

# ***Building consent for a house on an overland flow path***

## **1 THE MATTER TO BE DETERMINED**

- 1.1 The matter before the Authority is a dispute as to whether building consent should be granted for a house on an overland flow path.
- 1.2 The Authority takes the view that it is being asked in effect to determine whether the proposed building complies with clause E1.3.2 of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 In making its determination the Authority has not considered whether the proposed building work will comply with any other provisions of the building code.
- 1.4 The Authority has also not considered whether the proposed building work requires authorisation under the Resource Management Act 1991 or any other Act except the Building Act.

## **2 THE BUILDING**

- 2.1 The proposed building is a new detached house that is to replace an existing house (which has been completely removed) on a sloping allotment with ground levels varying from approximately RL 13.1 to 15.1 m.
- 2.2 The site is entirely within the flow path for a flood having a 1% probability of occurring annually (colloquially called “the 100 year flood”, referred to below as “the 1% AEP event”). Part of the site is within the flow path for a flood having a 10% probability of occurring annually (“the 10 year flood” or “the 10% AEP event”).

## **3 THE PARTIES**

- 3.1 The applicant was the owner. The only other party was the territorial authority.
- 3.2 Neither party wished the Authority to hold a hearing at which it could speak and call evidence.

## 4 THE SUBMISSIONS

4.1 The applicant submitted a report by a consulting engineer that was based on a report on the relevant catchment issued by the territorial authority. Relevant extracts from the territorial authority's report, together with a peer review of the consulting engineer's report and the territorial authority's comments were included in the applicant's submissions.

4.2 The consulting engineer's report recommended certain floor levels. Those recommendations were reviewed by another consulting engineer and slightly amended. The territorial authority was then asked to approve the following:

- (a) Habitable rooms to have floor levels of RL 15.57 m adjacent to the 10% AEP flow path.
- (b) A conservatory on the other side of the house to have a floor level of RL 15.30 m.
- (c) A garage workshop to have a floor level of RL 15.41 m.
- (d) The bottom of an existing fence to be cut back 120 mm to allow the passage of floodwaters.
- (e) Siteworks, described as "minor contouring only", to prevent ponding.

4.3 The territorial authority responded:

" . . . the flood level for the 100-year storm event . . . is approximately RL 14.87 to 14.79m.

"The proposal . . . that the minimum floor levels for the garage to be at RL 15.41m, for the dwelling to be at RL 15.57m and for the conservatory to be at RL 15.30m complies with the required freeboard but the proposed new house shall not be allowed to be built within the 100-year flood plain.

"Take Note: Section 4-11 of the Development and Connections Standards [issued by the territorial authority] states that: 'No building or other solid obstruction shall be built or placed in the 100-year flood plain.'

"The levels and contours on the site plan . . . shows that site is within the 1 in 100-year flood plain.

"We recommend that your application for the proposed development be declined until such time that the Council has alleviated the flooding issue in this area."

4.4 The applicant then applied for this determination and served the application and accompanying documents on the territorial authority.

4.5 The territorial authority made submissions that in effect repeated its original response set out in 4.3 above. A member of the Authority's staff wrote to the territorial authority pointing out that it did not appear to have identified any non-compliance with the building code, and attaching a copy of Determination 99/005, which was on a similar matter and which the territorial authority might find helpful.

4.6 In response, the territorial authority said (emphasis as in the original):

“Following to the two points summarised in our previous communications:

- “the property . . . is within a floodplain”.
- “. . . flow can be expected to reach 3.3 m<sup>3</sup>/s in 1 in 10 year and 11.7 m<sup>3</sup>/s at 1 in 100 year storm events . . . . These are considered significant in term of flowing through a residential property”.

“We wish to add that, the land is subject to inundation, therefore as per Section 36 of the Building Act, [the territorial authority] was unable to issue a Building Consent . . .

“[The territorial authority] believes that, because of the risk of inundation and possible related consequences, the proposed development . . . does not comply with the New Zealand Building Act.”

## 5 THE BUILDING ACT AND THE BUILDING CODE

5.1. The relevant provisions of the Act are:

(a) Section 34(3):

(3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

(b) Section 35(1A)

(1A) The territorial authority may attach to a building consent . . . a certificate, in the prescribed form, to the effect that an authorisation under the Resource Management Act 1991 which, in the opinion of the territorial authority, will materially affect the building work to which the building consent relates has not yet been obtained, and until that authorisation has been so obtained—

- (a) No building work may proceed; or
- (b) Building work may only proceed to the extent specified in the certificate.

(c) Section 36:

(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 [subject to a certain condition]

5.2 The relevant provision of the building code is:

<b>Provision</b>	<b>Limits on application</b>
<b>E1.3.2</b> <i>Surface water</i> , resulting from an event having a 2% probability of occurring annually, shall not enter <i>buildings</i> .	Performance E1.3.2 shall apply only to <i>Housing, Communal Residential</i> and <i>Communal Non-residential buildings</i> .

## **6 DISCUSSION AND CONCLUSIONS**

### **6.1 General**

- 6.1.1 Much of the following is closely similar to Determination 99/005, updated and amended as appropriate.
- 6.1.2 The Authority reads section 34(3) of the 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(1A) provides that the territorial authority may attach to a building consent a certificate to the effect that another authorisation is required under the Resource Management Act, and section 35(3) makes it clear that issuing a building consent under the Building Act will not prevent the enforcement of any other Act.
- 6.1.3 In other words, the Authority takes the view that section 34(3) of the Building Act prevents a territorial authority from refusing a building consent for work which complies with the building code even if it does not comply with requirements under any other Act. Such a requirement is to be enforced under the Act concerned, not by the refusal of a building consent under the Building Act. Thus the Development and Connections Standards mentioned by the territorial authority (see 4.3 above) are irrelevant to this determination. The Authority expresses no opinion as to whether those standards can be enforced under the Resource Management Act.

### **6.2 The building code**

- 6.2.1 The matter submitted for determination was confined to surface water considerations, and specifically to the question of compliance with clause E1.3.2 of the building code.

- 6.2.2 The Authority is mindful that other clauses of the building code are directly related to surface water, such as clause E1.3.1 in respect of the protection of other property and clause B1 in respect of structural stability in withstanding scour and other water related effects. There might well be other issues in respect of the house that are not related to surface water. The Authority notes the existence and importance of such other issues but has not considered them further because there appears to be no dispute about them and because the territorial authority did not make any submissions in respect of them.
- 6.2.3 As to clause E1.3.2, given that the territorial authority accepts that surface water will not enter the house in the 1% AEP event, see 4.3 above, the Authority concludes that surface water will not enter the house in the 2% AEP and that the house therefore complies with clause E1.3.2.

### **6.3 Section 36**

- 6.3.1 The Authority does not accept the territorial authority's submission that section 36 of the Act meant that it "was unable to issue a building consent", see 4.6 above.
- 6.3.2 As the Authority reads section 36, it requires the territorial authority to refuse consent only if:
- (a) The house will worsen the flooding, see section 36(2)(a), or
  - (b) The requirements of section 34 have not been met, see section 36(2)(c).
- 6.3.3 The territorial authority has not identified any respects in which the house will worsen the flooding or in which the requirements of section 34 have not been met. In those circumstances, the Authority reads section 36(2) as saying that the territorial authority "shall", not "may", grant the building consent.

## **7 THE AUTHORITY'S DECISION**

- 7.1 In accordance with section 20(a) of the Building Act the Authority hereby determines that the house will comply with clause E1.3.2 of the building code and accordingly reverses the territorial authority's decision to refuse to grant the building consent on that account.

Signed for and on behalf of the **Building Industry Authority** on 19 October 2004.



**John Ryan**  
Chief Executive