



Determination 2017/048

Regarding the decision to grant a building consent subject to notification under section 73 for building work on land subject to a natural hazard at 27C Alice Avenue, Stanmore Bay, Orewa

Summary

This determination concerns the natural hazards provisions of the Act. The matter turned on whether the conditions under section 71(2) had been met and the consent could be issued without notification under section 73. Adequate provision had been made to protect the building work from the natural hazard (inundation) and the building work would not accelerate, worsen, or result in a natural hazard, but no provision had been made to protect the land.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property, Mr M Gillard (“the applicant”)
 - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 This determination arises from the authority’s decision to grant building consent for the construction of a house subject to a section 73² notice on the grounds that the land on which the house is to be built is subject to a natural hazard (inundation). The applicant is of the view that the conditions in section 71(2) are satisfied and the building consent should not be subject to notification under section 73.
- 1.4 The matter to be determined³ is therefore the authority’s exercise of its powers in granting the building consent under section 72 of the Act making it subject to notification under section 73. In making this decision I must consider whether section 71(2) applies.
- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.
- 1.6 There appears to be no dispute between the parties that adequate provision has been made to protect the building work from the natural hazard and that the proposed

¹ The Building Act, Building Code, Acceptable Solutions and Verification Methods, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

² Unless otherwise stated all references to sections are to sections of the Act and all references to clauses are to clauses of the Building Code. The relevant sections of the Act are set out in Appendix A.

³ Under sections 177(1)(b) and 177(2)(a) of the Act.

building work complies with the Building Code; I do not consider compliance with the Building Code further in this determination.

2. The building work

- 2.1 The building work consists of a single storey, timber framed house located on Lot 1 (No. 27C) to the west of an existing dwelling and on a flat site that is subject to inundation (see Figure 1 below). The authority's catchment and hydrology plan indicate a secondary flow path cutting through the east of Lot 2.



Figure 1: Site plan (not to scale)

- 2.2 Correspondence from the applicant's consulting engineer ("the consultant"), dated 8 January 2016, advises that the building was constructed with the following features incorporated to mitigate the effect of flooding on the building work:

- The [minimum finished floor level] of the new structure is 0.5m above the 100 year flood extent at RL 4.44m
- Permeable subfloor is utilised for the new house
- New fences are permeable
- No earthworks are undertaken in the flood plain that additional creates ponding (*sic*)
- Driveway finished ground levels are matched as closely to natural ground maintaining the exiting hydraulic regime.

(I note here that, based on the levels set out in the consultant's flood risk assessment described in paragraph 3.1 below, the reference above to the minimum finished floor level being 0.5m above the flood level appears to be incorrect. The assessment states a flood RL⁴ at 4.24; accordingly 0.5m above that would be 4.74, which is stated in the assessment as being the floor level of habitable spaces.)

- 2.3 Building plans provided by the applicant for the dwelling on Lot 1 show the garage floor (non-habitable) level at RL 4.44m and house's habitable floor level at RL 4.80m, which is generally consistent with the recommendations in the consultant's report (refer to paragraph 3.1).
- 2.4 No information has been presented to me regarding the extent of a 50-year flood event (2% AEP)⁵ at the site.

⁴ Reduced level, which is the height above a specified datum.

⁵ Clause E1.3.1 requires buildings must avoid the likelihood of damage or causing nuisance to other property by diverting surface water in a 10% Annual Exceedance Probability (AEP) event (i.e. 10% probability of occurring annually) and Clause E1.3.2 requires surface water must not enter houses in a 2% AEP event.

3. Background

3.1 The consultant prepared a “Flood Risk Assessment”, dated 18 June 2014, to support the proposed development on the Lot 1 site. The maximum flow depth calculated within the site was assessed as 0.74m (flowing at 0.12m/s) and it was noted the site would be subject to secondary flow during a “100 year event”. The assessment indicated the estimated flood RL at 4.24m and recommended the minimum finished floor level (FFL) for habitable spaces at RL 4.74m and for non-habitable spaces at RL 4.44m. The report made additional recommendations in regard to design and materials used, types of fencing, earthworks and landscaping, and driveway design to mitigate the effect of inundation and ensure it would not worsen the hazard.

3.2 The consultant’s report also stated:

... adequate provision has been made to protect the building work from the peak flood level ... [and] in our opinion the works will not increase the scale of the natural hazard either on this or any surrounding sites due to the house construction making allowance for the free flow of water without any adverse reduction in flood storage.

On that basis the consultant was of the view that section 71(2)(a) applied and the authority could grant the building consent.

3.3 The application for building consent no. ABA-1021865 was received by the authority on 29 October 2015.

3.4 On 17 November 2015 the authority wrote to the applicant, advising that the site was subject to inundation and that if the building consent was granted under section 72 of the Act it would be subject to notification under section 73. A standardised form, entitled “Application to continue with a building consent application subject to section 73 notification...” was attached for the applicant to indicate their intention with regard to the building consent application.

3.5 The applicant returned the form, signed on 8 January 2016, selecting the following option (“Option #1”):

I/we wish to change the design or present a technical report providing the bases (*sic*) for approving the building consent without a Section 73 notice. This will be forwarded to [the authority] in the near future.

The form was completed with confirmation the applicant had taken legal and technical advice in relation to the section 73 notice and the risk associated with the natural hazard, and the contact details for legal and technical advisors were provided by the applicant.

3.6 On 8 January 2016 the consultant wrote again to the authority, identifying the mitigating features (refer paragraph 2.2) and stating that in the consultant’s opinion ‘the flood hazard does not apply in such circumstances that would affect the new house build as it is elevated at least 1m above ground level. The consultant requested the authority remove the section 73 notice.

3.7 On 4 February 2016, the consultant, acting as technical advisor on the matter, wrote to the authority regarding the section 73 notification. The consultant noted he was the author of the “Flood Risk Assessment” prepared for the site (being the report referred to in paragraph 3.1 above), and that in the consultant’s opinion:

... building consent should be issued under Section 71 of the building act due to subsection 2(a) being satisfied. No further assessment is required to be

undertaken, specifically Section 72 is not replied (*sic*) upon to issue a consent and as such a Section 73 notification is not required.

- 3.8 The consultant sought clarification from the authority as to what criteria under section 71(2) had not been satisfied, and noted that recent nearby developments affected by the same hazard had building consents issued without section 73 notification.
- 3.9 On 25 February 2016, the applicant's legal advisor ("the legal advisor") wrote to the authority disputing the requirement for a section 73 notice and noting (in summary):
- The resource consent process specified a minimum finished floor level which was offered as a condition to mitigate the natural hazard.
 - The building was designed with pile foundations, at the suggestion of the authority's engineer, which further mitigates the potential for damage in the event of a flood.
 - The applicant was aware that a neighbouring property had been issued with a building consent that did not require a section 73 notice, and was of the view that the design of the applicant's building likewise mitigated the need for a notice.
 - It was not until a late stage in the building consent process that the applicant was notified the authority intended to register the notice under section 73 and it is 'inequitable for the [authority] to raise the issue at such a late stage'.
- 3.10 The legal advisor requested the authority review its process, stating that the building consent application did not fall within section 72 and the authority should have considered section 71(2) and noting that the Act allowed for the authority to request the removal of the notice on the title (sections 74(3) and (4)). The legal advisor also noted that the applicant was reluctant to uplift the building consent with it being subject to a section 73 notice but was under contractual pressure to do so to allow building work to commence.
- 3.11 On 4 March 2016 the authority issued the building consent subject to notification under section 73. Included in Section C of the advice notes attached to the consent was the statement that the authority would proceed with the section 73 notification 'prior to the application for Code Compliance Certificate'.
- 3.12 The consultant prepared a "Flood Risk Assessment: Case Study Review", dated 3 October 2016, which reviewed four different building consents issued by the authority and whether they were subject to section 73 notices. In the consultant's opinion there was an inconsistent approach from the authority in regard to the application of the natural hazard provisions, and that building on land subject to flooding should be assessed differently to those subject to other hazards like erosion for example. (It is unclear whether this report was provided to the authority by the applicant.)
- 3.13 On 21 October 2016, the applicant received legal advice regarding the authority's intention to notify the consent under section 73. The legal advisor noted that although the building consent had been issued a recent search of the title showed the notice had not yet been registered and that the authority had not followed its own written procedures. The legal advisor referred to section 5 of the authority's practice note in regard to building consents being issued without section 73 notices, and that as the building had been designed 'specifically to meet those requirements' the legal advisor's understanding was that the authority had decided not to register the notice.

4. The submissions

4.1 The initial submissions

- 4.1.1 The Ministry received an application for determination on 28 October 2016. Along with the completed application form and submission, the applicant provided copies of:
- relevant correspondence between the parties, the legal advisor, and the consultant
 - the consultant's Flood Risk Assessment for Lots 1 and 2, dated 18 June 2014 (refer paragraph 3.1)
 - the authority's Practice Note AC2229: Building on land subject to natural hazards (version 2, dated March 2012)⁶
 - resource consent decision, dated 24 September 2014, and aerial view showing the subdivision of the section
 - the building consent no ABA-1021865, granted on 4 March 2016, relating to the proposed dwelling on Lot 1 and drawings stamped as approved
 - the consultant's Case Study Review, dated 3 October 2016 (refer paragraph 3.12)
 - the certificate of title, with the search date noted as 14 October 2016
 - photographs of the completed building and others nearby.
- 4.1.2 The applicant submitted that the authority had been inconsistent in its approach to section 73 notifications and that in the applicant's view it was wrong to have the notice applied when steps had been taken to mitigate the effects of any hazard. The applicant set out the changes made to the building work to mitigate the need for a section 73 notice, provided a summary of the background to the issue and submitted (in summary):
- it was the applicant's understanding that a "waiver"⁷ would be granted on the basis of meeting the requirement under section 71(2) to protect the building work and mitigate for any effects on the land or neighbouring property
 - other nearby properties do not have section 73 notices
 - the applicant had sought legal advice and provided technical reports in accordance with Option 1 of the authority's form (refer paragraph 3.5); it was the view of both the legal and technical advisors that the conditions of section 71(2) had been met
 - the authority had not responded to the technical report
 - the building consent was granted with an attached condition that provided for the authority to make a subsequent decision regarding the section 73 notice
 - no entry or registration was made on the title, therefore the applicant assumed the consent was not subject to a section 73 notification

⁶ This was the version of the authority's Practice Note that was current at the time the building consent application was lodged in October 2015. The current version of this Practice Note is version 3 dated June 2016.

⁷ Section 67(1) of the Act provides for territorial authorities to grant building consents subject to waivers or modifications of the Building Code subject to any conditions the authority considers appropriate. Given that the authority issued the building consent it appears that the design complied with the Building Code, and the applicant's reference to a waiver may have been in error or misunderstanding of the natural hazard provisions of the Act.

- if the purpose of the section 73 notice is to provide information to future purchasers, that information is clearly provided in the authority's own inundation and Geographic Information Systems (GIS) reporting for the region.
- 4.1.3 The authority did not acknowledge or make any submission in response to the application.
- 4.1.4 On 20 December 2016 I requested clarification from the authority as to the reference in Section C of the Schedule attached to the issued consent regarding the notification being made prior to the application for a code compliance certificate (refer paragraph 3.11).
- 4.1.5 The authority responded on 22 December 2016 with a brief outline of the events that lead to the determination application, stating that the applicant had disputed the application of section 72 but wished to progress with the building work, and so it had been agreed that the section 73 notification would be delayed in order that a determination could be applied for. This allowed for the applicant to progress the building work and apply for a determination to resolve the dispute regarding notification under section 73.

4.2 The first draft determination and submissions in response

- 4.2.1 A first draft of this determination was issued to the parties for comment on 21 December 2016. The draft concluded that the authority correctly exercised its powers in granting the building consent subject to section 73 notification, on the basis that the requirement under section 71(2)(a) to protect the land or other property could not be met.
- 4.2.2 The authority responded on 12 January 2017, accepting the draft determination and referencing it's submission of 22 December 2016.
- 4.2.3 The applicant responded on 21 February 2017, and did not accept the conclusions reached in the draft determination. The applicant provided a submission prepared by a legal advisor to the effect that the building consent should have been issued pursuant to section 71(2)(a) or 71(2)(b) (in summary):
- Section 71(2)(b) applies and appears not to have been considered in the draft. The building work has not caused damage to the land or other property and no restoration is required, nor has it resulted in a natural hazard or worsened the inundation risk or resulted in a natural hazard.
 - The design of the building specifically addresses the risk of inundation at the site having regard to the level and frequency of the inundation.
 - The exception in section 71(2)(a) is also applicable; adequate provision has been made to protect the land, building work or other property from the inundation.
 - In *Logan v Auckland City Council*⁸, the Court of Appeal stated that a territorial authority is expected to take a “common sense approach” in deciding what will be adequate provision to protect the land, given that adequate provision for protection does not require the elimination of any possibility in all conceivable circumstances of inundation or other natural hazards.
 - A sensible assessment involving considerations of fact and degree is required as to 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,

⁸ CA243/99, 9 March 2000.

to require a warning notice on the title, which is a blot on the title and may have significant implications.

- The applicant is not required to eliminate all of the risks, and the protections are adequate having regard to the level and frequency of the inundation. The consultant has confirmed the degree of inundation for the building site/platform is less than minor and is not considered to be unsafe.
- 4.2.4 In regard to the last bullet point above –the consultant has assessed the maximum flow depth as 0.74m and I accept the findings of the consultant. I am of the view that the inundation is greater than minor or trivial, and accordingly I consider the site is subject to a natural hazard under section 71(3)(d). I note that the consultant did not dispute that the site was subject to a natural hazard (refer paragraphs 3.1 and 3.2), rather the applicant and the consultant present the view that section 71(2) applies and the building consent can be granted without being subject to notification under section 73.

4.3 The second draft determination and submissions in response

- 4.3.1 A second draft of the determination was issued to the parties for comment on 17 March 2017. The draft expanded on the discussion concerning the conditions in section 71(2)(a) and provided an updated “natural hazards decision tree” to further clarify the application of the natural hazard provisions.
- 4.3.2 In a response on 28 March 2017, the authority accepted the second draft without further comment.
- 4.3.3 In an email on 4 April 2017 the applicant’s legal advisor queried why the decision tree ‘does not recognise the use of the word “or” ... between subsections 71(2)(a) and (b)’.

4.4 The third draft determination and submissions in response

- 4.4.1 A third draft of the determination was issued to the parties for comment on 12 May 2017 to respond to the query raised by the applicant’s legal advisor regarding subsections 71(2)(a) and (b), and provided further guidance in general on the application of the natural hazard provisions in the Act and use of the appended decision tree.
- 4.4.2 In an email on 23 May 2017 the authority accepted the draft without further comment.
- 4.4.3 The applicant responded on 28 June 2017, accepting the draft but noting that it was contrary to the legal and engineering opinions that had been sought and that the applicant found the consenting process “extremely misleading”.

5. Discussion

5.1 The purpose of the natural hazard provisions

- 5.1.1 The applicant has queried the purpose of the section 73 notice with regard to providing information to future purchasers about the natural hazard, and has concerns regarding the effect of the notice on the title.
- 5.1.2 The applicant has correctly stated that the information regarding a natural hazard would be available to future purchasers through other means. A section 73 notice not only provides information on the natural hazard, but has the effect of confirming that the building consent authority has considered the natural hazard when granting the

building consent, and therefore should provide some assurance to future owners in regard to the building work carried out under that consent.

- 5.1.3 The primary purpose of the natural hazard provisions is to ensure consideration is given to how building work affects natural hazards and impacts on the land or other property. The provisions do not prevent building work even where land is subject to natural hazards, unless the building work will accelerate, worsen or result in a natural hazard on the land which the building work is to be carried out or to any other property.
- 5.1.4 Where building work is undertaken on land that is subject to a natural hazard and the building work will not accelerate or worsen the natural hazard, the purposes of the provisions are to:
- notify of the existence of natural hazards by placing a notice on the title
 - ensure the building work is protected from the natural hazard
 - confirm that the building consent authority has considered the natural hazard when granting the building consent
 - give an authority certain protections from liability, under section 392(3) of the Act, relating to its decision to grant a building consent notwithstanding the natural hazard.

- 5.1.5 To put it another way, the natural hazard provisions exist so that the risk to land and other property can be recognised, the effect of the building work considered, and steps taken to mitigate those risks and effects. Where the risks and effects cannot be sufficiently mitigated but the land is still subject to a natural hazard then the provisions recognise that it may nevertheless be acceptable to build on the land and require notification of the risk on the title to the land and provide authorities with immunity (on the basis that the owner is knowingly building on land affected by the natural hazard). Placing a notice on the title ensures that future purchasers and other interested parties are aware that the land is subject to a natural hazard.

5.2 The legislation

- 5.2.1 Under section 71(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.
- 5.2.2 I note here that the circumstances in which building consent authorities will consider the application of the natural hazard provisions will vary. Authorities should turn their mind to both subsections 71(1)(a) and (b), although in some cases only one of these will be relevant. It is also possible that more than one natural hazard will need to be considered.
- 5.2.3 Section 71(2) provides that if certain conditions are satisfied, section 71(1) does not apply:

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.
- 5.2.4 The applicant's legal advisor has questioned the application of the provisions in relation to the use of the word "or" between subsections 71(2)(a) and (b), noting 'the section is drafted so that either 71(2)(a) or 71(2)(b) may be applied'.
- 5.2.5 The issue of interpreting the word "or" as used in the natural hazard provisions was raised in *Logan v Auckland City Council*⁹, where the Court of Appeal was requested to provide a conclusion on the interpretation of section 36 of the Building Act 1991¹⁰ and the inter-relationship between the subsections:
- [29] While using the ordinary disjunctive word "or" in the context of subs (1), para (c) necessarily requires that the land as well as the building work be protected. It is badly drafted, but to conclude otherwise would negate the whole thrust of paras (a) and (b). Similarly, provision for both protection (para (c)) and restoration (para (d)) may be required in some cases.
- 5.2.6 For ease of translating this interpretation to the provisions in the current Act, I have repeated the quote with the references to sections of the former Act updated to reflect those in the current Act:
- [29] While using the ordinary disjunctive word "or" in the context of [section 71], [section 71(2)(a)] necessarily requires that the land as well as the building work be protected. It is badly drafted, but to conclude otherwise would negate the whole thrust of [sections 71(1)(a) and (b)]. Similarly, provision for both protection [section 71(2)(a)] and restoration [section 71(2)(b)] may be required in some cases.
- 5.2.7 In other words, although "or" is generally used when expressing an alternative, that is not the case when interpreting the conditions to be met in 71(2)(a). The conditions under section 71(2)(a) are for protection of land *and* the building work, *and* (where the circumstances mean it is relevant) other property. In regard to the condition requiring protection of other property, this condition is only required to be met in relation to section 71(1)(b) where the building work is likely to accelerate, worsen, or result in a natural hazard on any other property (i.e. the 'other property referred to' in section 71(1)).
- 5.2.8 The statement in *Logan* that 'provision for both protection [71(2)(a)] and restoration [71(2)(b)] may be required in some cases' reflects that there are some circumstances where the authority must be satisfied that the conditions in both subsections (2)(a) and (2)(b) are met before deciding that section 71(1) does not apply. This will apply in those circumstances where the building work is likely to accelerate, worsen, or result in a natural hazard on that land or any other property (71(1)(b)), as well as in circumstances where both sections 71(1)(a) and 71(1)(b) apply.
- 5.2.9 In considering section 71(2)(a), I have also turned my mind to the term "protect the land" and the extent to which the land must be "protected" from inundation. The applicant has submitted they are 'not required to eliminate all of the risks' and that 'the protections to the land, building work or other property that were put in place were adequate having regard to the level and frequency of the inundation' and 'the degree of inundation for the building site/platform is less than minor and is not considered to be unsafe'.

⁹ CA243/99, 9 March 2000. [p 28, 29]

¹⁰ Section 36 of the Building Act 1991 is equivalent to sections 71 to 73 of the Building Act 2004.

- 5.2.10 This issue of adequate protection of the land was considered in *Auckland City Council v Logan*¹¹, in which Hammond J commented:

[48] The word “protect” is not a term of art, nor does it have any special meaning in s36(1). It has its ordinary, everyday meaning: to guard against, or take care of.

On this view, the statutory obligation is not just to do something about the results of an inundation that has in fact occurred, it is to protect against the inundation of the site itself where (at least in this case) the building and the site are intimately connected.

- 5.2.11 Further, the requirement that “adequate” provision be made is not an insignificant requirement as it will require that the protection of the land from inundation is “satisfactory or acceptable”. In *Logan v Auckland City Council*, the Court of Appeal stated:

[33] We should add that in determining whether the statutory risk threshold under subs (1)(a) and subs (2)(b) has been reached, and what will be adequate provision to protect the land under subs (1), given, too, that adequate provision for protection does not require the elimination of any possibility in all conceivable circumstances of inundation or other relevant hazards, 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 insurance implications, will always require a sensible assessment involving considerations of fact and degree.

- 5.2.12 Taking the above into account, what is “adequate provision for protection of the land” from inundation does not mean section 71(2) requires the total elimination of the possibility of inundation (as the land would then no longer be subject to a natural hazard). The level of protection from inundation required to satisfy section 71(2) will be a question of degree and will need to take into account factors such as maximum depth, velocity, and frequency of occurrence, and the likely effects of the natural hazard on the land. That degree of protection is likely to be less than that required to protect buildings, although this will not be the case where there is a significant risk of erosion causing loss of support for the building.

5.3 The application of the provisions in this case

- 5.3.1 I note here that the first version of the Ministry’s “natural hazards decision tree” referred to in the consultant’s case study review was first published in Determination 2008/082¹². I am of the view that although that decision tree was a useful tool in that particular instance, it did not address the complexities of making decisions relating to the natural hazard provisions. While I have included a new decision tree in this determination (see Appendix B) with the intention to further clarify the steps involved in applying the natural hazard provisions, I emphasise that there are a number of factors to consider at each step of the process that cannot be sufficiently addressed using such a simplified tool.
- 5.3.2 In the following paragraphs I utilise the updated decision tree to explain how the natural hazard provisions apply in this case.

¹¹ *Auckland City Council v Logan*, 1/10/99, Hammond J, HC Auckland, AP77/99

¹² Determination 2008/082 Building consent for a storage shed on land subject to inundation at 58 Brookvale Lane, Taupaki (5 September 2008) The Department of Building and Housing.

- 5.3.3 The building work involved in this case is the “construction of a building” (71(1)) where the land on which the building work was carried out is subject to inundation (71(3)(d)).
- 5.3.4 Using the updated decision tree, the first step is to consider whether the building work will accelerate, worsen, or result in a natural hazard on that land or other property. Based on the information provided to the determination, there appears to be no concern that the building work was likely to accelerate, worsen, or result in a natural hazard.
- 5.3.5 The decision tree then takes us to “Path B” to consider whether the land on which the building work will be carried out is subject or likely to be subject to a natural hazard (s71(1)(a)). In this case the land subject to the natural hazard is intimately connected with the building work and the hazard is more than minimal or trivial.
- 5.3.6 The next steps, using the decision tree, require that we establish whether adequate provision is made to protect the land and building work from the natural hazard (71(2)(a)). As noted in the discussion in paragraphs 5.2.4 to 5.2.7 above, the requirement is for protection of both the land and the building work, not just the building work.
- 5.3.7 It is the applicant’s view that because the design of the house is such that it will not be affected by the natural hazard, the building consent should not be subject to notification under section 73. The applicant argues that as the building work is protected from the natural hazard, and the building work does not accelerate, worsen, or result in a natural hazard on that land or any other property, the conditions of 71(2) have been met and the building consent should not be subject to notification under section 73.
- 5.3.8 There appears to be no dispute between the parties that adequate provision has been made in this case to protect the building work from the natural hazard or that the proposed building work complies with the Building Code. Previous determinations have taken the position that compliance with the Building Code will be accepted as “adequate provision” to protect the building work¹³ and I remain of that view. Accordingly I accept that the condition under section 71(2)(a) to protect the building work has been met.
- 5.3.9 Although the building work has been designed in such a way as to protect the building work from the effect of inundation, the requirement to protect the land from the inundation must also be met for section 71(2) to apply. I have discussed the interpretation of the requirement to “protect the land”, in this case from inundation, in paragraphs 5.2.9 to 5.2.12.
- 5.3.10 The applicant has submitted they are ‘not required to eliminate all of the risks’ and that ‘the protections to the land, building work or other property that were put in place were adequate having regard to the level and frequency of the inundation’ and ‘this position is supported by [the consultant] who confirm[s] the degree of inundation for the building site/platform is less than minor and is not considered to be unsafe’.
- 5.3.11 As noted in paragraph 4.2.4, I consider the level of inundation in this case to be greater than minor or trivial; while the flow rate of surface water resulting from the consultant’s modelling is not significant at 0.12m/s the depth of the water (at around 0.74m) is significant. The building work proposed in this case will have no effect on

¹³ See Determination 2007/110 Building consent for a house on land subject to coastal hazards [6.4.5(a)] (17 September 2007) Department of Building and Housing.

the fact that the site will continue to be subject to inundation to this extent. The applicant has not pointed to any positive steps he has taken or proposes to take that could constitute “adequate provision to protect the land” from inundation as required by section 71(2)(a). I am therefore of the view that the condition under section 71(2)(a) to protect the land has not been met in this case, and the answer to the question posed in the decision tree “has adequate provision been made (or will be made) to protect the land and building work from the natural hazard?” is no.

- 5.3.12 Following on from that, as no waiver has been sought, the resulting outcome in the decision tree is the granting of the building consent under section 49 subject to notification under section 73.
- 5.3.13 In conclusion, I have reached the view that as the building work has been carried out on land subject or likely to be subject to inundation, and adequate provision has not been made to protect the land from the natural hazard, the authority correctly exercised its powers in issuing the building consent subject to notification under section 73 of the Act.

5.4 Comments on other related issues

- 5.4.1 While the applicant had taken reasonable steps in seeking both technical and legal advice on this matter, it is clear that there has been some confusion regarding the natural hazard provisions and in particular how section 71(2)(a) applies to the development in question. I note that Option 1 of the authority’s application form (refer paragraph 3.5) may well have added to the likelihood of the conditions under this section being misinterpreted. The authority’s practice note provides additional information on building consents that can be issued without the imposition of notification under section 73; however it is unclear whether this was read in conjunction with the authority’s application form or considered as a separate standalone document.
- 5.4.2 I acknowledge the applicant’s concerns regarding alleged inconsistencies in how the authority has previously applied the natural hazard provisions in respect of building work on sites near the applicant’s property, and in regard to the authority’s lack of response to the clarification sought by the consultant. These issues are not a matter that can be considered within the scope of this determination, but they could potentially be the subject of a complaint under section 200 of the Act.
- 5.4.3 I note that the authority did not notify the Registrar-General of Land at the time the consent was issued, and in Section C of the Schedule attached to the building consent stated that the notification would occur ‘prior to the application for Code Compliance Certificate’.
- 5.4.4 Section 73 provides
 - (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 [my emphasis], notify the consent to,—
 - ...
 - (c) in any other case, the Registrar-General of Land.

- 5.4.5 In my opinion notification should occur as soon as is practicable at the time the building consent is issued. It appears in this instance that there may have been a misunderstanding or miscommunication between the authority and the applicant about the matter of the determination being applied for through the Ministry in order

to resolve the difference of views regarding the section 73 notice, and that this misunderstanding created the delay in the notification.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision in granting the building consent subject to a section 73 notice, and accordingly I confirm the authority's decision to grant the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 30 June 2017.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the 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:
 - (d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding):

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,—

...

- (c) in any other case, the Registrar-General of Land.

A.2 The sections of the Building Act 1991 referred to in this determination

Limitations and Restrictions on Building Consents

36 Building on land subject to erosion, etc. ---

(1) Except as provided for in subsection (2) of this section, a territorial authority shall refuse to grant a building consent involving construction of a building or major alterations to a building if –

- (a) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
- (b) The building work itself is likely to accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property –

unless the territorial authority is satisfied that adequate provision has been or will be made to –

- (c) Protect the land or building work or that other property concerned from erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; or
- (d) Restore any damage to the land or that other property concerned as a result of the building work.

Appendix B: Natural Hazards Decision Tree

