

CHRISTCHURCH CITY COUNCIL SUPPLEMENTARY AGENDA

WEDNESDAY 6 OCTOBER 2010

9.30AM

**FUNCTION ROOM, FIRST FLOOR,
CIVIC OFFICES,
53 HEREFORD STREET**

AGENDA - OPEN SUPPLEMENTARY

CHRISTCHURCH CITY COUNCIL

**Wednesday 6 October 2010 at 9.30am
in the Council Chamber, Civic Offices, 53 Hereford Street**

Council: The Mayor, Bob Parker (Chairperson).
Councillors Helen Broughton, Sally Buck, Ngaire Button, Barry Corbett, David Cox, Yani Johanson,
Claudia Reid, Bob Shearing, Gail Sheriff, Mike Wall, Sue Wells, Chrissie Williams and Norm Withers.

ITEM NO	DESCRIPTION	PAGE NO
11.	RESOLUTION TO BE PASSED - SUPPLEMENTARY REPORT	3
12.	EXERCISE OF POWERS UNDER SECTION 129 OF THE BUILDING ACT 2004 (IMMEDIATE DANGER) AND OTHER OPTIONS	4

11. RESOLUTION TO BE PASSED - SUPPLEMENTARY REPORT

Approval is sought to submit the following report to the meeting of the Council on Wednesday 6 October 2010:

- Exercise of powers under section 129 of the Building Act 2004 (immediate danger) and other options

The reason, in terms of section 46(vii) of the Local Government Official Information and Meetings Act 1987, why the reports were not included on the main agenda is that they were not available at the time the agenda was prepared.

All reports are urgent and cannot wait for the next meeting of the Council.

RECOMMENDATION

That the report be received and considered at the meeting of the Council on Wednesday 6 October 2010.

12. EXERCISE OF POWERS UNDER SECTION 129 OF THE BUILDING ACT 2004 (IMMEDIATE DANGER) AND OTHER OPTIONS

General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	EPA Unit Manager and Legal Services Unit Manager
Author:	Judith Cheyne and Steve McCarthy

PURPOSE OF REPORT

1. This report describes the powers the chief executive can exercise under section 129 of the Building Act 2004 (BA04) in respect of buildings that are in such a state that an immediate danger to the safety of people is likely, and the legal principles to be applied.
2. The report assesses the situation of the buildings at 160 Manchester Street, 192 Madras Street, 461A-469A Colombo St, 456 Colombo St, 580 Ferry Road, and the Ohinetahi homestead ("the Buildings"), as to whether or not they are in such a state that they are an "immediate danger".
3. The report identifies what action may be appropriate to remove the danger, where an "immediate danger" is found to exist. For any buildings that are not an immediate danger the report discusses the legal considerations and other options for the Council.

EXECUTIVE SUMMARY

4. For the reasons identified in the background section below the acting chief executive for the purpose of this report, General Manager, Regulation & Democracy Services, has reached a view about the exercise of his powers under section 129 of the BA04 in respect of the Buildings.
5. After assessing all the information before the Council the acting chief executive honestly believes that the situation of the buildings at 160 Manchester St and 461A-469A Colombo Street are such that an immediate danger to the safety of people is likely because of the dangerous state of the buildings. He intends to issue a warrant under section 129 of the BA04 requiring the demolition of both buildings. The Council is asked to endorse this decision.
6. After assessing all the information before the Council the acting chief executive does not hold the same belief with regard to the buildings at 192 Madras Street, 456 Colombo Street, 580 Ferry Road. A warrant will not be issued for those buildings, at this time, under section 129 of the BA04. This means the owners of these three buildings must apply for a building consent for any demolition or repairs (if they have not already done so and if that work is not exempt under schedule 1 of the BA04), and a resource consent under the Resource Management Act 1991 (as well as ensuring an archaeological assessment is carried out, if required).
7. Regarding the Ohinetahi homestead he believes there are grounds to issue a warrant under s.129 to ensure that there is no moisture penetration of the building The Council is asked to endorse these decisions.
8. The background section of this report sets out information about the options for the Council to try and ensure the resource consent process can be streamlined, so building owners can minimise the delays in relation to fixing and/or demolishing their earthquake damaged buildings and so the impact on the neighbouring areas are minimal. The two options are direct referral to the Environment Court, and seeking a new Order in Council under the Canterbury Earthquake Response and Recovery Act 2010. Staff recommend that a new Order in Council is sought and seek Council approval to work with the relevant government departments to achieve that end.

FINANCIAL IMPLICATIONS

9. The recommendations in this report, seeking the Council's endorsement and approval of various actions do not lead to any specific financial implications for the Council. Other financial implications in relation to the Buildings are discussed in the reports that were before the Council on 4 October 2010.

LEGAL CONSIDERATIONS

Have you considered the legal implications of the issue under consideration?

10. See the background section of this report.

CONSULTATION FULFILMENT

11. Numerous affected property owners and interested parties spoke at the Council meeting on Monday 4 October 2010 and information provided at that time has been considered in relation to the assessments in this report. Various council units, including the Council's heritage team, have been involved in the preparation of this report.

STAFF RECOMMENDATION

It is recommended that the Council:

- (a) Endorse the acting chief executive's opinion that the buildings at 160 Manchester Street and 461A-469A Colombo Street are an immediate danger and to issue a warrant under section 129 of the Building Act 2004 for the demolition of their buildings.
- (b) Endorse the acting chief executive's opinion that the buildings at 192 Madras Street, 456 Colombo Street and 580 Ferry Road and the Ohinetahi Homestead are not an immediate danger under section 129 of the Building Act 2004 and that no warrant be issued on this ground be issued.
- (c) Endorse the acting chief executive's opinion that with regard to the Ohinetahi Homestead it is necessary to fix the insanitary conditions by requiring the owners of Ohinetahi to take all steps necessary to ensure provision against moisture penetration which may cause dampness in the building
- (d) Approve that officers work with the relevant government departments to seek an Order in Council from the Government to address the streamlining of the resource consent process for heritage buildings, as outlined in paragraph 46 of this report.

BACKGROUND (THE ISSUES)

Legal Principles – Dangerous, Earthquake Prone and Insanitary Buildings and the exercise of powers under section 129 of the Building Act 2004

Are the Buildings dangerous, earthquake prone and insanitary?

(see the **Appendix 1** for the definitions of these terms, and for section 129 of the BA04, set out in full)

12. The buildings at 160 Manchester Street, 192 Madras St, 461A-469A Colombo St, 456 Colombo St, and 580 Ferry Road are all unreinforced masonry/concrete commercial buildings and were all likely to be earthquake prone buildings under section 122 of the Building Act 2004 (BA04) before the earthquake on 4 September. While some of these buildings have had earthquake strengthening carried out, it is likely that because of the damage they suffered during the earthquake and/or its aftershocks, and the resulting structural instability of the buildings, they will all be earthquake prone now, even if they were not before 4 September.
13. Ohinetahi does not come within the definition of an earthquake prone building because it is a residential building that does not comprise 2 or more storeys and contain 3 or more household units. However it can come within the definition of an “insanitary building” as that phrase is used in s. 123 of the Building Act as a building that “...has insufficient or defective provisions against moisture penetration so as to cause dampness in the building ...”
14. All the Buildings are also dangerous buildings, under section 121(1)(a) and/or (c), and in some cases possibly even section 121(1)(b) as a fire hazard, where the Fire Service has reported on the building. The red stickers issued for these buildings under the CDEMA powers are now all deemed to be notices under section 124(1)(b) of the BA04.

Powers in the BA04 in relation to dangerous buildings – sections 124 and 129

16. When the Council is faced with a dangerous, earthquake-prone or insanitary building it “may” exercise one or more of the powers in section 124 of the BA04. However, if the situation presented by the particular dangerous, earthquake prone or insanitary building is considered to constitute an “immediate danger”, the Council, through its chief executive issuing a warrant, can take action under section 129.

Section 124

17. Section 124 (as amended by the Canterbury Earthquake (Building Act) Order 2010 (Building Act Order)) provides that if the Council “is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may” do one or more of four things, including putting up a hoarding or fence to prevent people from approaching the building nearer than is safe, attaching a notice to the building warning people not to approach, issue a notice restricting entry to the building, and for all buildings (except some categories of dangerous building), give written notice requiring work to be carried out on the building to reduce or remove the danger.
18. The BA04 does not require that the Council “must” take action under section 124. It can decide for itself the extent of the problem with the building, and any proposals the owner may make for dealing with the issue before deciding if any action is required under section 124. To date, no section 124(1)(c) notices have been issued by the Council for the buildings as the owners have been in discussions with the Council.
19. The Council's new earthquake-prone, dangerous and insanitary buildings policy contains a section on earthquake prone buildings damaged by an earthquake. It provides that strengthening of a building post earthquake should be, where possible, to 67% strength of a new building. It also provides that the Council will take action as required under section 124(1) of the Building Act in relation to those buildings. Although the policy does not mention section 129, the Council can still exercise that power under the Building Act on an earthquake prone building damaged in the earthquake.

20. For some of the Buildings, a building consent will not be required for demolition, as they come within the Schedule 1(ke) exemption (as added by the Building Act Order) - detached and less than 3 storeys.

Section 129

21. Section 129 of the BA04 provides additional powers where the state of the building is such that "immediate danger to the safety of people is likely in terms of section 121 or section 122 or section 123" or "immediate action is necessary to fix insanitary conditions". This requires that there be something about the building that takes it beyond being a "simple" dangerous, earthquake-prone or insanitary building.
22. This is because the very nature of it being a dangerous earthquake prone or insanitary building in the first place means it is likely to cause injury to people in the ordinary course of events, by collapse or otherwise etc.
23. The test for "danger to the safety of people" being "likely" requires that the risk of the building causing injury or death to people must be "a reasonable consequence" or "something which could well happen". For an "immediate danger" to arise the situation must have become particularly urgent and immediate. This concept is discussed in further detail below in the discussion on the cases.

Chief executive's warrant

24. The process, if section 129(1) is satisfied, is that the chief executive "may, by warrant issued under his or her signature, cause any action to be taken that is necessary in his or her judgment to (a) remove that danger; or (b) fix those insanitary conditions". A warrant issued under section 129 normally requires later confirmation by the court, but the Canterbury Earthquake (Building Act) Order 2010 has removed that obligation from the Council.
25. Removing the danger can include demolition of buildings as well as the repair of buildings. It is for the Council to determine what is required in order to remove the danger, but a warrant should not authorise work greater than what is needed to remove the immediate danger. Council should be guided by expert advice as to what is necessary to remove the danger.
26. The wording of section 129, like section 124, is not mandatory. The chief executive is not under any "obligation" to issue a warrant when faced with an immediate danger situation. As noted in the Rua Developments case (discussed below), there may be some instances where the chief executive does not exercise his discretion. For example, where other steps have been taken such as erecting safety barriers or where the building owner is in a position to take the necessary measures to remove the immediate danger.
27. Safety barriers and notices preventing entry have been used for all the Buildings, but that does not necessarily mean that will be enough to remove the immediate danger in every case. In addition, for these Buildings, the building owners will not be in a position to take necessary measures immediately because of the need for a resource consent in relation to any steps the building owner might take.

What if the Council does not act in relation to a dangerous building?

28. If the Council/Chief Executive fails or refuses to take action under section 124 or 129, the building owner, or an owner of other affected property, or other parties such as the Fire Service could apply for a Determination to the Department of Building and Housing about the matter, under section 177 of the BA04. Section 381 also states that the Department of Building and Housing, and other entities such as the Fire Service, could seek an injunction against the Council to force it to exercise its powers.
29. Note that although a resource consent and building consent are not required where the Council exercises its powers under section 129, an archaeological assessment under the Historic Places Act 1993 will still be required for any of the Buildings that are demolished. [Note that if there is a damaged Heritage building that is not in immediate danger the normal process will apply].

Relevant cases on section 129 (and its predecessor, s70 Building Act 1991)

Rotorua DC v Rua Developments Ltd

In *Rotorua DC v Rua Developments Ltd* 3/3/98, Judge McGuire, DC Rotorua NP966/97, the Council was dealing with a building with a long history. It had been vacant since 1993, and four notices to rectify problems with the building had been issued between 1995 and 1996 but were not complied with. When the Council received a report in 1997 identifying a more pressing danger than had previously been known to the Council the chief executive issued the warrant. The building owner's engineer gave evidence that although there were structural concerns with the building in his view the danger was not "immediate". However, the Court disagreed and found that the warrant and work that followed were appropriate.

The Court held that "*immediate danger is apprehended [by the chief executive] when there is an honest belief that there is an immediate danger*". The Court accepted the dictionary definition of the word "immediate" put forward by the Council's solicitor, "*as meaning having no person, thing, or space intervening. In other words the danger is such that it may occasion injury to persons on other property at any time from that point on.*" (Both quotes from page 24 of the decision.)

The Court found a high degree of certainty is not required, as that might defeat the whole purpose of the provision. However, this does not give the chief executive "*carte blanche to issue warrants...[because it] ...does amount to a significant invasion of the property rights of the owner*", so is "*required to be issued in good faith*" (p25).

At page 27 the Court confirmed the position taken by the Council as follows:

"...as at 20 June the Chief Executive was presented with professional advice of serious misgivings in respect of the security of the top section of the walls of the building in high wind conditions: the fact of ongoing deterioration of the fabric of the building and the fact of the building being positioned in the Central Business District of Rotorua on a busy street. He was entitled in my view in these circumstances to apprehend immediate danger to the safety of people - a danger to the safety of people that he apprehended was present from that time on.

I am satisfied that having apprehended immediate danger he then exercised the discretion he has under s. 70 in a reasonable manner in issuing the warrant to take the measures that were necessary in his judgement to secure the safety of the public.

The work actually carried out pursuant to the warrant was essentially as set out the 20 June 1997 letter, and consisted of placing a timber runner along the top of the parapet and "strapping" the top of the structure to hold it in place. Having had the advantage of a cursory inspection of the building with counsel, and having had the remedial work explained, it seems to me that the work done was appropriate and not in excess of what was required to remove the apprehended danger."

Thompson v Southland DC

In *Thompson v Southland DC*, 2/10/07, Hansen J, High Court Invercargill, CIV 2007-425-0231 the appellants house had been severely damaged in a fire and the Council had written to the defendant stating they believed it was a dangerous building. A few months later the Council issued a section 124(1)(c) notice, noting that it considered the building was beyond repair and required demolition with all materials and debris removed from the site.

The council then received an official severe wind warning for parts of the district. There was a concern that the loose roofing iron on the building would be an immediate danger in the high wind conditions. The chief executive reached the view that the building had to be demolished, and the site cleared of all material caused by the demolition, in order to prevent immediate danger to the safety of the public likely to arise as a result of the winds.

Court agreed with the issue of the warrant, on the basis that the situation had shifted from the building being dangerous to one of immediate danger as a result of the Council receiving notice of severe wind conditions in the relevant area. There were reports before the Chief Executive of the state of the building and the danger from loose iron, as well as photographs to assist his assessment as to the extent of the damage. The Court reached the view the Chief Executive was entitled to reach his conclusion based on such evidence, and was not required to personally inspect the property in question, especially in the circumstances of this case where there had been ongoing communications between the Council and the appellant.

Comparing Rua Developments and Thompson with the general situation of the Buildings, and principles for immediate danger

Immediate danger, and work that can be required to remove the danger

Relevant principles to be taken from the cases about the factors to consider in relation to section 129 are:

- If a building has previously been identified as dangerous, it can become an immediate danger if new information or changed circumstances warrant it.
- Relevant information and circumstances include things such as:
 - professional reports on the state of the building, including whether the risks presented by the building to people's safety are such that action on the building cannot wait to follow the usual processes;
 - is there ongoing deterioration of the building;
 - are there any external conditions to be considered (eg high wind/aftershocks);
 - what are the features of the building itself that are relevant, eg height of the building, location (is it in a busy street/its relationship does it have to neighbouring buildings, the building materials and how these contribute to the danger
- The chief executive must base his decision on appropriate evidence but a "high degree of certainty" is not necessary.
- The chief executive must have an honest belief there is an immediate danger likely to the safety of people.

In this situation there are also additional factors that were not present in the Rua Developments and Thompson cases that are also relevant to consider whether there is an immediate danger. Those additional considerations (and they are not likely to be a closed list as each situation will present its own specific factors) are:

- The "danger" already presented by the Buildings has been caused by an earthquake and/or its after shocks which are continuing (which is different to either of the situations in Rua Developments or Thompson). On one hand the Buildings have now been standing for four weeks since the earthquake, despite a number of significant aftershocks. On the other hand, a gradually deteriorating building may present an immediate danger if it will otherwise take a long time for work to start on the building to remove the danger.
- In this situation, because of the Orders In Council enacted by Parliament, exercising the powers in section 129 also means the danger can be addressed more quickly than it could be by the owner, because the Council does not have to obtain a resource consent first.

What action should be taken to remove the danger

In some cases the only solution will be to demolish the building. The risk to people in other buildings and on the street may be such that outside the barriers/stickered buildings a collapsing building may injure people. There is also evidence that despite cordons/safety barriers being erected and notices preventing entry being erected people are still breaching the cordon and entering the dangerous building/surrounding buildings. The fact that people may be in the building, rightly or wrongly, may mean the only option is to remove the building.

Economically, demolition may also be the cheapest option to remove the danger. Although the Council cannot do more than is necessary to remove the danger, because the building owner must pay the cost of the work carried out under section 129, the cost should be reasonable for the owner.

In some cases the Council may decide there is an immediate danger, but the cordons in place or other minor support work to a building may be sufficient to remove the danger. This was considered appropriate in the *Rua Developments* case, whereas demolition was considered the appropriate response in the Thompson case because of the high wind risk.

Risks to Council in taking action under section 129 and liability for costs of work

Unlike the *Rua Developments* and *Thompson* situations, where the owners' challenged the Council's exercise of its "immediate danger" powers, there is not likely to be any risk to Council of a challenge by an owner, if it takes action under s129 with the Buildings. A risk of challenge by another party that disagrees with any decision by Council remains, but is considered to be minimal. Section 129(4) also provides that the chief executive and the Council are not under any liability arising from the issue, in good faith, of a warrant.

Whatever course of action the Council takes in relation to any building there is a risk around setting a precedent for the future. However, under section 129 each building and each situation needs to be considered on its own merits, both in relation to the danger presented and what action is required of the Council to remove the immediate danger.

If the owner does not meet the demolition costs the Council can be responsible for the costs of the repairs or demolition that are undertaken, but can recover those costs from the owner as a debt and can register a statutory charge against the land.

Assessment of each building in relation to section 129

The assessment of these buildings has been undertaken by structural engineers working for the Council who have reviewed engineering reports provided by the owners of the buildings. Where applicable Council has engaged further engineering reports.

160 Manchester Street

The professional reports on the state of the building at 160 Manchester Street and the risks presented by the building to people's safety are such that action on the building cannot wait to follow the usual processes. It is the opinion of Council Officers that the building at 160 Manchester Street poses an immediate danger to persons under section 129 of the Building Act 2004.

In the days following the September 4 earthquake, the Urban Search and Rescue staff, fire service and structural engineers sought to stabilise the building internally. Because of the danger the fire service ordered them away from the building and they were unable to continue their work. An engineer working with the USAR group considered the building a significant risk to public safety and ordered that there be no public access.

The Police and the owner of the building have subsequently advised that youths have regularly breached the cordon, occupied parts of the ground floor of the building and in one instance lit a fire within the building. There is also evidence that adjacent property owners and tenants of buildings have accessed their properties to remove goods and equipment to set up elsewhere. In both of these situations people are placing themselves significantly at risk because the structural engineering advice is that the building is structurally unsound and likely to fail in the ordinary course of events or in a significant aftershock. They are in some cases also likely to exacerbate the problems associated with the building and cause it to fail i.e. light fires.

Furthermore a number of contractors who have been engaged to undertake investigations and repair on the building and have advised that they have had to stop because of the imminent risk posed to everyone in and about the building. The Operations Manager from Hawkins Environmental advised that the building is structurally unsafe and detailed uncharacteristic cracking on faces of the building, columns and facades. He advised that the shear wall columns had moved from side to side and backwards and forwards during the earthquake causing criss-cross cracks between the 2nd and 4th floors. The southern wall from level 4 to the roof parapet has a jagged crack between each wall on the eastern side to the corner of the building and a further fracture down to the 4th floor in a straight line. He concluded that there is significant cracking throughout the structure and should there be another tremor exceeding 5.5 be experienced in close proximity, the building or major parts to the building will probably collapse. The serious risk posed by the building meant that other detailed internal testing by other contractors was not possible.

The location of the building on the corner of Hereford and Manchester Streets means that there is high public activity, exacerbated by a large number of night clubs in the vicinity. This leads to the cordon being regularly breached by revellers. This increases the risk of death or injury to persons, should the building fail and fall into the cordon area.

It has been recommended to the Acting Chief Executive that there is an immediate danger to the safety of people in terms of section 121 and that a warrant should be issued, to cause action to be taken to immediately remove the danger by taking down and removing the building at 160 Manchester Street.

192 Madras St

Structural Engineers undertaking assessments for the Council advise that the façade of the building is 'dangerous' in that it would be unable to withstand a moderate earthquake and would wholly or partially collapse onto the road reserve, with the barricaded area. It is unlikely to be an immediate danger to the safety of people while it is closed and barricaded off. The building is able to be secured to prevent entry or risk to other buildings in the meantime. There have been a number of structural engineers reports on this building which conclude that while there has been damage to the building, do not suggest that there is any immediate risk to the safety of people.

It is recommended that the owners of this building be required to obtain a resource consent to demolish this building as required by the City Plan. That the process of obtaining the resource consent be effected as quickly as possible and as outlined elsewhere in this report.

461A-469A Colombo St

Structural Engineers in the Council's building assessment team advised that the building is seriously structurally damaged, and will suffer further damage with any significant aftershocks would not withstand a moderate earthquake. The building is not able to be secured fully and is in a state of collapse. There is evidence that the building has been illegally accessed since it was damaged. This puts the people entering at extreme risk because of the dangerous and unstable state of the building. Structural reports prepared for the owner advise that internal walls and the state of collapse of the buildings render them not safe to occupy. This building also affects adjacent buildings in Sandyford Street and at 459 Colombo Street.

It has been recommended to the Acting Chief Executive that there is an immediate danger to the safety of people in terms of section 121 and that a warrant should be issued, to cause action to be taken to immediately remove the danger by taking down and removing the building at 461a-469a Colombo Street.

456 Colombo St

Structural engineers in the Council's building assessment team advised that 456 Colombo Street is presently 'dangerous' in that it would be unable to withstand a moderate earthquake and is barricaded off. It sits in the middle of a block of shops and at the moment presents no immediate danger to the safety of people or to adjacent buildings. There is some deterioration occurring between visits of the owners structural engineers and they advise that neighbouring buildings may be damaged by falling masonry.

It is recommended that the owners of this building be required to obtain a resource consent to demolish this building as required by the City Plan. That the process of obtaining the resource consent be effected as quickly as possible and as outlined elsewhere in this report.

580 Ferry Road

Structural engineers in the Council's building assessment team advised that 580 Ferry Road is presently 'dangerous' in that it would be unable to withstand a moderate earthquake and is barricaded off. At the moment it presents no immediate danger to the safety of people. This view is supported by the owner's structural engineer who advises that provided the hoardings remain in place there is not an immediate threat to public safety. This building has already undergone some repair with the parapets having been removed for public safety and the rear wall to the two story building has been partially removed. A further report indicates that the damage to the majority of the building is moderate and is able to be repaired and strengthened.

It is recommended that the owners of this building be required to obtain a resource consent to demolish or repair this building as required by the City Plan. That the process of obtaining the resource consent be effected as quickly as possible and as outlined elsewhere in this report.

Ohinetahi homestead

The owner of this building has sought permission to repair and rebuild parts of the historic homestead. This application needs to be fully considered to ensure the retention of the unique characteristics of this building. The reports before Council do not suggest that there is an immediate danger in respect of this building.

Regarding this building being "insanitary" as that term is defined in the Building act Sir Miles Warren advised the Council at its meeting on Monday 4 October 2010 that he was concerned about issues regarding weather tightness at Ohinetahi and whether there was a means of ensuring that work to provide protection from the elements could be undertaken without obtaining a resource consent. Staff have considered this matter and advise that the Chief Executive's power in s. 129 of the Building Act 2004 to issue a warrant can be used in this situation.

Section 129 of the Building Act provides that that section applies if, because of the state of a building, "*...immediate action is necessary to fix insanitary conditions.*"

Section 123 of the Act states:

"A building is insanitary for the purpose of this Act if the building -

b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building..."

Given these statutory provisions it is lawful for a warrant to be issued by the Chief Executive to take work that is necessary to fix the insanitary conditions by requiring the owners of Ohinetahi to take all steps necessary to ensure provision against moisture penetration which may cause dampness in the building.

This will then be able to include the work referred to by Sir Miles Warren that is necessary before any repair work at Ohinetahi is commenced.

The owners of Ohinetahi will still need to apply to the Council for a resource consent for the substantive repair work that the building requires. The s. 129 warrant will only apply to ensure that there is no moisture penetration of the building.

It has been recommended to the Acting Chief Executive that immediate action is necessary to fix insanitary conditions as the building is insanitary in terms of s. 123 and that a warrant should be issued, requiring the owners of Ohinetahi to take all steps necessary to ensure provision against moisture penetration which may cause dampness in the building.

It is recommended that the owners of this building be required to obtain a resource consent to demolish and repair this building as required by the City Plan. That the process of obtaining the resource consent be effected as quickly as possible and as outlined elsewhere in this report.

Legal considerations and options if demolition under s129 is not warranted

30. There are three possible results from the acting chief executive's assessment under s129 of the Building Act:
 1. that no warrant is issued; or
 2. a warrant to remove the immediate danger by taking steps that do not include demolition, such as by propping up an unstable wall is issued; or
 3. a warrant for demolition of the building is issued.
31. No resource consent is required if the Council exercises its powers under s129 of the Building Act (clause 12 of the Canterbury Earthquake (Resource Management Act) Order 2010). But if the Council does not warrant demolition of the building under s129, then demolition will require resource consent.
32. There are no existing provisions in the Resource Management Act or in the Orders in Council which fast-track resource consent applications for demolition of earthquake damaged buildings that are listed heritage buildings in the City Plan. As the law now provides the resource consent process will involve:
 1. Notification of the resource consent applications, either limited notification or public notification. The Council must publicly notify the application if it considers that the demolition of the heritage building will have or is likely to have adverse effects on the environment that are more than minor (s95A(2)(a)). It must use limited notification on people who are affected to a minor, but not less than minor, extent (s95E(1)). There has not been a notification decision yet on these applications. The minimum period for which submissions may be lodged following notification is one month.
 2. Submissions in opposition;
 3. A hearing;
 4. Appeals to the Environment Court.
33. Even without appeals to the Environment Court, the process will take several months.
34. The Council will need to appoint Commissioners to decide on the resource consent application, so as to avoid any perception of bias or predetermination arising from any prior Council decisions in relation to funding the retention of any of the Buildings.
35. There are two options available for streamlining the resource consent process (assuming that streamlining is necessary, due to notification of the applications, and the possibility of submissions in opposition):
 1. Direct referral to the Environment Court;
 2. Seeking a new Order in Council under the Canterbury Earthquake Response and Recovery Act 2010.

Reinstatement and restoration of heritage buildings

36. The City Plan requires resource consent for "alteration" of heritage buildings. Repair and reinstatement of damaged heritage buildings will often require resource consent under that provision. The Council's process for that resource consent requires a heritage report, and consideration by the Heritage Panel.

37. That current statutory process takes too long for addressing earthquake damage. Protection of the heritage fabric of the buildings suffers. For some buildings, there may be neighbouring activity – whether it be roads, footpaths, or businesses – that are adversely affected by the delays.
38. Officers consider that changes to the Council process for these consent applications under the existing statutory framework will not be able to significantly reduce delays in this resource consent process. Further intervention to streamline the process is warranted. As for demolition of heritage buildings that cannot be saved, the options are:
 1. Direct referral to the Environment Court;
 2. Seeking a new Order in Council under the Canterbury Earthquake Response and Recovery Act 2010.

Direct Referral to the Environment Court

39. Officers do not recommend that the Council rely on this as an adequate tool for streamlining the resource consent process.
40. A 2009 change to the RMA introduced the ability to directly refer a resource consent application to the Environment Court. The purpose is to streamline the resource consent process by removing the need for a Council hearing of the application. That direct referral process could be used for applications for demolition of heritage buildings that cannot be saved, and for restoration and reinstatement of heritage buildings. However, the statutory process for direct referral includes:
 - a. The process is available only if the Council has decided to notify the application;
 - b. Council cannot initiate direct referral unless requested by applicant;
 - c. Council must make a decision on whether to refer it within 15 working days after receipt of the request to refer unless it has yet to decide whether to notify the application. In that case the Council must make a decision on whether to refer it within 15 working days after it decides to notify the application;
 - d. If it agrees to refer, the Council must prepare a report on the application (similar to a s42A report) within 20 working days after the close of submissions or the decision to refer (whichever is the longer period). Council must provide a copy of the report to the applicant and any submitter;
 - e. If following receipt of the report, the applicant still wishes to proceed with referral, they have 10 working days to lodge a notice of motion with the Court. Council must at that point lodge all consent documentation with the Court;
 - f. At that point the Court generally sets the timetable for the hearing. The Court can also direct mediation and/or caucusing between experts prior to a hearing.
41. In terms of streamlining, the only real advantage is that the Court hearing is the one and only hearing unless the Court's decision is appealed on a point of law to the High Court. The process will still take many months. Accordingly, officers do not recommend relying on this as being an adequate tool for the necessary streamlining of resource consent processes for heritage buildings.

Seeking a new Order in Council for demolition of heritage buildings that cannot be saved, and for repair and reinstatement of heritage buildings

42. The Canterbury Earthquake Response and Recovery Act 2010 (CERRA) enables the Governor-General, by Order in Council made on the recommendation of the Minister, to make any legislative change to the listed statutes as is reasonably necessary or expedient for the purpose of CERRA. The purpose of CERRA includes to facilitate the response to the

Canterbury earthquake, and relaxing or suspending statutory provisions that are not reasonably capable of being complied with, or complied with fully, owing to circumstances resulting from the Canterbury earthquake.

43. It is for the Minister to decide whether to promulgate an Order in Council (OIC). The Council through the Canterbury Earthquake Recovery Commission established under the CERRA legislation, and through requests to the Ministry for the Environment, can seek the OIC.
44. Officers consider that the request for an OIC to streamline the process for resource consent applications for demolition of heritage buildings that cannot feasibly be saved, and for repair and reinstatement of those that can be saved, is necessary so as to facilitate the response to the Canterbury earthquake. The request for an OIC is justified by the unprecedented social, environmental and economic adverse effects arising from the time needed to progress demolition of a heritage building that cannot reasonably be saved, and by the similar costs, and harm to the heritage fabric, that may result from delays in the resource consent process for repair and reinstatement of heritage buildings.
45. The options for the changes to the legislative framework to seek in an OIC are numerous. The OIC process is one in which the legislative change that results from the process of Canterbury Earthquake Recovery Commission input, MfE officer input, Parliamentary Counsel Office drafting and Ministerial views may be quite different from the OIC sought by the Council.
46. However, officers seek Council approval for seeking an OIC in accordance with the following broad framework:
 1. Enabling the Council to establish an independent panel of experts to decide all matters concerning resource consent applications for change to heritage buildings resulting from earthquake damage.
 2. If the Panel decides to notify an application, the submission period is considerably shortened from the current minimum 20 working days required by the RMA.
 3. Only the applicant has a right of appeal. The Canterbury Earthquake (Historic Places Act) Order 2010 provided that the right of appeal against a decision concerning disturbance of an archaeological site is restricted to the applicant. This Order in Council would seek a similar provision.
 4. For demolition of Group 1 or 2 heritage buildings listed in the City Plan that cannot feasibly be saved, alter the activity status from non-complying to discretionary. Reason: the non-complying activity threshold test in the RMA may mean that resource consent for demolition cannot be granted.
 5. For restoration and reinstatement of Group 1-3 heritage buildings listed in the City Plan, alter the activity status from discretionary to controlled.
 6. Insert new assessment criteria in the relevant parts of the City Plan so that the decision making criteria include the impact of the earthquake on heritage buildings.

Relevance of Historic Places Act 1993 Listing

47. Historic Places Act listing of these buildings has no regulatory effect. The Historic Places Act 1993 provides that the purpose of the listing is to assist with protection under the RMA. The regulatory protection is under the City Plan, nothing else.
48. However, buildings and in-ground remains that are over 100 years old are archaeological sites. Archaeological approval under the Historic Places Act will be required for in-ground excavation at all sites, and for demolition of the buildings that are over 100 years old. That approval process has been streamlined by the Canterbury Earthquake (Historic Places) Order in Council. The decision on the application for archaeological approval will take a maximum of three working days.

Meaning of dangerous building

Section 121 of the Building Act 2004 (BA04) provides that a building is a dangerous building if:

- “(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
 - (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
 - (ii) damage to other property; or
- (b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely because of fire hazard or the occupancy of the building.”

The Canterbury Earthquake (Building Act) Order 2010 (Building Act Order) added 3 new categories of “dangerous” building, including section 121(1)(c): a building is dangerous if “there is a risk [it] could collapse or otherwise cause injury or death to any person in the building as a result of an earthquake that generates shaking that is less than a moderate earthquake”.

Meaning of Earthquake-prone building

Section 122 of the BA04 defines an earthquake prone building as one that “having regard to its condition and to the ground on which it is built, and because of its construction, the building:

- (a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); and
- (b) would be likely to collapse causing—
 - (i) injury or death to persons in the building or to persons on any other property; or
 - (ii) damage to any other property.”

Note: “Ultimate capacity” means seismic load capacity, and “moderate earthquake means, in relation to a building, an earthquake that would generate shaking at the site of the building that is of the same duration as, but that is one-third as strong as the earthquake shaking (determined by normal measures of acceleration, velocity, and displacement) that would be used to design a new building at that site.”

This definition applies to commercial buildings, and residential buildings that comprise 2 or more storeys and contain 3 or more household units.

Meaning of insanitary building

Under section 123 of the Building Act, a building is insanitary if it:

- “(a) is offensive or likely to be injurious to health because—
 - (i) of how it is situated or constructed; or
 - (ii) it is in a state of disrepair; or
- (b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or
- (c) does not have a supply of potable water that is adequate for its intended use; or
- (d) does not have sanitary facilities that are adequate for its intended use.”

Section 129

129 Measures to avoid immediate danger or to fix insanitary conditions (as amended by the Building Act Order)

- “(1) This section applies if, because of the state of a building,—
- (a) immediate danger to the safety of people is likely in terms of section 121 or section 122 or section 123; or
 - (b) immediate action is necessary to fix insanitary conditions.
- (2) The chief executive of a territorial authority may, by warrant issued under his or her signature, cause any action to be taken that is necessary in his or her judgment to—
- (a) remove that danger; or
 - (b) fix those insanitary conditions.
- (3) If the territorial authority takes action under subsection (2) and either of the events described in subsection (3A) has occurred,—
- (a) the owner of the building is liable for the costs of the action; and
 - (b) the territorial authority may recover those costs from the owner; and
 - (c) the amount recoverable by the territorial authority becomes a charge on the land on which the building is situated.
- (3A) The events are—
- (a) the owner of the building has failed to apply to a District Court, within 5 days of the work being carried out, for an order that the owner is not liable for the costs of the territorial authority exercising its powers under this section:
 - (b) the owner’s application to a District Court for an order that the owner is not liable for the costs of the territorial authority exercising its powers under this section is unsuccessful.
- (4) The chief executive of the territorial authority and the territorial authority are not under any liability arising from the issue, in good faith, of a warrant under subsection (2) or any liability arising from any work that the territorial authority has, in good faith, carried out under section 126 as modified by the Canterbury Earthquake (Building Act) Order 2010.”