

Natural Hazards Guidance Document

To be used for guidance when building on land which is, or is likely to be
subject to a natural hazard

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Summary of Section 72 Building Act 2004

The Building Act provides necessary controls on building work, in the public interest and with due regard to national costs and benefits. City and District councils (building consent authorities that are territorial authorities) are charged with the day-to-day application of those controls. Section 72 of the Building Act 2004 is concerned with land, which is subject to a natural hazard – flooding, slippage, erosion, and subsidence for example. There are obvious difficulties in building on such hazardous land. Those difficulties affect not only owners, but also territorial authorities, because they can be held liable if they do not use reasonable skill and care in applying the Building Act. This creates a conflict between an owner who wishes to build on hazardous land and the building consent authority that is a territorial authority, which could be liable for future damage to the building if it issues a building consent. Section 72 offers a solution by allowing, in certain situations, an owner to take the risk of building on hazardous land without exposing the building consent authority that is a territorial authority to future liability. This involves the building consent authority that is a territorial authority issuing a building consent subject to a 'condition' to the effect that the building consent authority that is a territorial authority is protected against legal liability, and an entry is made on the certificate of title to the land put on record that the land is hazardous and that the building consent authority that is a territorial authority is protected from liability.

SECTIONS 71-74 BUILDING ACT 2004 BUILDING CONSENTS AND NATURAL HAZARDS

What are sections 71-74 and what is their purpose?

Sections 71-74 of the Building Act 2004 are concerned with land, which is subject to a natural hazard. These sections set out a standard for the building consent authority that is a territorial authority to apply when dealing with building consents for land subject to natural hazards. If the building consent authority that is a territorial authority is not satisfied that these standards are met, then it must refuse to grant a building consent. The building consent authority that is a territorial authority does however have the ability to consider various factors relating to the land and the natural hazard and may grant a building consent in some instances, where those factors support the grant of a building consent.

Put simply, the purposes of these sections of the Building Act are threefold:

- (a) to protect the public from the hazard;
- (b) to advise future land owners of the hazard; and
- (c) to exempt the building consent authority that is a territorial authority from liability pursuant to section 392 of the Building Act.

Appendix A sets out the decision making process a building consent authority that is a territorial authority takes when making a decision under sections 71 to 74 of the Building Act 2004, the various matters of which are discussed in this policy document.

Appendix B sets out in full sections 71 to 74 of the Building Act 2004 for reference.

What are the natural hazards identified by section 71?

Section 71(3) of the Building Act 2004 defines the natural hazards that section 72 is concerned with. A natural hazard is land subject to:

- (a) Erosion (including coastal erosion, bank erosion, and sheet erosion);
- (b) Falling debris (including rock, soil, snow and ice);
- (c) Subsidence;

- (d) Inundation (including flooding, overland flow, storm surge, tidal effects and ponding); and
- (e) Slippage.

Where the land is subject to one or more of these natural hazards, the building consent authority that is a territorial authority must consider the application of sections 71 and 72.

What do these sections do and how are they applied to a building consent application?

Section 71 states that where the land on which the building work is to be carried out, as a whole, is subject to, or is likely to be subject to, a natural hazard, or where the building work is likely to accelerate, worsen or result in a natural hazard on that land or any other property, the building consent authority that is a territorial authority must refuse to grant a building consent for that land.

However, there are circumstances where, despite the natural hazard, the building consent authority that is a territorial authority may consider granting the building consent. Under section 71(2), the building consent authority that is a territorial authority may grant a building consent for land that is subject to a natural hazard, in the normal way (i.e. without reference to a section 73 notice), if it is satisfied that:

- (a) The building work is sufficiently remote from the natural hazard; or
- (b) In the event the building consent relates to an alteration of an existing building, those alterations are not major alterations; or
- (c) Adequate provision has been made to protect the land, building work, or other property from the hazard; or
- (d) Adequate provision has been made to restore any damage to the land or other property as a result of the building work.

Applications for building consents which are subject to a natural hazard should be accompanied by an expert report. The expert report should include an assessment of the impact or effect of the natural hazard on both the land and the proposed building work.

The building consent authority that is a territorial authority should be guided by the statement of the Court of Appeal in the case of *Logan v Auckland City Council*, where the Court explained that:¹

"... 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."

When is building work sufficiently remote from the natural hazard?

The phrase "the land on which the building work is to be carried out" in section 71 has been interpreted by the Department of Building and Housing (now the Ministry of Innovation, Business and Employment) as meaning the land "intimately connected" with the building.² Where the building consent authority

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

² *Re: Building Consent for a storage shed on land subject to inundation at 58 Brookvale Lane, Taupaki* DepBH Determination 2008/82, at [6.2.6].

that is a territorial authority considers that the land on which the building work is to be carried out is not "intimately connected" with the natural hazard, the building consent authority that is a territorial authority can deduce that the building work is sufficiently remote from the natural hazard.

This assessment must be on a case-by-case basis. A number of factors are relevant in assessing whether the land is "intimately connected" with the natural hazard including, but not limited to:

- (a) the risk involved;
- (b) the nature of the natural hazard affecting the building site;
- (c) the building work that is proposed to be carried out to protect the land on which the building work is proposed to be located; and
- (d) any other associated site works required as part of the construction of the building works or the building consent.

What are major alterations?

The Palmerston North City Council has determined that based on average house size and the scope of work contained within Schedule 1 of the Building Act 2004 that the following parameters are applicable when considering if an alteration is a "major alteration":

- (a) when the work exceeds a floor area size of greater than 30m²; or
- (b) when the work exceeds 25% of the existing floor area (whichever is the lesser); or
- (c) when the work is significant enough to warrant consideration as being "major".

Where one or more of these considerations are satisfied, the Council will determine that the works are "major alterations".

What is considered adequate provision being made to protect the land, building work, or other property from the natural hazard?

The building consent authority that is a territorial authority will need to make an assessment of the protection mechanisms available to the land owner to protect the land, building work, or other property from the hazard. This will often be provided by an expert report provided by the applicant in relation to the land and the natural hazard. Protection mechanisms available to a land owner will differ from case to case and each will need to be assessed on its own merits.

One example of a protection mechanism that could be available to a land owner is a building line restriction, including a consent notice under section 221 of the Resource Management Act 1991. The building consent authority that is a territorial authority may consider that a section 73 certificate is not required where the subdivision consent or land use consent has identified a building line restriction on the site. A building line restriction identified by way of a covenant or consent notice, which identifies a no-build area, may provide protection to the land and building works in terms of section 71(2) of the Building Act. A building line restriction showing a no-build area will act to prevent building work taking place on a particular part of the site because of flooding, inundation or land instability. If the building work takes place within a safe build area, the building consent is likely to be issued without the requirement of a section 73 certificate.

Appendix C provides a sample consent notice that may be issued by the Palmerston North City Council based on this example of a protection mechanism.³

³ The sample consent notice provided in Appendix C is for presentation purposes only and actual consent notices will differ from this sample based on the assessment of each individual property.

If there is an existing consent notice on the land which provides a no-build area due to a natural hazard existing on the land then the building consent authority that is a territorial authority may not require an expert report as it may determine that the analysis undertaken at the subdivision consent stage, leading to a consent notice being issued, is sufficient. In most cases the land owner can expect that the protection mechanism in the consent notice will satisfy section 71(2)(a). One example of a scenario where sections 71 and 72 would still apply even where a consent notice provides for a no-build area would be where there has been some deterioration of the land subsequent to the subdivision consent and the registration of the consent notice on the title of the property.

What if none of these options apply to a building consent application? How can building work take place on land subject to a natural hazard?

Where none of the options set out in section 71 are available to the applicant, the building consent authority that is a territorial authority may still consider granting the building consent on the basis of a condition being imposed upon the land under sections 72 and 73.

Section 72 states that despite section 71, the building consent authority that is a territorial authority must grant a building consent for building work on land subject to a natural hazard if:

- (a) The building work to which the application relates will not accelerate, worsen or result in a natural hazard on the land on which the building work is being carried out or any other property; and
- (b) The land is subject or is likely to be subject to one 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.

Note: If there is no waiver or modification required to be considered by the Building Code, item (c) above can be regarded as satisfied.

Where these conditions are met, the building consent authority that is a territorial authority must grant a building consent, but must also impose a condition on the building consent and register a certificate against the title to the property when the consent is issued under section 73 of the Building Act 2004.

What is the effect of a section 73 certificate?

The condition on the building consent and the certificate registered against the title to the land records that the land is hazardous, identifies the natural hazard, and protects the building consent authority that is a territorial authority against legal liability in granting the building consent.

The owner of the land subject to the natural hazard takes and accepts the risk that the natural hazard affecting the site may, under certain circumstances, affect the proposed building works. The certificate registered on the title protects the building consent authority that is a territorial authority from any associated liability as set out in section 392 of the Building Act 2004. Without this notice, the building consent authority that is a territorial authority does not have the protection granted under section 392. If there is a certificate on the title of the property and the building is subsequently damaged by a natural hazard, then the owner, and any subsequent owners of the property, cannot claim against the building consent authority that is a territorial authority for issuing the consent.

A certificate under section 73 of the Building Act 2004 registered against the owners title may affect the ability of the owner to obtain appropriate insurance cover for the property.

SUMMARY OF NATURAL HAZARDS POLICY

This natural hazards policy should be read in full to ensure understanding of the Council's approach to sections 71 to 74 of the Building Act 2004.

There are several steps to be taken and a number of decisions that must be made in order to determine whether or not a section 73 notice under the Building Act is required to be registered. These have been discussed throughout this document, but for ease of reference these matters are clearly set out in the decision tree in Appendix A.

Where the land is subject to a natural hazard, an assessment needs to be undertaken of any protection mechanisms available to a land owner to protect against the natural hazard. Protection mechanisms will differ from case to case and each will need to be assessed on its own merits. Protection mechanisms that may be considered include, but are not limited to:

- (a) Retaining walls;
- (b) Flood banks;
- (c) Deeper foundations;
- (d) Building above known flood levels on the land;
- (e) A consent notice and designation on the certificate of title clearly defining a safe building area and detailing the natural hazard (supported by a geotechnical report); or
- (f) Ultimately, if no protection mechanism is available, the submission and registration of a section 73 notice as prescribed by section 73 of the Building Act.

Each property will be different and protection mechanisms will need to be considered on a case by case basis. An applicant will need to discuss whether any protection mechanisms are appropriate and satisfactory with the Building Consent Authority and we recommend that expert geotechnical advice is obtained in support of any such mechanisms which the applicant seeks to rely upon.

As more difficult to build on sites are now becoming more prevalent it would be highly recommended for a prospective purchaser/builder to satisfy themselves of all aspects of the property e.g. steep sites, low lying, adjoining cliffs, rivers etc. Council may have some information in relation to the site. Please also bear in mind that costs could increase and time delays are likely when dealing with such sites through Council consenting processes.

Appendix A – Building sites subject to hazards

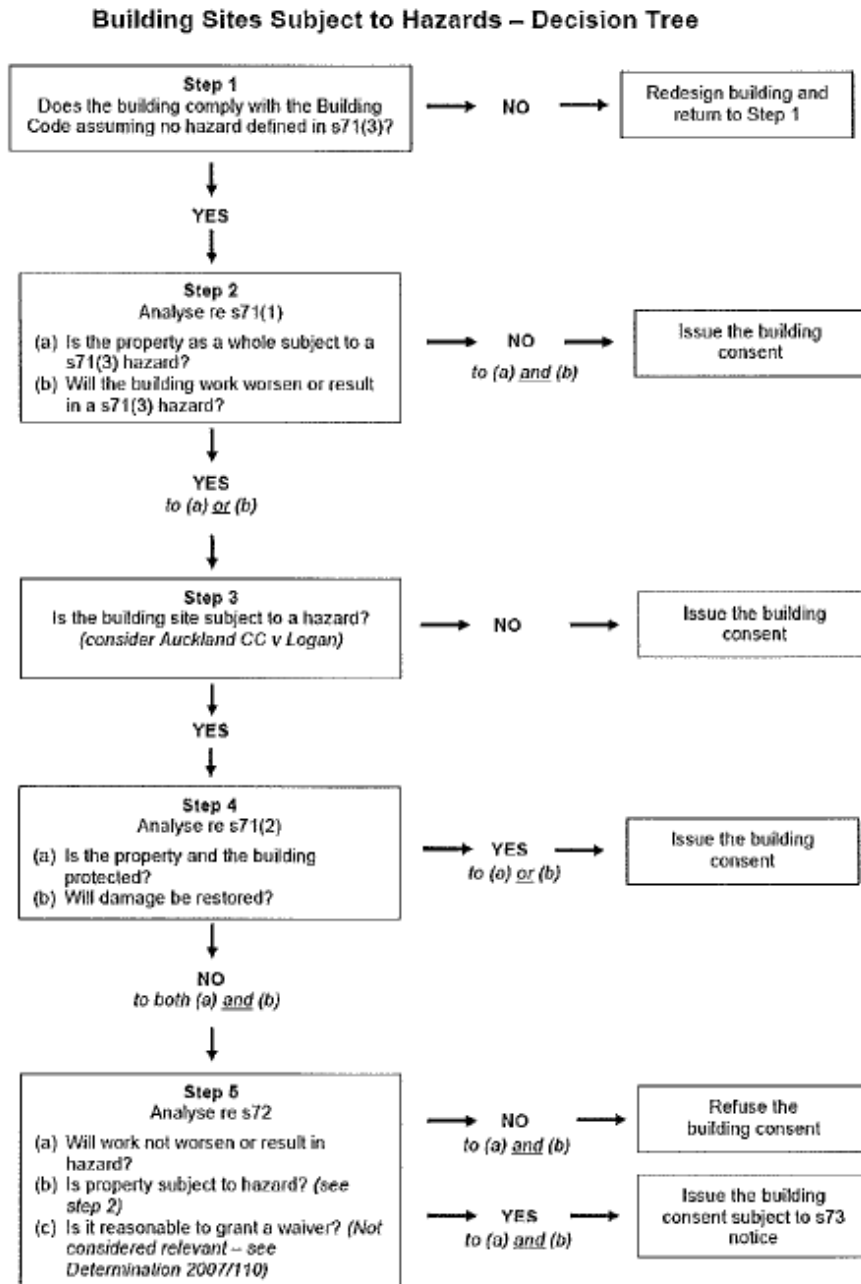


Figure 1: Building sites subject to hazards – the decision process described in the Building Act 2004

Appendix B – Legislation – Building Act 2004

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.

Source: www.legislation.govt.nz

Appendix C – Sample consent notice

PALMERSTON NORTH CITY COUNCIL

CONSENT NOTICE PURSUANT TO SECTION 221 OF
THE RESOURCE MANAGEMENT ACT 1991

IN THE MATTER of Lot # Deposited Plan #####

AND

IN THE MATTER of a Subdivision Consent pursuant to the Resource Management Act 1991

1. Pursuant to Section 221 of the Resource Management Act 1991 the Palmerston North City Council imposes the following conditions on the registered proprietors of Lot # Deposited Plan #####:

- (a) The erection of any building, structure or accessories of whatsoever nature (with the exception of appropriate fencing) and any earthworks associated with buildings, access, retaining walls, drainage or swimming pools, on, over or within areas "L" and "M" identified on the Land Transfer Plan for "Lot #" is prohibited unless the registered proprietor first provides to the Palmerston North City Council a Geotechnical Report supporting the proposal entirely satisfactory to the Palmerston North City Council prepared by a suitably qualified Geotechnical Engineer recognised by Council in relation to the prohibited area.

It is acknowledged that areas "L" and "M" are subject to a natural hazard being slippage.

- (b) The registered proprietors of 'Lot #' shall not dispose of collected surface runoff water, or overflow water onto or over the gully slopes but shall ensure that all water collection systems, including the disposal of swimming pool water are to be discharged via the appropriate Council drainage system for the area.

DATED this day of 20 .

Name
Authorised Officer