainage system did not conform to the network utility operator's management of its drainage system. On the evidence presented to the Authority, there is therefore no need to modify the building consent in that respect.

5.1.2.2 If subsequent events establish that the new drain is not an appropriate outfall, the Authority understands that the territorial authority has adequate powers under other legislation to remedy the situation.

5.2 The bund

5.2.1 For the reasons set out in 4.2 above, for the purposes of the Building Act the bund is a building and its construction is building work. That being so, the Authority concludes that:

- (a) In order to dispose of water collected or concentrated by the bund on the applicant's land, the bund must include provisions enabling overland flows from the applicant's land to discharge into the watercourse. Those provisions must include backflow preventers to prevent water from the watercourse flooding the applicant's land when the water level in the watercourse is at or above the level of the land.
- (b) When the bund is constructed, backflow preventers will also need to be provided at the points of discharge of the new drain and any other drains for which the watercourse is the outfall so as to prevent water from the watercourse entering those drains and flooding other property.

5.3 Section 36

- 5.3.1 The building work complies with the building code so that, on the view the Authority takes of section 36, a section 36(2) condition on the building consent is not required.
- 5.3.2 Under section 20, the Authority is required to confirm, reverse, or modify the disputed decision to issue the building consent subject to a section 36(2) condition. In doing so, the Authority “may incorporate . . . conditions that a territorial authority is empowered to . . . impose”. The Authority takes that to mean that it is required to substitute its own decision as to the need for a section 36(2) condition for the territorial authority’s decision that such a condition was required.

6 THE AUTHORITY'S DECISION

- 6.1 In accordance with section 20(a) of the Building Act the Authority hereby:
- (a) Modifies the plans and specifications for which the territorial authority granted the building consent by deleting the building certifier’s endorsement to the effect that backflow preventers are to be provided in the applicant’s drainage system at each connection to the new drain.
 - (b) Determines that the proposed bund and any associated building work is required to comply with the building code, subject to any waivers or modifications which the territorial authority may grant to itself under section 34(4) of the Building Act. In order to comply with clause E1.3.1 of the building code:
 - (i) Provisions must be made for overland flows of surface water from the applicant’s property that are collected or concentrated by the bund to discharge into the watercourse; and
 - (ii) Backflow preventers must be provided as part of those provisions and must also be provided for the new drain and any other drains discharging into the watercourse.
 - (c) Reverses the territorial authority’s decision that a section 36(2) entry is to be made on the title to the applicant’s property.

Signed for and on behalf of the Building Industry Authority on this 5th day of May 1999

W A Porteous
Chief Executive