

Policy

Decision Making for Building Work, Subject to Natural Hazards

Table of Contents

1.0	Introduction	2
2.0	Purpose of Sections 71 to 74	2
3.0	Legislation, Related Forms & Documentation	4
4.0	Council Liability.....	4
5.0	Natural Hazards	4
6.0	Building Work that meets the Requirements of Section 71(2)	5
7.0	Land Subject to Flooding	5
8.0	Type of Building Work Subject to Sections 71 to 74	6
9.0	Site Assessment.....	7
10.0	Assessment Building Work Subject to Hazard	8
11.0	Procedural Requirements	9
12.0	Rodney District Plan Requirements	9
13.0	Applicant Awareness and Decision Making Record	10
Appendix 1	12
	Hazard	14
	Risk to Life or Injury	14
	Hazard for which Building Consents are able to be granted under section 72 subject to section 73 notice	14
	Record of Decisions for building work subject to one or more natural hazards	15
	Yes or No.....	15

Commencement and Review

Date Approved: _____

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Approved by: _____

Signed: _____ Date: _____

Position: _____

1.0 Introduction

The Building Act in 2004 in Sections 71 to 74 sets out the legislative provisions for dealing with building work subject to one or more natural hazards. A guideline for decision making is required so that the Building Consent Authority (BCA) can demonstrate that it gave appropriate consideration to the legislative provisions on a case by case basis.

A decision making process based on policy is to be avoided as a case by case decision making process is a statutory requirement.

The purpose of the decision making guideline is to provide a balance between the right of the property owner to develop free from any encumbrances or notices on the title of his/her property and the liability that the BCA may incur situations when it should have refused a consent for building work on a site subject to one or more natural hazards.

This guideline should be read in conjunction with the background paper on the same topic. This background paper also includes examples.

2.0 Purpose of Sections 71 to 74

The purpose of Sections 71 to 74 is to ensure that a BCA refuses a consent for building work if it may lead to making matters worse for the land and other property subject to one or more natural hazards, but if the natural hazard(s) is unaffected by the building work, to allow such a building consent if it is reasonable to grant a waiver or modification, if necessary, to the building code and owners or prospective owners are made aware of the natural hazard by way of a notice on the title of the property.

The above is a brief summary only and the following legal tests must be followed.

Section 71 states that a building consent must be refused for the construction of a building, or major alteration to a building if

71(1)(a) the land on which the building work is to be carried out subject to or is likely to be subject to one or more hazard; or

71(1) (b) the building work is likely to accelerate, worsen or result in a natural hazard on that land or any other property”.

This prohibition to issue a building consent does not apply if adequate provision has been made to:

71(2)(a) Protect the land, building work or other property referred to in that subsection from the natural hazard or hazards; or

71(2) (b) Restore any damage to that land or other property as a result of the building work

If one of these conditions is satisfied a building consent is able to be processed as normal. No section 73 notice is able to be attached to the title of the property.

Section 72 provides building consent applicant with the ability to develop land that is subject to one or more natural hazards subject to a set of prerequisites being met and subject to a condition that the natural hazard is noted in a section 73 notice, on the title of the property.

The ability to develop such a site is made very plain in the wording of section 72 which states:

“Despite section 71, a building consent 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, or worsen, or result in a natural hazard on the land on which the building work is to be carried out or on 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*

It is noted here that a) and b) are in fact the combined requirements of 71(1) with the addition of a new requirement 72 (c). Section 73 requires that building consent issued subject to section 72 must have a condition in the building consent noting that the land is subject to one or more hazards. It should be noted that there is a range of requirements in respect to such notices depending who is the owner of the land.

Thus if the requirements in section 72 are satisfied, the building consent authority (BCA) must grant the building consent pursuant subject to a section 73 notice to the Registrar General of lands, to attach to the title a description of the natural hazard that the building work is subject to.

3.0 Legislation, Related Forms & Documentation

Section 45 of the Building Act 2004, sets out the requirements for building consent applications. The information to be supplied with a building consent application must:

1. Demonstrate compliance with each clause of the building code relevant to the application.
2. Meet the minimum operational requirements of the Rodney District Council.

4.0 Council Liability

The BA04 in Section 392 exempts Council from claims of civil liability in respect of any claims that such a natural hazard may cause to the building work.

For Council to be able to rely on this exemption from liability it must be able to demonstrate that it gave proper consideration to the statutory requirements in Sections 71 to 74 on site specific basis (not based on a standard Council policy).

5.0 Natural Hazards

Consideration of natural hazards under the Building Act is limited to those natural hazards specified in section 71(3) as follows:

- 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*

It is important to note that the Building Act 2004 (BA04) has a different definition for natural hazards as compared to the definition in the Resource Management Act 1991 (RMA). This can only be deliberate as the development of the BA04 has clearly been able to take into account the RMA. Thus earthquakes and tsunamis are not regarded as hazards in the BA04 probably in the case of earthquakes the building code incorporates design requirements for such events and secondly in respect to tsunamis, it could be speculated that the reason may relate to the fact that, the events have a probability of occurring well out side any building design life and it would be impossible to design for in any case. There is clearly much more relevant for the RMA to deal with such hazards at the RMA has longer term planning horizons.

The other fact to note is that the hazard must be a natural hazard. The question that this raises is a designed overland flow path a natural hazard? This question is raised as it may be possible

to consider an overland flow path as a result of a natural event as opposed to a design overland flow path. For this reason the Rodney District BCA has determined, as discussed later, based on legal advice, that where there is an overland flow path easement on a property, and subject to conditions, that no section 73 notice is required.

6.0 Building Work that meets the Requirements of Section 71(2)

Building work that meets the requirements in section 71(2) can be processed as normal. The requirements in this section of the act are as follows:

71(2)(a) Protect the land, building work or other property referred to in that subsection from the natural hazard or hazards; or

71(2) (b) Restore any damage to that land or other property as a result of the building work

The building work required by section 72(2), that protects the proposed building site to make it free from a natural hazard that might otherwise exist on the land or restores any damage, needs to meet a number of requirements as follows:

- 1) The protection works should be designed to have a life span of 100 years, in order to ensure the protection of the proposed building works. It is necessary for protection work to be sure to last significantly longer than the proposed building work. This provides a margin of safety.
- 2) In the event that such protective structures have maintenance requirements to ensure the structural integrity for such work for the next 100 years, will require an encumbrance or a covenant registered against the property title, that sets out the structures maintenance requirements.
- 3) The design of structures to protect the land from a hazard shall require design and durability assessments from a chartered engineer experienced in hazard mitigation work. Expertise required would for example involve flood protection, geotechnical assessment and coastal protection.

The hazard protection design needs to meet a high level of confidence that the hazard protection work will succeed in safe guarding the land associated with the proposed building work. This is the reason for the 100 year durability requirement

7.0 Land Subject to Flooding

Section 71 of the BA04, as did the previous legislation refers to the land not the building. It could have been argued that Sections 71 to 74 of the BA04 apply even to a large site with one remote corner of the site subject to flooding for example.

This was the subject of a court decision Auckland City Council versus Logan. The decision criticised the Council for the above mentioned approach. The judgment suggested that the land intimately associated with the building work needed to be considered not the whole site.

The Rodney District Council has adopted a guideline of 10 metres from the building for land that could be considered to be, intimately associated with the building work.

Please note that this is a guideline as it could be more than 10 metres. It could for example include:

- onsite wastewater treatment site
- drainage systems
- driveways that give access to the building

Similarly it could also be less than 10 metres. If it is closer than 10 metres the applicants need to develop a case why it could be less for the BCA to consider. It could for example be that boundaries are closer and that it could be regarded as unreasonable to consider the area outside of the property. It could also be argued that portions of the land adjoining the building work are not intimately associated with the building work for one reason or another.

It is noted that the Earthquake Commission has in use an 8m guideline for land stability.

The consideration here is not whether or not it is possible to refuse a Building Consent but whether or not the building work must be issued, subject to a Section 73 notice.

8.0 Type of Building Work Subject to Sections 71 to 74

All types of building work, residential, commercial or industrial from retaining walls to wastewater treatment or drainage systems are subject to sections 71 to 74.

The fact that there may not be any performance requirements in the building Code in relation to certain building work is irrelevant to whether or not sections 71 and 72 of the BA04 are applicable. If there are no performance requirements in the building relevant to the natural hazard that affects or potentially affects the land, will clearly be impossible to grant a waiver or modification.

In the case of a dwelling that is located on land that floods the area of land intimately associated with the building, however the building is designed so that no water enters the building during a flooding event with an annual probability of 2% will also not be able to apply for a waiver or modification as the building code requirement in clause E1 has been met. In this situation the design of the building could be changed so as to lower the floor level so that the clause E1 requirement is breached and a modification to the building code requirement could be granted.

Clearly the law did not intend that a building, which less prone to a natural hazard would be discriminated against in this way, or to put it another way, it would not be considered justifiable to deliberately place a building in harms way in order to enable a waiver or modification to be granted in order to comply with the requirement of section 71 (c). For this reason our legal advice has determined that if there is no waiver or modification to the building code able to be granted, that this requirement does not need to be considered. This is supported by a determination from the DBH.

Legal advice is therefore that, if there is no waiver or modification to grant then Section 72(c) must be considered to have been satisfied.

Thus, for building work such as commercial buildings or dwellings with floor levels above a flood level having a 2% probability occurring annually, consent for building work must be issued if the BCA considers that Sections 72(a) and 72(b) are satisfied only.

9.0 Site Assessment

Not a Major Alteration

Other than the building work which has met the requirements of section 71 (2) of BA04, a building alteration which can be regarded as less than a major alterations are not subject to Section 71 to 74 of the BA04.

The Rodney District BCA guideline is that alterations to a dwelling which adds a floor area less than 12m² and meet the following criteria can be regarded as less than major:

- the building addition part of the building alteration must be so located that it will not be at greater risk of being affected by the natural hazard as compared to the existing building and
- the alteration will not renew more than 30% of the floor area of the building which is subject to a natural hazard.

Hazard Subject to Easement on a Property

Building work which is located on a property on which there is an easement for an overland flow path is exempt from the requirements of section 71 to 74 subject to the following requirements:

- Building work adjacent an overland flow path easement on the site where the floor level is at least 300mm above the maximum overland flow path level.

Hazard protection Building Line Restrictions

Building work that occurs behind a building line restriction imposed by a subdivision or land development Resource Consent will not be subject to section 71 to 74 requirements if they comply in every respect to the relevant consent notice, covenant or encumbrance requirements.

Hazard Protection Building Works

Clearly the building work carried out to protect the site against a natural hazard, can be consent without the need for a section 37 notice. Please note the suggested durability requirements in section 5 of this guideline.

10.0 Assessment Building Work Subject to Hazard

Section 72 of the BA04 is clear that a consent authority must issue a building Consent if subsection a), b) and c) are satisfied:

- *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*
- *The land is subject or is likely to be subject to 1 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*

Thus land subject to erosion, flooding, inundation, subsidence for example must be allowed to proceed subject to a Section 73 Notice on the title if the above requirements are met.

Subsection c) requires Council to determine that it is reasonable to grant a waiver.

- The presumption is that it will not risk life or injury. Given that there is no or little, historical evidence of death or injury associated with natural hazard occurring this tends to be a low threshold
- While not always necessary, the reasonableness is enhanced if the building structure is able to resist damage when it is subject to a hazard event.

The risk assessment is to be based on Table 1 and 2 attached to this guideline.

If considered reasonable, additional design consideration could assist in the decision making process, such as those set out in the table below:

Natural Hazard	Design Consideration
Flooding / Inundation	Damage resistant building materials
Wave run up zone on the foreshore	Deeper foundations to resist scour and other protective work
Erosion	The ability to remove the building or to allow a building with a life to match the erosion time frame

11.0 Procedural Requirements

The Building Act 2004 makes the Building Consent Authority (BCA) responsible for issuing building consents with or without Section 73 notices. The Building Consent Authority is able to remove, when no longer required, section 73 notices or section 36 notices under the Former Act and an entries under Section 641A of the Local Government Act 1974.

It should be noted that these powers are allocated to the BCA whether or not it is a Private or a territorial authority BCA.

The BA04 intended that the territorial authority determine what the natural hazard is and the BCA to determine whether or not a building consent was to be refused or issued with a section 73 notice.

12.0 Rodney District Plan Requirements

The current planning documents have out of date references in respect to the BA04 and other documents and is in need of updating. It is also noted that there are currently assessment criteria in subdivisions that include consideration of “flood free and stable building platforms. Similarly in the case of discretionary resource consent applications flooding and stable building sites is a factor able to be considered.

However there are currently permitted activities or restricted discretionary activities that are not able to assess or consider the issue of flooding in high density residential areas, for example.

In addition it is allowed to subsequently subdivide such sites around existing building as long as there is no further development potential, as a restricted discretionary activity subdivision. Again such an subdivision is seen as having no adverse environmental effects and the issue of flooding is not considered in the decision making process.

Council has decided to review this issue as part of a plan change to update the natural hazard section. Any changes will then be able to be the subject of public scrutiny and submissions.

Until such time or date a plan change, dealing with the natural hazard section is made public such subdivision are able to be proceeded with under the current rules in the District Plan.

13.0 Applicant Awareness and Decision Making Record

Clearly the above issues are not straightforward and there is a need for a building consent applicant to make an informed decision. In the event that the Rodney District BCA needs to consider that it is reasonable to grant a waiver or modification to the building code, we will require a formal application by the building consent applicant.

Even if there is no need for a waiver or modification, we will require a statement from the building consent applicant that he has consulted with expert engineers and legal advisers and that applicant understands the nature of the natural hazard and the legal implications. The purpose for this requirement is that a Court might view that Council has a duty of care given the potential imbalance of knowledge in respect this issue.

For this purpose and the potential repercussions that may occur when the natural hazard may adversely affect the site and or buildings it is important that there is a clear decision making record on file. Attached to this guideline in table 3 is the decision making checklist that will need to be completed when granting a building consent application under section 72 of the act and subject to a section 73 notice on the title of the property.

Note: the building consent must have a condition that that the consent was issued subject to a section 73 notice to be placed on the title of the property.

Note: The Project Information Memorandum (as well as any LIM) should include advice such as follows:

Natural Hazard Information

Your proposed development appears to subject to the following natural hazard(s) of_____. You will need to take legal and engineering expert advice as this proposed building development will or maybe subject to risks. You need to take these risks into account in this building project.

The building consent, of the natural hazard is verified, will be subject to a section 73/74 notice which will be registered against the title of this property.

The existence of an entry pursuant to section 73/74 of the Building Act 2004 may limit statutory natural disaster insurance. Refer Clause 3(d) of the Earthquake Commission Act 1993. For further information please contact the Earthquake Commission on 0800 652 333.

Note: The building consent must have a condition that the consent was issued subject to a section 73 notice being placed on the title of the property. The condition should be worded as follows:

Natural Hazard Notice

This building consent will be issued subject to a section 73/74 notice pursuant to the Building Act 2004. This notice will record that the following natural hazard affects the building site on which the building work proposed in this consent will take place.

Natural Hazard _____

Appendix 1

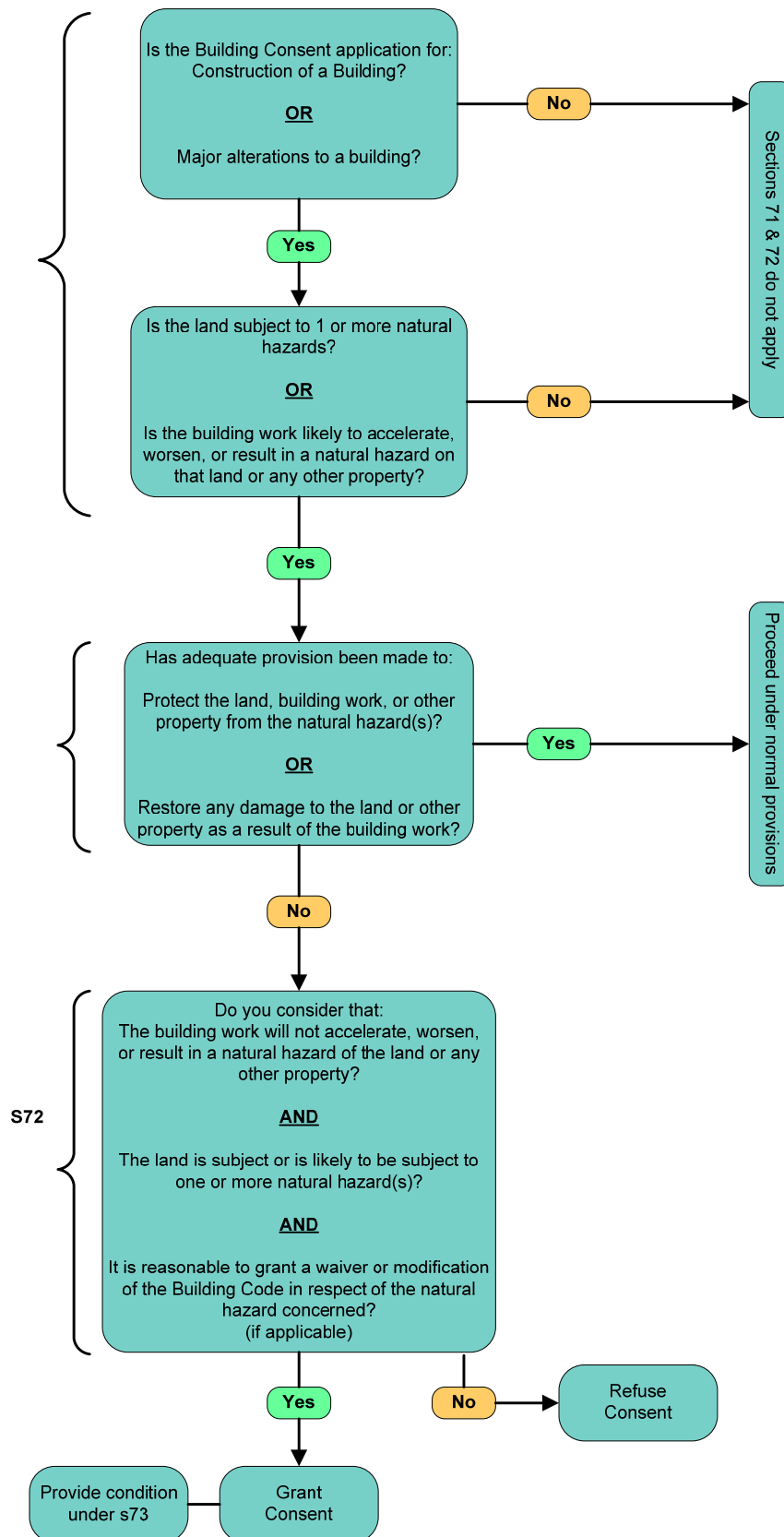


Table 1

<u>Hazard</u>	<u>Risk to Life or Injury</u>		
	High	Medium	Low
Erosion			✓
Falling Debris	✓		
Subsidence - Large		✓	
Subsidence - Small			✓
Inundation - Sudden	✓		
Inundation - Gradual			✓
Slippage - Large	✓	✓	
Slippage - Small			✓

Table 2

<u>Hazard for which Building Consents are able to be granted under section 72 subject to section 73 notice</u>			
Hazard	Example	Notes	Waiver/Modification
<u>Coastal Erosion</u>	Land on the foreshore which is subject to erosion	In general this is a gradual process which will allow people to evacuate safely.	The relevant waiver or modification is related to the land stability requirements in Clause B1 of the Building Code.
<u>Bank or Sheet Erosion</u>	Land with instability or sloping land	Subject to the scale of the potential failure being moderate to minor. The failure being of such magnitude that people would survive such an event without risk to life or injury.	The relevant waiver or modification is related to the land stability requirements in Clause B1 of the Building Code.
<u>Subsidence or Slippage</u>	Land with instability of such a scale that is likely to cause damage to building	Subject to the scale of potential failure being moderate to minor. The failure is of such a magnitude that people would survive an event without risk to life or injury.	The relevant waiver or modification is related to the land stability requirements in Clause B1 of the Building Code.
<u>Inundation, Flooding, Overland Flow, Storm Surge, Tidal Effects and Ponding</u>	Flooding of land on which the building work is to be located	In general as long as the flooding process is gradual, people are able to leave or be evacuated safely. This is dependant on the ability to contact people. Dwellings in remote locations could be more of a problem.	Waivers are only able to be considered for habitable floor space which has a 2% probability of being flooded within a 50 year period, as provided for in E1 of the Building Code.

Table 3

<u>Record of Decisions for building work subject to one or more natural hazards</u>	Yes or No
<p>1/ Is the application for:</p> <p style="padding-left: 40px;">(a) construction of a building</p> <p style="padding-left: 40px;">(OR)</p> <p style="padding-left: 40px;">(b) a major alteration (section 71(1))?</p>	<p>If the answer is Yes, circle (a) or (b) and proceed to (2). If the answer is No, process the BC as normal.</p>
<p>2/ Is:</p> <p style="padding-left: 40px;">(a) Is the land subject or likely to be subject to 1 or more natural hazards?</p> <p style="padding-left: 40px;">(OR)</p> <p style="padding-left: 40px;">(b) The building work likely to accelerate, worsen or result in a natural hazard on that land or any other property</p> <p style="padding-left: 40px;">(describe the natural hazard(s) concerned below)</p>	<p>If the answer is Yes, circle (a) or (b) or both and proceed to (3). If the answer is No, process the BC as normal.</p>
<p>3/ Has adequate provision been proposed to:</p> <p style="padding-left: 40px;">(a) protect the land, building work or other property from the natural hazard(s) – see section 71(2)?</p> <p style="padding-left: 40px;">(OR)</p> <p style="padding-left: 40px;">(b) restore any damage to that land or other property caused by the proposed building work?</p>	<p>If the answer is Yes, circle (a) or (b) or both and process the BC as normal. If the answer is No, proceed to (4).</p>

<p>4/ Will the building work accelerate, worsen or result in a natural hazard on the land or on any other property? (Describe why the answer is yes or no)</p>	<p>If the answer is Yes refuse the BC. If the answer is No, proceed to (5).</p>
<p>5/ Is the land subject or likely to be subject to 1 or more natural hazards?</p>	<p>If the answer is Yes, proceed to (6). If the answer is No, process BC as normal.</p>
<p>6/ If applicable, is it reasonable to grant a waiver or modification? (describe why the answer is yes or no. Also, specify what waiver or modification has been applied for)</p>	<p>If not applicable or if the answer is Yes, proceed to (7). If the answer is No, refuse the BC.</p>
<p>7/ has the applicant demonstrated that he has sought expert and/or legal advice and in the case where it is reasonable to grant a waiver or modification has this been applied for?</p>	<p>If the answer to either one of those questions is no request such information and/or application before proceeding to (8) below.</p>
<p>8/ Have you made sure that the required hazard condition has been added to conditions of the building consent?</p>	<p>If the answer is yes grant this consent and notify the Director General of Lands as required by section 73 of the BA04.</p>