3 December 2014

Julie Knauf

Manager, Construction Market Policy

Ministry of Business, Innovation and Employment

PO Box 1473

Wellington 6140

Your reference: 18368446

Dear Ms Knauf

**Rock Fall and Notices Under Section 124 of the Building Act 2004**

I am writing to belatedly reply to your letter of 28 July 2014 which in turn was a reply to my letter of 30 May 2014 about rock fall and notices under section 124 of the Building Act 2004.

Let me begin by saying that the Commission is pleased to note the government’s recognition of the effect that the issuing of an extended s. 124 notice has on people’s rights, particularly property rights. In the Commission’s view in New Zealand property rights are human rights. I would add that there should also be an explicit recognition of the effect it is having on people’s human right to health and is stopping people from moving forward.

In my earlier letter I asked about the work the Ministry was doing in response to the recommendations made by the Regulations Review Committee in its report about a complaint about the Canterbury earthquake (Building Act) Order 2011. You replied that the “Christchurch City Council (CCC) and the Ministry are developing a rock roll hazard mitigation process and refining the current technical guideline for rock protection structures.”

In your reply you noted that: “information arising from the determinations has informed the Ministry’s work with CCC to develop the rock roll hazard mitigation guide and to refine CCC’s current technical guidelines for rock protection structures.”

I wish to follow-up with you about both these issues.

The Commission understands that there are still issues about the technical guideline for rock protection structures and the ability of those wanting to either install a rock fall protection structure or to have an existing one approved. One Port Hills resident, who is an engineer, recently provided the following information to the Commission:

The problem with the existing situation (which the Government do not seem to be intending to change) is that MBIE has still not released their “hazard based” guidelines for rock fall protection structures which are what is needed to properly design rock fall protection structures for site specific conditions.

To quote the Government response: ‘Specifically, the Ministry of Business, Innovation and Employment (the Ministry) is working with CCC on a rock roll hazard mitigation process and to refine CCC’s current Technical Guideline for Rock Protection Structures.'

To date we have seen no evidence of any such refinement of the Technical Guideline for Rock Protection Structures.

The Technical Guideline for Rock Protection Structures, which CCC has had in place for some time, has put all the onus on individual property owners to engage and pay for Geotechnical Engineering advice and for the designers to “negotiate” with CCC in using CCC's design standard which has never been confirmed as a means of compliance with the NZ Building Code. Christchurch City Council's design standard is a “risk based” approach which has proven to be very subjective and frustrating to negotiate with CCC requiring extremely conservative designs even in cases where it is recognised by such agencies as MBIE themselves that little or no risk of rock impact exists.

The Engineering consultants involved, who have had great difficulty understanding the risk based models and how to apply them in a site specific manner, are expected to take full liability for the effectiveness of their designs.

Some residents have engaged in this process, and a handful have recently had success in negotiating the system after major investment of time and money. The designs that have been approved appear to be very conservative and will in my opinion be unnecessarily expensive to implement.’

In Determination 2013/037, issued on 2 July 2013, the delegate from MBIE considered the adequacy of a rock fall protection structure which had received the necessary consents. While finding that the building was within the extended definition of a dangerous building the delegate was critical of the CCC’s guidelines:

“While I appreciate that there are some relevant design considerations in the Technical Guideline for Rock Protection Structures, it is my view that these are not framed in a way that is meaningful for the applicants or the owners of any property where a s. 124 notice has been issued. In particular, there do not appear to be clear criteria that will be applied for removal of a s. 124 notice.”

The applicants are entitled to expect clear guidance from the authority (CCC) in respect of the criteria that will be applied when considering any proposal submitted in order that the building would no longer be dangerous as defined by the order. This is particularly important as the Technical Guideline for Rock Protection Structures leads the reader to conclude that the authority’s decision will hinge on the resulting [Annual Individual Fatality Risk] AIFR at the dwelling.

The authority also needs to inform the applicants as to the reliance they might place on the authority’s own evaluation findings.

For this property, I note that the Port Hills Geotechnical Group appears to have concluded that it could be protected by a rock fall protection structure. The authority needs to provide clear reasons if the applicants are not able to rely on this advice. (In mid-2011 the CCC established the Port Hills Geotechnical Group a consortium of specialist engineers, to assess those properties that had red placards issued by Civil Defence and to recommend whether or not a s. 124 notice should be issued.)

This issue has still not been resolved. People are still unable to live in their homes and no useful way forward has been provided for them. The risk approach applied to rock fall risk in the Port Hills is inconsistent with the approach taken in managing the risk from earthquake prone buildings and to rock fall prone roads such as Milford. Yet the s. 124 notices have a direct impact on people’s ability to enjoy their property rights.

These issues have been well canvassed in the submissions to CCC on the District Plan. In particular the Tonkin and Taylor submission makes some pertinent points on the matter. These are the consultants that MBIE have used to support them in their geotechnical work and I am surprised that their views have not been used to inform guidance on management of rock fall risk.

The Commission requests that the Ministry and CCC work together to create new guidelines being that can be relied on by property owners. The Commission is particularly concerned that these guidelines be informed by community engagement and independent expert opinion and that these views are given full and proper weight.

I also request that the Ministry gives full weight to the cogent criticisms made by John Gardiner of the existing Guidelines. I appreciate that John Gardner works at MBIE but makes his determinations independent of MBIE. Little will be achieved if the revamped technical guidelines on rock fall protection structures are: “not framed in a way that is meaningful for the … owners of any property where a s. 124 notice has been issued. In particular, there do not appear to be clear criteria that will be applied for removal of s. 124 notice.”

I would welcome an opportunity to meet with you and with the Christchurch City Council’s representatives to discuss the Commission’s concerns. Should that not be possible I ask that you make the correspondence we have exchanged available to all those in the Ministry and at the CCC who are working on the revamp of the Technical Guideline for Rock Protection Structures.

I look forward to your reply.

Yours sincerely

David Rutherford's signature.tif

David Rutherford

Chief Commissioner