



# Natural Hazards Guidance

## PURPOSE

The purpose of this guidance note is to ensure that there is a consistent approach regarding the consenting of building work on land subject to natural hazards in a manner that:

- Advises potential purchasers of natural hazards;
- Protects the public (health and safety); and
- Manages Council's liability through exemption.

## SUMMARY OF BUILDING ACT 2004 PROCESS

If a natural hazard is identified on land, a building consent application must be considered with reference to sections 71-74 of the Building Act 2004 (Act).

Sections 71 through 74 of the Act set out the matters to be considered and the actions to be taken by Council, as the Building Consent Authority (BCA), when dealing with applications for building consents for land subject to natural hazards. In some circumstances, Council must refuse to grant a building consent. In others, Council must grant a building consent.

If a consent is granted under section 72, a condition of consent will require Council to notify the Register-General of Land, and an entry will be made on the Certificate of Title. This will indicate a building consent was granted under section 72, and will identify the natural hazard concerned.

**Attachment A** to this document contains sections 71 through 74 in full.

## NATURAL HAZARD

The Act defines a natural hazard as:

- Erosion (including coastal erosion, bank erosion, and sheet erosion);
- Falling debris (including soil, rock, snow and ice);
- Subsidence;
- Inundation (including flooding, overland flow, storm surge, tidal effects and ponding);
- Slippage.

If the land contains one or more of the above hazards then Council officers will need to consider the application of sections 71 and 72 of the Act.

This assessment should occur on a case by case basis. Council officers must adopt a common-sense approach, as noted in *Logan v Auckland City Council*.<sup>1</sup>

*“...in determining whether the statutory risk threshold under [sections 71(1)(a) and section 72(b)] has been reached, and what will be adequate provision to protect the land under [section 71(2)], given too, that adequate provision for protection does not require the elimination of any possibility in all conceivable circumstances of inundation or other relevant hazard, a territorial authority can be expected to take a common sense approach. Whether the risk is at the level and frequency to justify the expense and other implications of making adequate provision to protect the land, and if not, to require a warning notice which is a blot on the title and may have significant implications, will always require a sensible assessment involving consideration of fact and degree.”*

## **WHAT BUILDINGS ARE AFFECTED?**

All new buildings and major alterations, regardless of use (i.e. residential and commercial) are affected by sections 71-74 of the Act. The nature of the alterations (i.e. whether they are minor or not) is assessed on a case-by-case basis.

The following factors guide Council officers and are considered major alterations:

- An increase of more than 20m<sup>2</sup> to the floor area of the building;
- The alteration affects more than 30% of the existing floor area of the building; or
- An addition which forms part of an alteration which increases the effect of the natural hazard on the existing building.

Building consents for building work such as a bund to protect against flooding or a barrier pile wall to protect against land instability will not result in a section 73 notice against the land.

## **SECTION 71**

Pursuant to section 71(1) of the Act, Council, as the BCA, must refuse to grant a building consent for the construction of a building, or major alterations to a building if:

- The land on which the building work is to be carried out is subject to or is likely to be subject to 1 or more natural hazards; or
- The building work is likely to accelerate, worsen or result in a natural hazard on that land or any other property.

Building work may take place, if:

- The natural hazard is sufficiently remote from the building work (see below);
- The overland flow, or other natural hazard the land is subject to, is deemed not to be a natural hazard, such as in the case of a constructed or designed overland flow path.

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<sup>1</sup> *Logan v Auckland City Council* CA243/99 (9 March 2000) at [33].

However, under section 71(2) of the Act, the BCA must grant a building consent if it is satisfied that 'adequate provision' has been made, or will be made, to:

- Protect the land, building work or other property from the natural hazard(s); or
- Restore any damage to that land or other property as a result of the building work.

**Subject to, or likely to be subject to, a natural hazard?**

The provisions of sections 71 and 72 primarily relate to the land which is subject to a natural hazard. The preliminary consideration is whether the land is subject to a natural hazard, not the building itself.

Case law indicates that "the land" is to be interpreted as meaning "the land intimately connected with the building". In *Auckland City Council v Logan*<sup>2</sup>, the meaning of "the land" in section 36(1)(a) of the Building Act 1991 was discussed as follows:

*"When the statute refers, as it does, to 'the land on which the building work is to take place', is it referring to the area contiguous to the building or to the land in general? Plainly, the circumstances may vary greatly. The 'land' may be a 1000-acre property, on which a new house is to be built. The house may be far away from any potential inundation. Or, as here, the site may be a smallish suburban one, which is earmarked for higher density use, and it is difficult to disassociate the building from the entire parcel of land."*

Council takes the view that if the natural hazard comes within 10 metres of the proposed building, the natural hazard will need to be assessed by reference to sections 71 and 72 of the Act. In doing so, Council officers will need to determine what distance around the proposed building will need to be protected from the natural hazard to avoid a section 73 notice being issued. The 10-metre set back is in this sense a trigger for Council to turn its mind to the issue of the actual distance required to protect the land intimately connected with the building. It is not intended to limit Council's assessment of the natural hazard, with each matter being considered on a case-by-case basis.

Applications for building consent on land which is subject to one or more hazards may be required to be accompanied by an expert report. The report should include an assessment of the impact or effect of the natural hazard on both the land and the proposed building.

Assessment of the protected area of land within 10 metres outside the perimeter of the building is dependent upon:

- the risk;
- the nature of the natural hazard affecting the building site; and
- any proposed work to protect the land on which the building work is proposed to be located.

Note: associated site works may also require protection.

**Adequate Provision**

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<sup>2</sup> HC Auckland AP77/99.

Building work that meets the requirements of section 71(2) of the Act can be processed by Council without the need for a section 73 notice on the Certificate of Title.

In order to demonstrate that 'adequate' provision has been made to protect from the natural hazard or restore any damage, applicants may be required to provide a site specific report from a suitably qualified professional. The BCA will take that report into account when deciding whether 'adequate provision' has been made, which will be determined on a case by case basis.

The report must address section 71(2) of the Act and confirm that the applicable statutory requirements will be satisfied, including:

- Confirmation that suitable mitigation of the relevant natural hazard has been or will be achieved;
- Confirmation that the proposed design incorporates appropriate protection of the land, the building work, or other property and/or that any damage to the land or other property will be restored;
- Assessment of compliance with the NZ Building Code.

The applicant will need to demonstrate how adequate provision is provided to protect the proposed building site from a natural hazard or restore any damage under section 71(2) as part of the building consent application.

The design of structures to protect the land from a hazard must be supported by design and durability assessments from a suitably qualified person (e.g. a chartered professional engineer) experienced in hazard mitigation work (e.g. flood protection, geotechnical assessment and coastal protection etc.)

### **When does building work comply with section 71(2) even though a natural hazard affects the site?**

#### **1. Flooding adjacent to a stream or river**

Council will give particular consideration to building work in the proximity of rivers or streams where the width of the stream floods flow is clearly confined to the stream bed (incorporating the land adjacent to the river or stream at normal flood flow levels). In such cases, a storm event will typically flood the areas of land within the wider bed of the river or stream, but the building and the land intimately connected with the building are unaffected by the flood flow. If however, the bank of the river is prone to erosion, which has the potential of removing part of the area of land intimately connected with the dwelling, then consideration will be given to imposition of a section 73 notice.

#### **2. Overland flow paths**

Overland flows are defined as a natural hazard in terms of the Building Act. Some of these overland flows have the potential to be a major flooding event. However where overland design flows are clearly identified and confined to a specific part of the land which is protected by an easement on the relevant certificate of title, a subsequent section 73 notice is not deemed to be necessary. These overland flows are often design features as part of a stormwater network.

Easements for overland flow paths are a desirable option as Council is able to impose a condition that the identified land must be kept clear to allow the overland flow to pass uninterrupted by structures. Such an easement can be, depending on the circumstances, regarded as a means to protect the land and building work in terms of section 71(2) of the Building Act 2004.

### 3. Hazard protection / building line restrictions

A section 73 condition is unlikely where the District Plan, subdivision consent, or land use consent has identified a building line restriction.

A building line restriction identified by way of a consent notice, covenant or similar means of identifying “no build areas”, is intended to provide protection to the land and building work. For example, a building line restriction may prevent building work taking place on a particular part of the site because of flooding or land instability. If the building work takes place within that building line, the building consent is, depending on the circumstances, unlikely to require a section 73 notice.

## **SECTION 72**

Despite the requirements of section 71, there are instances when the BCA must grant a building consent for building work on land subject to natural hazards. The criteria are set out in section 72 of the Act. These are:

- The proposed building work will not accelerate, worsen or result in a natural hazard on the land or any other property;
- The land is subject to, or is likely to be subject to, one or more natural hazards; and
- It is reasonable to grant a waiver or modification of the Building Code in respect of the natural hazard concerned.

All three of these criteria must be satisfied before section 72 of the Act will be triggered. However, if there is no waiver or modification required to be considered by the Building Code, criteria (c) above can be regarded as having been satisfied.

If the above conditions are met, building consent must issue with the proviso that the Council must impose a condition on the consent and register a notice in accordance with section 73 of the Act. This must occur every time a building consent is issued for the land, irrespective of any notices previously registered against the property, under the Act or any other legislation.

### **Reasonable to grant a waiver**

When determining whether it is reasonable to grant a waiver or modification of the Building Code, it is necessary to consider the purpose and principles of the Act (including risk to the public and / or the building occupants), as well as the potential need to make the building more resistant to the effects of the natural hazard, if such an event was to occur.

Further, Council will take into account the following:

- The presumption is that the hazard will not injure or take a person's life. Given that there is little or no historical evidence of injury or death associated with natural hazards occurring this tends to be a low threshold.
- While not always necessary, the reasonableness of granting a waiver or modification is enhanced if the building structure is able to resist damage when it is subject to a hazard event.
- In a number of instances there will not be a waiver or modification of the building code to grant. In these circumstances it is deemed that s72 is met.

## **SECTION 73 AND 74**

Section 73 requires a BCA which grants a building consent under section 72 to notify the Register-General of Land of the consent. On receiving notification, the Register-General will then place an entry on the title of the land, confirming that the building consent has been granted under section 72 and identifying the natural hazard concerned.

### **What is the effect of a section 73 Certificate?**

Council officers will encourage the owners of land subject to a natural hazard to obtain independent advice. This is because the owner of the land subject to a section 73 notice accepts the risk that the natural hazard affecting the site may under certain circumstances affect the proposed building work.

A notice registered on the title also protects the Council from liability associated with granting the consent under section 392 of the Act, should the building be subsequently impacted by the hazard.

The implications arising from natural hazards are not straightforward and there is a need for an owner/building consent applicant to make an informed decision. For example, registration of a section 73 notice on the certificate of title may affect the owner's ability to obtain appropriate insurance cover for the property. Care should be particularly taken where the building consent applicant is an agent acting on behalf of an owner.

For this reason Council encourages a statement from the owner that he or she has consulted with expert engineers and legal advisers and that they understand the nature of the natural hazard and the legal ramifications of a notice registered on the title under section 73 of the Act.

## **Attachment A**

### **71 Building on land subject to natural hazards**

- (1) A building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if—
- (a) the land on which the building work is to be carried out is subject or is likely to be subject to 1 or more natural hazards; or

- (b) the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.
- (2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—
  - (a) protect the land, building work, or other property referred to in that subsection from the natural hazard or hazards; or
  - (b) restore any damage to that land or other property as a result of the building work.
- (3) In this section and [sections 72 to 74](#), **natural hazard** means any of the following:
  - (a) erosion (including coastal erosion, bank erosion, and sheet erosion):
  - (b) falling debris (including soil, rock, snow, and ice):
  - (c) subsidence:
  - (d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding):
  - (e) slippage.

## **72 Building consent for building on land subject to natural hazards must be granted in certain cases**

Despite [section 71](#), a building consent authority that is a territorial authority must grant a building consent if the building consent authority considers that—

- (a) the building work to which an application for a building consent relates will not accelerate, worsen, or result in a natural hazard on the land on which the building work is to be carried out or any other property; and
- (b) the land is subject or is likely to be subject to 1 or more natural hazards; and
- (c) it is reasonable to grant a waiver or modification of the [building code](#) in respect of the natural hazard concerned.

## **73 Conditions on building consents granted under section 72**

- (1) A building consent authority that is a territorial authority that grants a building consent under [section 72](#) must include, as a condition of the consent, that the building consent authority will, on issuing the consent, notify the consent to,—
  - (a) in the case of an application made by, or on behalf of, the Crown, the appropriate Minister and the Surveyor-General; and
  - (b) in the case of an application made by, or on behalf of, the owners of Māori land, the Registrar of the Maori Land Court; and
  - (c) in any other case, the Registrar-General of Land.
- (2) The notification under subsection (1)(a) or (b) must be accompanied by a copy of any project information memorandum that has been issued and that relates to the building consent in question.
- (3) The notification under subsection (1)(c) must identify the natural hazard concerned.

## 74 Steps after notification

- (1) On receiving a notification under [section 73](#),—
- (a) the Surveyor-General or the Registrar of the Maori Land Court, as the case may be, must enter in his or her records the particulars of the notification together with a copy of any project information memorandum that accompanied the notification:
  - (b) the Registrar-General of Land must record, as an entry on the certificate of title to the land on which the building work is carried out,—
    - (i) that a building consent has been granted under [section 72](#); and
    - (ii) particulars that identify the natural hazard concerned.
- (2) If an entry has been recorded on a duplicate of the certificate of title referred to in subsection (1)(b) under [section 641A](#) of the Local Government Act 1974 or section 36 of the former Act, the Registrar-General of Land does not need to record another entry on the duplicate.
- (3) Subsection (4) applies if a building consent authority determines that any of the following entries is no longer required:
- (a) an entry referred to in subsection (1)(b):
  - (b) an entry under [section 641A](#) of the Local Government Act 1974:
  - (c) an entry under section 36 of the former Act.
- (4) The building consent authority must notify the Surveyor-General, the Registrar of the Maori Land Court, or the Registrar-General of Land, as the case may be, who must amend his or her records or remove the entry from the certificate of title.