

Determinations 2024/025

An authority's decision to grant building consents under section 72

97 Taranaki Street, Te Aro, Wellington

Summary

This determination considers an authority's decision to grant building consents under section 72 of the Building Act 2004. The authority's decision gives rise to a natural hazard notice being entered on the record of title for the property where the building work will take place.

In this determination, unless otherwise stated, references to “section” are to sections of the Building Act 2004 (“the Act”) and references to “the Building Code” is to Schedule 1 of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Manager Advisory, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2. The parties to the determination are:
 - 1.2.1 Bligh Trustee Limited (“the owner”) who, as trustee of the Bligh Trust, is the registered owner of 97 Taranaki Street (“the property”), and
 - 1.2.2 Wellington City Council (“the authority”), carrying out its duties as a territorial or building consent authority.
- 1.3. This determination relates to three building consents (“the building consents”) that were granted by the authority for the staged construction of a low-rise development at the property. The authority decided the building consents must be granted under section 72. Consequently, they were granted subject to the condition that the authority would give notice to the Registrar-General of Land according to section 73(1)(c).² This notice results in an entry being made on the relevant record of title (“a hazard notice”), which sets out particulars that identify the hazard concerned and that a building consent has been granted under section 72.
- 1.4. The owner considers that the building consents should not have been granted under section 72. It also considers that the authority should have granted the consents *without* any conditions which give rise to a hazard notice being entered on the title for the property .
- 1.5. The owner says that the “[n]atural hazard provisions are not relevant to [its] building consent application” and it provides the following arguments to support this position:

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² The Registrar-General of Land is an independent statutory officer established by the Land Transfer Act 1952 with specific responsibility for the land titles registration system.

- 1.5.1 First, it says the hazard identified by the authority is not a ‘natural hazard’ for the purposes of the Act³
- 1.5.2 Even if it is a ‘natural hazard’ for the purposes of the Act, it says the land on which the building work is to be carried out is not subject or likely to be subject to a ‘natural hazard’
- 1.5.3 Even if the land concerned is subject or likely to be subject to a ‘natural hazard’, the owner says adequate provision has been made to protect the land and the building work in accordance with section 71(2)(a).⁴
- 1.6. The matter to be determined, under section 177(1)(b) and (2)(a) is, therefore, the authority’s decision to grant the building consents under section 72 and subject to notice being given to the Registrar-General of Land under section 73(1)(c). In making this determination, I consider whether:
- 1.6.1 the land on which the building work is to be carried out is subject to or likely to be subject to one or more natural hazards for the purposes of section 71(1)(a)⁵
- 1.6.2 adequate provision will be made to the protect the land and building work (with the limitations laid out below at 2.1) for the purposes of section 71(2)(a).

2. Matters outside the scope of this determination

- 2.1. The owner says the authority misapplied the natural hazard provisions in a number of ways (as outlined in paragraph 1.5 above). I will determine those matters of dispute but will not consider any other matters (including whether the authority misapplied the natural hazard provisions in any other respects or whether the proposed building work complies with the Building Code). The parties may wish to consider these further themselves as a number of points raised in submissions relate to these issues.
- 2.2. Further, I note the owner says that hazard notices have been entered on separate property titles for a number of units at the low-rise development.⁶ The authority subsequently confirmed, however, that fee simple subdivision for the units had not occurred at the time of issuing the building consents and that the entry was made on a single record of title for the entire property. As the matter to be determined arises from building consents which were granted in relation to the *entire property*, it is outside the

³ Either because “the flooding... is the impact of human intervention”, or it is minimal or trivial.

⁴ If ‘adequate provision’ has been made for the purposes of section 71(2), then section 71(1) does not apply and the authority must grant the building consents in the normal way (ie, under section 49 and without any conditions that would result in a hazard notice being entered on the property title).

⁵ This will include consideration of whether the hazard identified by the authority falls within the definition of ‘natural hazard’ in the Act.

⁶ Those being units 1 to 4, 7 to 8, 54 to 59 and 136 to 152 (see figure 4 below).

scope of this determination to determine the application of the natural hazard provisions with respect to individual units.

3. The building work

The site and services

- 3.1. The property is a flat, central city site in Te Aro, Wellington. The area is densely built, surrounded by commercial and business premises and low to medium rise apartment buildings.
- 3.2. Taranaki Street is on the western boundary of the property, Jessie Street on the southern boundary and Ebor Street on the eastern boundary. The adjacent properties on the northern boundary contain a residential apartment building and a commercial building.

The buildings

- 3.3. The proposed buildings are a low-rise development at the property of 152 units, comprising residential and mixed-use⁷ units. The units are designed in blocks, with common walkways between blocks, which run north to south, and east to west. A site plan for the development is shown in figure 1.
- 3.4. The residential units are to be situated within the interior of the site. They will be elevated above the flood level projected by the authority in its flood modelling for the catchment. The flood modelling used by the authority is for a 1% AEP⁸ event and includes an allowance for sea level rise and increased rainfall (see figure 2). In this determination I refer to this as “the authority’s flood modelling”.
- 3.5. The mixed-use units will front Taranaki Street and Jessie Street. They are to be sited as shown in figure 3. According to the authority’s flood modelling, water is projected to enter many of the mixed-use units to varying extents (see figure 4).

⁷ The mixed-use units are classified as commercial on the ground floor and residential on the floor above.

⁸ Annual Exceedance Probability (AEP) is probability of an event (such as flooding) occurring annually and is usually expressed as a percentage; a 1% AEP is an event which has a 1% probability of occurring annually and is commonly referred to as a 1-in-100 years event.

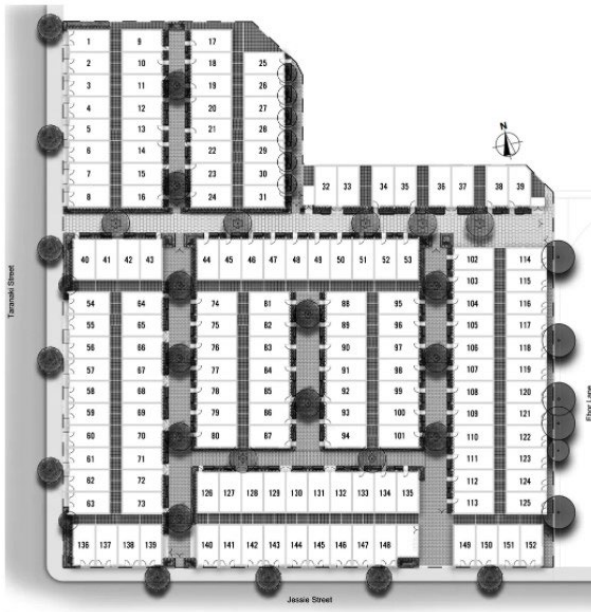


Figure 1: Site plan of the proposed development

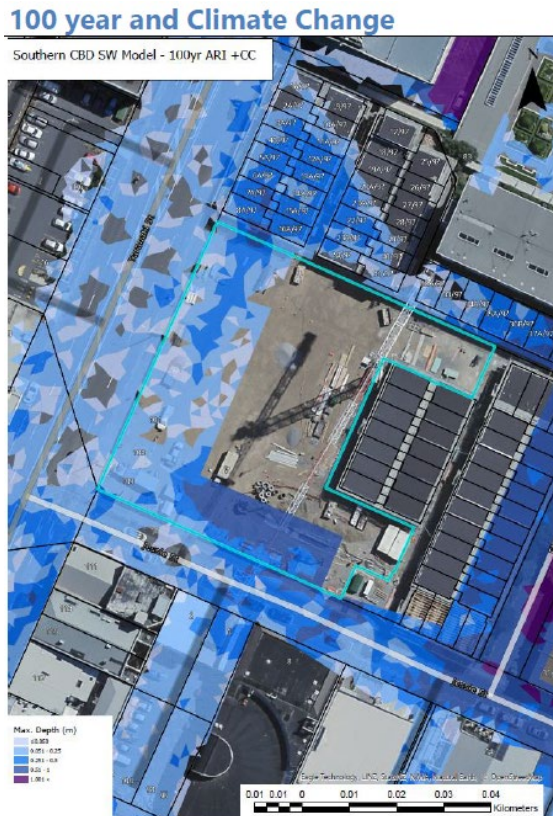


Figure 2: Flood modelling provided by authority



Figure 3: Mixed-use units (highlighted)



Figure 4: Projected flood depths in mixed-use units

4. Background

4.1. On 20 December 2019, the authority granted three building consents for the construction of 152 low-rise units at the property.

4.2. Each of the building consents state that:

As the building consent is granted under section 73 (conditions on building consents granted under section 72 “Building consent for building on land subject to natural hazards must be granted in some cases”) of the Building Act 2004, a copy of the building consent will be notified to the Registrar-General of Land.

4.3. The owner disagreed with the decision by the authority to grant the building consents under section 72.

4.4. The Ministry received an application from the owner for a determination on 5 July 2021.

5. Legislation

5.1. Under section 49(1), a building consent authority must grant a building consent if it is satisfied that building work presented in the plans and specifications complies with the Building Code. However, if the building work is on land that is subject to a ‘natural hazard’ for the purposes of the Act, sections 71 to 74 (“the natural hazard provisions”) must be applied by the authority concerned.

5.2. The Act provides that the expression ‘natural hazard’ has the meaning given to it by section 71.⁹ Section 71(3) says that ‘natural hazard’ means any of the any of the circumstances specified in that section (I refer to these collectively as “the listed hazards”). These circumstances include erosion (including coast 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) and slippage.

5.3. The natural hazard provisions provide for three outcomes. Building consent must be:

- refused under section 71(1),
- granted in the normal way (ie, under section 49), or
- granted under section 72, which gives rise to the building consent being made subject to the conditions specified in section 73.

⁹ Section 7.

- 5.4. Under section 71(1), a building consent authority must refuse to grant a building consent for the construction of a building, or major alterations to a building, if:
- 5.4.1 the land on which the building work is to be carried out is subject to one or more natural hazards, or
 - 5.4.2 the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property.
- 5.5. However, the Act goes on to provide two exceptions to the requirement to refuse building consent.
- 5.6. According to section 71(2), building consent must be granted in the normal way (ie, under section 49 *without* any section 73 conditions) if the building consent authority is satisfied that adequate provision has been, or will be made, to:
- 5.6.1 protect the land, the building work, and other property from the natural hazard, and
 - 5.6.2 restore any damage (if any) to that land or other property as a result of the building work.
- 5.7. Where adequate provision under section 71(2) cannot be made, section 72 provides another way for building consent to be granted. According to this section an authority must grant a building consent if it considers that:
- 5.7.1 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
 - 5.7.2 the land is subject or is likely to be subject to 1 or more natural hazards, and
 - 5.7.3 it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned¹⁰.
- 5.8. Conditions (as prescribed by the Act) must be applied to consents granted under section 72. According to section 73, the building consent authority must include, as a condition of the consent, that it will give notice to the Registrar-General of Land (or another specified person). When notice is given, the building consent authority receives immunity from civil liability should damage arise from the hazard identified to the building concerned, or the land on which the building is situated.¹¹

¹⁰ Earlier determinations have considered this criterion to be met where the building work will comply with the Building Code in all respects. For example, see Determination 2007/110.

¹¹ Section 392(2) and (3).

- 5.9. Where the Registrar-General of Land receives notice it must, according to section 74(1)(b), enter details of the hazard concerned on the record of title for the property, including that a building consent has been granted under section 72. Such an entry is commonly referred to as a “section 72 notice”.

6. Discussion

- 6.1. The matter for determination is the authority’s decision to grant the building consents under section 72.¹² The authority is of the view that the Act requires it to grant the building consents under section 72. The owner contends that it does not.
- 6.2. To determine whether the Act requires the authority to grant the building consents under section 72, I must consider whether:
- 7.3.1 the land on which the building work is to be carried out is subject to or likely to be subject to one or more natural hazards for the purposes of section 71(1)(a), and
 - 7.3.2 ‘adequate provision’ will be made to the protect the land and building work for the purposes of section 71(2)(a) (subject to the limitations I outlined at paragraph 2.1)
- 6.3. Before I consider those matters, I acknowledge that the natural hazard provisions are particularly difficult to interpret. An examination of their legislative history, in my view, provides an insight into the source of these difficulties.
- 6.4. The legislative history reveals two earlier iterations of the natural hazard provisions. In 1981 the first iteration was inserted into the Local Government Act 1974 (“the LGA 1974”).¹³ At that time that Act provided for our system of local government. It gave local authorities certain roles and responsibilities including for building control and land management.
- 6.5. This first iteration of hazard-related provisions appears to have been enacted largely due to concerns about land subdivisions. They contemplated buildings being erected or altered on land that was “not suitable”, or such buildings being likely to sustain certain hazard-related damage during their “useful [lives]”.¹⁴ Where an authority considered an

¹² Where a building consent is granted under section 72, the authority responsible is required to include, as a condition of the consent, that the consent will be notified to the Registrar-General of Land. Upon receiving such notice, the Registrar-General is required to enter the natural hazard concerned on to the record of title for the property.

¹³ By way of the Local Government Amendment Act (No 2) 1981 (1981 No 111), sections 641 and 641A.

¹⁴ These were erosion, subsidence or slippage, and included inundation arising from those events (or all forms of inundation in specified circumstances).

application for a permit to build on these sites, these provisions set out criteria which provided for three possible outcomes:

- 6.5.1 refusal to grant a building permit
 - 6.5.2 granting of a building permit largely in the normal way, or
 - 6.5.3 granting of a building permit in an exceptional way.
- 6.6. In the first instance, these provisions required an authority to refuse to grant a building permit because of risks associated with specified hazards. However, the provisions went on to provide ways for the requirement – to refuse a building permit – to be put aside. Firstly, where the land was made suitable for building or the building was adequately protected, the provisions required the authority to grant a building permit largely in the normal way. The provisions also provided a second, exceptional way for authorities to permit building work. This special type of building permit was given at the discretion of an authority and only where a narrow set of criteria were met. Where it was given, the provisions conferred the authority concerned with statutory immunity from any civil liability for subsequent damage from the hazard to the building or the land. By obtaining a building permit in this way, the property owner essentially accepted the risks associated with the hazard identified. The provisions provided for prospective purchasers of the property to be warned of this acceptance of risk, by way of a notice which was required to be entered on the title for the property.
- 6.7. From 1 July 1992 the first iteration of the hazard-related provisions were repealed by the Building Act 1991 (“the former Building Act”). The former Building Act was enacted to establish a consistent building control regime throughout New Zealand¹⁵ and included an expanded set of provisions for hazards.¹⁶
- 6.8. This set of provisions, in the former Building Act, were considered in a number of determinations. Initially the Building Industry Authority found that the provisions did not require a notice on the property title unless the authority granted a waiver or modification of the Building Code. That approach, however, was rejected by the High Court in *Auckland City Council v Logan*.¹⁷ In that case the judge found that a notice was required despite the proposed building work complying with the Building Code. The judge said, “As I read it, the requirement to determine that there is ‘adequate provision for protection.. against inundation’ under s36(1) is an additional statutory requirement which is imposed on the consent granting authority, even though it does not arise directly out of

¹⁵ It also had the purpose to coordinate with other controls relating to building use and the management of natural and physical resources.

¹⁶ For example, further types of hazards were regulated including avulsion, alluvion, and falling debris.

¹⁷ *Auckland City Council v Logan* HC Auckland AP 77/99, 1 October 1999.

the building code, per se.”¹⁸ This decision was subsequently affirmed by the Court of Appeal in *Logan v Auckland City Council*.¹⁹

- 6.9. As a result of these decisions (which I refer to together as “the Logan decisions”) an applicant for building consent could be required to address the effects of a hazard on *land* in order to avoid a hazard notice being entered on their property title.²⁰ Notably, neither of these decisions outlined in detail why the former Building Act should be concerned with such effects (being primarily matters of land management, not building control).
- 6.10. From 31 March 2005 the second iteration of the provisions were repealed by the Act²¹ and replaced with the current set of natural hazard provisions.²² Determinations made in relation to this set of provisions have so far tended to continue to apply the same reasoning as the former Building Act.²³ By continuing to apply that particular reasoning, the current natural hazard provisions are considered to continue to provide, in part, for the management of land despite the purposes and wider scheme of the Act providing for building control.²⁴ This contributes to much of the difficulty interpreting the natural hazards provisions.²⁵
- 6.11. In light of this issue, it is appropriate to analyse the purposes of the natural hazard provisions in the Act. I am of the view that the hazard-related provisions in the LGA 1974 are of assistance with this, particularly one of their primary purposes. In my view that was to manage the liability of councils where they permitted building work on land in the knowledge that it was prone to certain types of hazards.²⁶ I consider this purpose was carried over in relation to the hazard provisions in the former Building Act and, later, to those in the current Act.²⁷

¹⁸ Ibid, at [46].

¹⁹ *Logan v Auckland City Council* (2000) 4 NZ ConvC 193, 184 (CA).

²⁰ This give rise to circumstances where a hazard notice was required on the title for a property despite the proposed building work complying in all respects with the Building Code.

²¹ Being the Building Act 2004, which was enacted, in part, to improve building code standards and administration.

²² Sections 71 to 74.

²³ For example, Determination 2017/048, paragraphs 5.2.9 to 5.2.12. In doing so, however, these determinations did not choose to explore the differences between the natural hazard provisions in the former and current Acts (for example, the differences in structure and wording).

²⁴ This gives rise to regulatory overlap with the Resource Management Act 1991 which has the purpose of land management and regulates the risks from natural hazards to land and people.

²⁵ Basic statutory interpretation methods (ie, reading the words of the provision in light of the purpose or scheme of the Act) provide little assistance with ascertaining what is meant by the phrase ‘adequate provision to protect land’.

²⁶ A further primary purpose of this set of provisions was to prevent building work where it would cause specified hazards to occur.

²⁷ The rationale for councils receiving such immunity under the former and current Building Acts is less clear. That is, however, a matter of policy and not one of statutory interpretation.

- 6.12. It is important to note that the requirement to enter a notice on a property title should not be understood solely as a stand-alone measure to warn prospective land purchasers of hazard risks. Rather, I consider the requirement for such notice to be ancillary to the purpose of managing council liability for certain situations. More specifically, these notices provided for prospective purchasers of land to be made aware that council would receive specific statutory immunity from liability in return for permission to undertake building work
- 6.13. In order to decide whether section 71(1)(a) applies in this case, I consider each of its requirements in turn.²⁸ I do so in light of the context above.
- 6.14. First I will determine what area at the property is the 'land' for the purposes of section 71(1)(a). In this case it is difficult to disassociate the site of the proposed building work from the entire parcel of land.²⁹ The building consists of 152 low-rise units which cover the entire property except for common areas used primarily as walkways. That being so, I am of the view that the 'land' for the purposes of section 71(1)(a) is the property as a whole.
- 6.15. I now consider whether the land on which the building work is to take place is *subject or likely to be subject* to a listed hazard.
- 6.16. I note that no evidence has been provided that satisfies me that the hazard identified has previously occurred on the land on which the building work is to take place.
- 6.17. However, there is another way the requirements of section 71(1)(a) can be met in this case; if the land concerned is *likely* to be subject to 'inundation'.

Does the hazard identified meet the threshold for being 'likely'?

- 6.18. I discussed the use of the term "likely" in Determination 2008/82.³⁰ I noted a number of court decisions which considered the meaning of "likely" in the context of section 64 of the former Building Act and I accepted those as good law with respect to the term "likely" in section 71. I am of that same view in the current situation.
- 6.19. In Determination 2008/82 I was of the view that a 1% AEP event "could well happen" over the life-time of the building in question and, as such, it was appropriate to use such

²⁸ I understand that the parties agree that the proposed building work is not likely to accelerate, worsen, or result in a natural hazard on that land or any other property. It is disputed, however, whether the land where the building work is being carried out is subject to, or is likely to be subject to, a natural hazard under section 71(1)(a).

²⁹ See commentary of the High Court in *Auckland City Council v Logan*, above fn 18 at [40].

³⁰ Determination 2008/82: Building consent for a storage shed on land subject to inundation at 58 Brookvale Lane, Taupaki

modelling when considering whether the land is likely to be subject to inundation for the purposes of section 71(1)(a).

6.20. The authority submits that:

The modelling [we used] showed flood depths between 100mm and 800mm in a 1% AEP event across the site with a max velocity of 0.2m/s and that at its peak this depth of inundation may be present on the site for up to 2 hours.

6.21. The owner does not raise any concerns about the use of a 1% AEP event to assess whether the hazard identified is likely. However, the owner notes that the authority's flood modelling incorporates a climate change allowance³¹ and it submits that the modelling "does not meet the threshold for being 'likely' over the economic life of the building" because it is too conservative in terms of its climate change allowance. In its submission the owner states, "Appropriate assessment events for inundation are the 1% AEP (100 year) event plus climate change to 2100, using the RCP4.5 intermediate-low climate change scenario".

6.22. It is not necessary, however, for me to consider whether the climate change allowance in the authority's flood modelling is appropriate in this case. I have received two aerial images of the property which show projected flooding in a 1% AEP event, one with the climate change allowance and the other without (see figure 5). I consider that there is only a marginal difference between the two. I am, therefore, satisfied that the projected inundation in the authority's flood modelling is "likely" for the purposes of section 71(1)(a).³²

³¹ I understand that the allowance is for increased rainfall and sea level rise over a period of 100 years.

³² Had the difference between the two images been more significant, I may have undertaken an assessment as to whether the climate change allowance was appropriate in the circumstances.

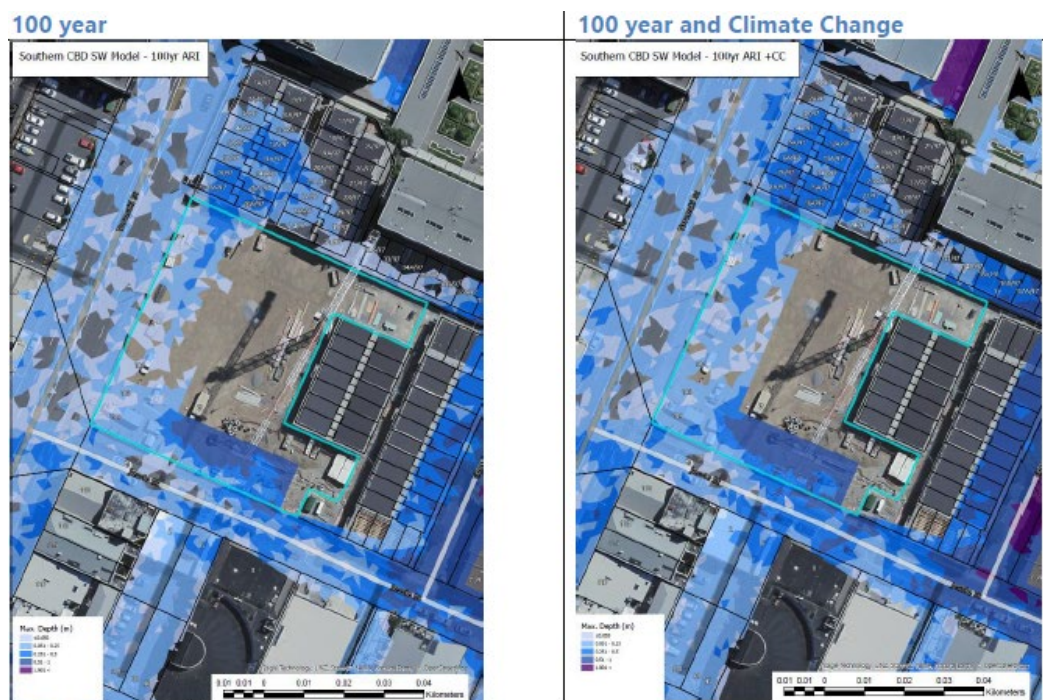


Figure 5: The authority’s flood modelling (on the left without the climate change allowance and on the right with the allowance)

6.23. As an aside, I note that the owner submits that catchment wide infrastructure upgrades may be undertaken over the development’s lifetime, which may reduce the exposure of the development to flooding. I have not seen any evidence of planned upgrades which will affect the catchment or the property in this manner. As such, I have given less weight to this argument.³³

Is the hazard identified a ‘natural hazard’ for the purposes of the Act?

6.24. The owner submits that what the hazard identified is not a ‘natural hazard’ as defined by the Act due to human intervention which has magnified and concentrated flood waters. More specifically, it says the site hydrogology is dominated by human impacts such as:

- the covering of land with impermeable surfaces
- building work reducing sub terranean flow

³³ In scenarios where the authority determines that an entry on the record of title made under section 74(1) is no longer required (for example, due to extensive upgrades to the management of storm water in a catchment), the authority must notify the Registrar-General of Land who must amend their records accordingly or remove the entry (see section 74(3) and (4)).

- building over natural flow paths, and
- any other changes by humans which modify the natural topography.

6.25. To address this submission, I now consider the definition of ‘natural hazard’ in the Act.

6.26. The Act provides that ‘natural hazard’ means any of the circumstances specified in section 71(3).³⁴ One of these circumstances is ‘inundation’.³⁵ The Oxford English Dictionary defines ‘inundation’ as, “The action of inundating; the fact of being inundated with water; an overflow of water; a flood.”³⁶

6.27. The Oxford Reference³⁷ says that a ‘natural hazard’ is a “process or event in the physical environment that is not caused by humans, is usually not entirely predictable, but can injure or kill people and damage property...”. It goes on to say, “Three trends have increased the problems of coping with natural hazards in recent decades – population increase, human impacts on environmental systems, and technological hazards...”.

6.28. I note the Oxford Reference clearly contemplates situations where a process or or event remains a natural hazard despite being affected by human factors.

6.29. Undoubtably humans have affected the risk of flooding at the site. For example:

- the constructing of buildings and surrounding roads and paths creates impermeable surfaces which increase surface water run-off
- the stormwater network which drains rain off the land, roads and footpaths, and from building gutters, and

6.30. While there is evidence of human impacts on the hazard identified, I am not satisfied that it is *caused* by humans. Therefore, I do not agree with the owner that human impacts preclude the hazard identified from falling within the definition of ‘natural hazard’ in section 71.

6.31. The owner also submits that the hazard identified is minimal or trivial and, therefore, does not fall within the definition of ‘natural hazard’ in the Act.

6.32. I note that the Act does not specify any minimum level or magnitude for each listed hazard to be considered a ‘natural hazard’ for the purposes of the Act.³⁸ Despite this,

³⁴ Therefore, the meaning of ‘natural hazard’ is restricted to these circumstances.

³⁵ Section 71(3)(d).

³⁶ Oxford English Dictionary (online publication), accessed on 29 January 2024.

³⁷ Oxford Reference (online publication), accessed on 29 January 2024.

³⁸ Section 7 provides that the term ‘natural hazard’ has the meaning given to it by section 71. Section 71(3) defines a natural hazard by the event occurring (in this case it is inundation).

previous determinations³⁹ have found that, before an event can be considered a ‘natural hazard’ for the purposes of the Act, it must be more than minimal or trivial. I consider taking that approach is appropriate in this case.

- 6.33. As noted above, in deciding whether section 71(1)(a) applies, the authority relied on modelling which predicts flood depths of up to 800mm in areas on the pre-development site with a max velocity of 0.2m/s and that at its peak this depth of inundation may be present on the site for up to 2 hours.
- 6.34. I consider the authority’s flood modelling gives rise to plausible concerns about hazard risk, particularly when considered in the context of the proposed building work and its intended uses. That being so, I consider the potential hazard risk in relation to the proposed building site is more than minimal or trivial.
- 6.35. In conclusion, I am satisfied that the hazard identified by the authority falls within the definition of ‘natural hazard’ in the Act.
- 6.36. Therefore, I find that – for the purpose of 71(1)(a) – the land on which the building work is to be carried out is likely to be subject to a listed hazard, that being inundation in the form of flooding. Notably, my finding may have been different if I had received evidence – for example, modelling from a suitably qualified expert – that contradicted the modelling relied upon by the authority.
- 6.37. For completeness, I note the authority and the owner state the building work will not accelerate, worsen, or result in a natural hazard on that land or other property. As this is not in dispute between the parties, I will not consider or make any findings regarding section 71(1)(b) in this determination.

³⁹ For example, see Determinations 2021/013; 2019/067; 2019/059; 2019/034; 2018/057; 2017/080; 2017/048; 2013/081; 2013/047.

Will ‘adequate provision’ be made?

- 6.38. I now turn my mind to whether adequate provision will be made to protect the land and the building work from the natural hazard for the purposes of section 71(2)(a).⁴⁰ I do so in light of the context above.⁴¹ If adequate provision will be made for *both*, section 71(1) is not applicable and the building consent must be granted in the normal way under section 49(1) and without any conditions that would result in a hazard notice being entered on the property title.⁴²
- 6.39. I note this test gives rise to significant interpretation difficulties because the Act does not specify who is to make adequate provision and how.
- 6.40. The Court of Appeal in *Logan v Auckland City Council* said that a territorial authority can be expected to take a “common-sense approach” when determining whether adequate provision has been or will be made for the purposes of the former Act.⁴³
- 6.41. The Court of Appeal also observed that, “Adequate provision for protection does not require the elimination of *any possibility in all conceivable circumstances* of inundation or other relevant hazards...” [my emphasis].⁴⁴ I take this to mean that adequate provision can be achieved without having to completely eliminate all possibility of the hazard concerned affecting the property.
- 6.42. The owner submits that it has made or will make adequate provision to protect the land and building work for the purposes of section 71(2)(a). It says this requirement has been met because it will use fill to create a building platform elevating the buildings to the interior of the site above the modelled flood level.
- 6.43. The authority submits it is not satisfied that adequate provision has or will be made to protect the land and building work from the hazard concerned. In support of this view it says, “The level of inundation anticipated to be inside the building considered to be considered a hazard to owners and occupants of the building”.

⁴⁰ Section 71(2)(a) requires the building consent authority to consider whether adequate provision has been or will be made to protect other property. As the parties agree that the building work in this case is not likely to accelerate, worsen or result in a natural hazard on any other property, it is not necessary for me to consider whether adequate provision has been or will be made to protect other property. I draw specific attention to this as the parties may wish to consider further based on submissions received during this determination.

⁴¹ See paragraphs 6.3 to 6.12 above.

⁴² I consider that the protections listed in section 71(2)(a) are cumulative. See *Logan v Auckland City Council*, above fn 20 at [29].

⁴³ *Logan v Auckland City Council*, above fn 20 at [33].

⁴⁴ *Ibid.*

Adequate provision to protect the land

- 6.44. When considering the obligation to protect land under section 71(2)(a), it is difficult to disassociate any part of the land at this property in question from the proposed building works.⁴⁵ Therefore, adequate provision must be made to protect all of the land at this property from the hazard concerned.
- 6.45. I note that much of the building site will be elevated above the 1% AEP flood level (by building up the ground level).⁴⁶ That being so, I am satisfied that adequate provision will be made to protect that part of the land.
- 6.46. However, some land will remain below the 1% AEP flood level; that being strips of land fronting Taranaki and Jessie Streets. This land is where the mixed-use units and common walkways, which provide access to the interior of the site, are to be constructed. Flood water is modelled to potentially enter the ground floors of some units to varying depths. It may also enter some of the common walkways to some extent between the mixed-used units. It is clear, therefore, that inundation will occur on part of the property in a 1% AEP flood event.⁴⁷
- 6.47. While inundation is projected to occur, I consider that is not sufficient in-of-itself (ie, the mere occurrence of inundation) to find in this case that adequate provision has not or will not be made to protect the land.
- 6.48. In considering the need to “protect the land” for the purpose of section 71(2), it is the land intimately connected with the building and the building or building work that is relevant.
- 6.49. I have not, however, received any evidence from the parties which indicates that this land would require specific protection from “damage arising, directly or indirectly,”⁴⁸ from the inundation it would be subject to.
- 6.50. In the absence of evidence the land requires specific protection, I am satisfied that adequate provision will be made to protect the land for the purposes of section 71(2)(a).

⁴⁵ See paragraph 6.14 above.

⁴⁶ This is where the residential units are to be situated.

⁴⁷ I note that the projected flooding in these circumstances (see, for example, Figure 4 above) should have been considered by the authority when assessing the Building Code compliance of the proposed building work. See paragraph 6.52 below for my view as to how a consenting authority should take a listed natural hazard into account during the consenting process.

⁴⁸ This threshold is established in section 392(3).

Adequate provision to protect the building work

- 6.51. Not only does adequate provision to protect the land need to be made to meet the requirements of section 71(2)(a); it also requires the building consent authority to be satisfied that adequate provision has been or will be made to protect the building work.⁴⁹
- 6.52. The owner is of the view that compliance with the Building Code amounts to adequate provision to protect building work. The authority submits that it is satisfied the proposed building work complies with the Building Code,⁵⁰ but it does not say whether it agrees that this amounts to adequate provision to protect the building work.
- 6.53. Previous determinations have noted that compliance with the Building Code will generally be accepted as being adequate provision to protect building work from the natural hazard concerned.⁵¹ Determination 2007/110 gave section 18 as the basis for this view.⁵² I remain of this view. To avoid any misunderstanding, however, I note that it is essential for the authority to take into account the natural hazard concerned when assessing whether building work complies with the Building Code. This must be done in relation to each and every performance requirement which is applicable, not just those requirements which explicitly refer to the hazard. For example, if inundation is likely to affect a residential building during its economic life, then the consenting authority not only needs to be satisfied that the requirement in Clause E1.3.2⁵³ is met, but also that the likely consequential effects of the hazard are designed for in terms of the other applicable performance standards including, but not limited to, B1 *Structure*, B2 *Durability*, D1 *Access*, E2 *External moisture* and G9 *Electricity*.⁵⁴

⁴⁹ See fn 42 above.

⁵⁰ This matter is outside the scope of this determination (see paragraph 2.1 above). I note, however, that it is essential for building consent authorities to properly take account of relevant listed hazards when considering whether proposed building work complies with the Building Code. Where a listed hazard gives rise to non-compliance, the building consent applicant may wish to redesign the building work in order to achieve compliance or, alternatively, seek a waiver or modification of the Building Code (but only to the extent that it is appropriate to do so).

⁵¹ For example, Determination 2017/080 (see paragraph 5.2.5); Determination 2017/048 (see paragraph 5.3.8); Determination 2015/018 (see paragraph 6.2.5); Determination 2007/110 (see paragraph 6.4.5).

⁵² Section 18(1) prevents a territorial authority from requiring the building consent applicant to achieve performance criteria that are additional to or more restrictive than the performance criteria prescribed in the Building Code or take any action in respect of that building work if it complies with the building code.

⁵³ Clause E1.3.2 of the Building Code provides that "Surface water, resulting from an event having a 2% probability of occurring annually, shall not enter [housing, communal residential and communal non-residential] buildings."

⁵⁴ I note that a consenting authority may waive or modify performance criteria, but only where it is appropriate to do so. In such circumstances, the Act requires consent to be granted by way of section 72. This results in a natural hazard notice being entered on the record of title for the property.

- 6.54. As the parties agree that the building work complies with the Building Code, I have not considered any further whether adequate provision has or will be made to protect the building work from the natural hazard concerned.
- 6.55. As I am satisfied that adequate provision will be made to protect the land and the building work (subject to 6.52 above) under section 71(2)(a), I find that the building consent should not have been granted under section 72.
- 6.56. As an aside, I note that the authority's submissions suggests that they can require a hazard notice to be entered on the record of title for the property simply because the inundation modelled is "more than minor or trivial". It does not, however, go on to explain the basis for this view. I am of the view the authority is required to consider whether it is satisfied that 'adequate provision' has or will be made according to section 71(2) before it goes on to consider whether it must grant a building consent under section 72 (and therefore subject to a hazard notice). Where an authority is satisfied (or otherwise) that adequate provision has or will be made, it should record its reasons for reaching that decision.

Conclusion

- 6.57. I consider that:⁵⁵
- the land on which the building work is to be carried out is subject or likely to be subject to a natural hazard, namely inundation (sections 71(1)(a) and 71(3)(d))
 - adequate provision will be made to protect the land and building work (subject to our commentary in 6.52 about the compliance of the building work not being disputed by the parties) from the natural hazard concerned (section 71(2)(a))
- 6.58. As a consequence, the authority must notify the Registrar-General of Land that an entry on the record of title for the property regarding the hazard concerned is not required by the Act. The Registrar-General will amend their records accordingly or remove the entry.⁵⁶

⁵⁵ These findings are based on the evidence provided to me and relate only to the matters in dispute as described in paragraph 1.5 above.

⁵⁶ Section 74(4).

7. Decision

- 7.1. I determine that the provision in section 71(2) is satisfied in regard to the protection of land. Accordingly, on the basis that the parties agree on the compliance of the building work, section 71(2) is satisfied, I modify the decision to grant the building consents to remove the conditions which provide for notification under section 73

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 27 May 2024.

Andrew Eames
Manager Advisory