



Determination 2020/024

Regarding the grant of a building consent for alterations to a building, with a condition requiring notification that the land is subject to a natural hazard, at 154 Marine Parade, Mount Maunganui

Summary

This determination considers whether alterations to a multi-level building on land subject to a natural hazard are “major alterations” in terms of section 71 of the Building Act; the natural hazard is inundation by flooding. The authority is of the view that the alterations are major and granted building consent subject to a condition requiring notification on the property titles under section 73 of the Act. The determination discusses the relevant factors in assessing whether building work constitutes major alterations.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2 The parties to the determination are:
 - the owners² of the property, represented by Body Corporate 414362 (“the applicants”), acting through an agent
 - Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to grant a building consent subject to a condition that the consent be notified to the Registrar-General of Land under section 73 of the Act. The authority considers that the building work included in the building consent constitutes major alterations in terms of section 71(1) of the Act, and therefore sections 72 and 73 apply. There is no dispute between the parties that the land is subject to a natural hazard, being inundation (flooding).
- 1.4 The matter to be determined³ is therefore the authority’s exercise of its power of decision in granting building consent BC191261 under section 72 of the Act, subject

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

² The owners are: W Preston and Wood Walton Trustees (2004) Limited; D Verran and G Mallett; W Mills and M Mills; S Morrison, M McConnochie, and Mackenzie Elvin Trustees (No 1) Limited; and Mr. M.F. Seidel Limited.

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

to notification that the land is subject to a natural hazard in terms of section 73 of the Act.

- 1.5 I have considered the submissions of the parties and the other evidence in making my decision. I have not considered the compliance of the building work with the Act or the Building Code as this is not in dispute and the authority has issued the building consent.
- 1.6 The relevant sections of the Act are contained in Appendix A. Unless otherwise stated, references in this determination to sections are to sections of the Act.

2. Background and the building work

- 2.1 The building is a unit title property situated across the road from the beach at Mount Maunganui. The building accommodates:
- storage and carparking in the basement
 - 4 commercial premises on the ground level
 - 5 residential units on levels 1 to 3.
- 2.2 The building covers in the order of 60% of the site, with the site including landscaping, the ramped vehicle access to the Basement, and pedestrian decking.
- 2.3 The building was constructed between 2007 and 2009, and the authority issued a code compliance certificate for this work on 17 June 2009. The building is of framed construction⁴ in reinforced concrete and timber, with proprietary precast concrete flooring system to all suspended floors and decks.
- 2.4 In 2014, the authority updated its flood hazard information for the Mount North catchment area, which includes the applicants' property. On 3 November 2014, the authority advised the owners at the time that the property was at risk of flooding in an extreme (100 year) rainfall event. The letter advised that the flood hazard information would be placed on the applicants' property files held by the authority.
- 2.5 In 2014 and 2015 the authority issued two building consents (and subsequently code compliance certificates) in relation to the building, which are not the subject of this determination. Neither of these building consents were granted under section 72:
- On 20 October 2014 the authority issued a building consent which enabled the owners of two of the residential units to remove the wall between the units.
 - On 27 February 2015 the authority issued a building consent for the enclosure and re-roofing of an outdoor area of one of the commercial units.
- 2.6 On 18 June 2019 the applicants applied to the authority for a building consent in relation to the building work outlined below. The applicants claim that the building was constructed with a number of defects that now require remediation. The building consent the subject of this determination covers building work to address these aspects identified by the applicants.
- 2.7 On 10 July 2019 the authority advised the applicants that the land on which the building work was to occur was subject to, or likely to be subject to, inundation. The authority further advised that as the works triggered section 71(1)(a), sections 72(a)

⁴ There appears to be a concrete frame to the lower levels with a timber frame to Level 3.

and 73(1)(a) applied, and requested that the applicants provide the information needed to register the building consent on the property titles.

2.8 On 22 July 2019 the applicants provided the requested information to the authority, but disagreed with the authority's decision to invoke section 71.

2.9 On 19 August 2019 the authority issued building consent BC191261 under section 72. The consent includes the following condition:

Section 71 - 73: As the building is on land subject to a natural hazard specifically [inundation], the Building Consent Authority will on issue of the building consent, notify the consent to the Registrar-General of Land in accordance with section 73 of the Building Act 2004.

2.10 The building work included in building consent BC191261 is as follows:

- partial recladding of some elevations and inspection and repair of specific cladding elements and cladding defects, removal and reinstatement of some claddings to enable other repairs (the proposed work covers some seven cladding types), replacement of any defective timber framing
- install new deck membrane and glass balustrades to decks and associated work (including new screed and concrete upstand)
- repair and replacement of metal flashings to exterior joinery (existing joinery to remain or be removed and reinstated), new parapet cappings and rainwater heads
- alterations to existing ventilation system, provision of new extract fans, etc.
- upgrade of the passive and active fire systems
- alterations to the existing roof cladding to accommodate the above.

2.11 On 16 August 2019, notification 11526166.1 was registered against the applicants' records of title in relation to their units. The notification states "Notification that a building consent issued pursuant to Section 72 Building Act 2004 identifies inundation as a natural hazard."

2.12 On 15 November 2019 the Ministry received the application for a determination.

3. The submissions

3.1 The applicants

3.1.1 The applicants provided a submission with their application for a determination, which included a summary of the background to this matter. The applicants also provided copies of documents relating to the property and building work and correspondence between the applicants and authority (including parts of the application for building consent and associated plans, the issued project information memorandum, earlier issued building consent forms and code compliance certificates, a change resource consent condition decision, and records of title).

3.1.2 In their submission the applicants state (in summary):

- the building consent work is not "major alterations" and therefore sections 71-74 do not apply to the building consent and they seek the removal of the notification from the records of title
- they do not dispute the land is subject to a natural hazard, but dispute the building work being major alterations

- the authority “automatically” considered the building work to be major alterations without proper assessment of the facts or consideration of the principles.

3.1.3 In respect of what constitutes major alterations the applicants state (in summary):

- There is no definition of the term “major alterations”, therefore it must be given its fair and natural meaning and should be considered in light of the purpose of the provisions.
- The factors outlined in Determination 2011/034⁵ are relevant in determining whether the building work is a major alteration. With reference to these factors, the remedial work does not involve the construction of any new buildings, add to the existing building footprint, increase the bulk and scale of the building, or alter the building load.
- The fact that the building work, which is remedial work by nature, requires a building consent and is not exempt under Schedule 1 of the Act⁶ does not mean that the work is automatically considered major alterations. A building consent is required because there are elements of the building that have failed to satisfy the durability provisions of the Building Code, and some of the work constitutes a substantial replacement of a specified system. The work is similar to work that is exempt under Schedule 1 and is akin to repairs.
- In Determination 2011/034, the proposed addition of a garage constituting 10% of the footprint of the house area and 7% of the site coverage, to land that was at risk of inundation, was not considered to be a major alteration.
- In Determination 2017/055⁷, a partial building reclad, replacement of exterior joinery and an extension constituting an increase of less than 8% of the building footprint, was not considered to be a major alteration.

3.1.4 By email on 26 March 2020, in response to a query from the Ministry as to the building work covered by the building consent and in particular the upgrades of the active and passive fire systems, the applicants stated that the fire safety upgrades should not be considered in any assessment of whether the building work is major alterations, as they were due to the following:

- the failure of the original construction to include the systems or properly install them, in which case their inclusion now is effectively a replacement of an existing consented structure
- the introduction of more stringent standards since the building was constructed, in which case any application for building consent, whether it concerned major alterations or not, would be captured⁸
- the authority’s policy that fire upgrades would be made to older buildings when the chance presented itself, irrespective of whether alterations were major or not.

⁵ Determination 2011/034 Does work to an existing building constitute ‘major alterations’, and therefore should a section 73 notice be issued in respect of land subject to natural hazards? (13 April 2011).

⁶ Under section 40(1) a person must not carry out any building work except in accordance with a building consent, unless the work is exempt. Building work that is exempt is set out in section 41 and Schedule 1.

⁷ Determination 2017/055 Regarding the grant of a building consent for alterations to an existing building on land subject to a natural hazard without notification under section 73 (17 July 2017).

⁸ I take this to be a reference to section 112, which deals with the Building Code requirements in respect of alterations to existing buildings.

3.2 The authority

- 3.2.1 By email on 17 December 2019 the authority made the following comments in response to the applicants' submissions:
- The applicants had an opportunity to oppose the notification of the hazard on the titles but they chose to register the notification.
 - The applicants have focused on increase in gross floor area and the percentage of the increase, however this is not the only factor in deciding whether an alteration is major or minor. The assessment should be on the amount of the building affected by the proposed work.
 - The authority uses Ministry guidance in relation to what constitutes major alterations, which similarly does not have clear definitions. (I note that the authority does not clarify what this guidance is).

3.3 Draft determination

- 3.3.1 On 26 May 2020 a draft of this determination was issued to the parties for comment.
- 3.3.2 On 27 May 2020 the applicants accepted the draft determination.
- 3.3.3 On 23 June 2020 the authority accepted the draft determination, with no further comment.

4. The legislation

- 4.1 Under section 49(1), a building consent authority must grant a building consent if satisfied that building work complies with the Building Code. However if the building work is on land that is subject to a natural hazard, the provisions relating to natural hazards in sections 71 to 74 are relevant.
- 4.2 Under section 71, a building consent authority must refuse to grant a building consent for work on land subject to certain natural hazards unless the authority is satisfied that the land, building work, or other property will be protected or that any damage will be restored. However, a building consent refused under section 71 must be granted under section 72 if certain conditions are satisfied.
- 4.3 Section 71(1) provides:
- 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.
- (emphasis added)
- 4.4 Section 71(2) provides that subsection (1) does not apply if adequate provision will be made to protect the land or building work from the natural hazard, or to restore any damage to land or other property as a result of the building work.
- 4.5 Section 71(3) sets out the types of natural hazards that section 71 to 74 apply to, and these include inundation (section 71(3)(d)).
- 4.6 Under section 72, a building consent authority must still grant a building consent for building work in certain circumstances, even though the land on which the work is to occur is subject to one or more natural hazards.

4.7 Section 73 sets out the conditions that building consent authorities must include in a building consent when it is issued under section 72, including notification of the consent to the Registrar General of Land.

4.8 Section 74 describes the steps that must be taken after notification, including in circumstances where the building consent authority determines that a notification is no longer required.

4.9 Purpose of the natural hazards provisions

4.9.1 The purpose of the natural hazards provisions is to protect building work, land and other property from the effects of natural hazards by placing limits on the granting of building consents for building work undertaken on land that is subject to a natural hazard.

4.9.2 The legislative policy of the provisions was discussed by the Court of Appeal in *Logan v Auckland City Council*⁹. In that case the Court considered the interpretation of, and relationship between, the equivalent of sections 71 and 72 in the former Act (the Building Act 1991). The Court explained the policy in the following terms (note I have updated references to reflect the current Act):

[31] That analysis [of the construction of section 71] reflects an understandable legislative policy that where a building is to be constructed or major alterations to a building are to be made, it is not reasonable to issue a building consent as of course unless adequate provision is made to protect the land concerned as well as the building work itself from the listed hazards. And if that requirement cannot be satisfied, [section 72] goes on to provide the flexibility to allow for the issue of a building consent if the set requirements of paras (a), (b) and (c) of [section 72] are met with notice to the world then being given through the entry on the title and with consequential exemption from civil liability of the [building consent] authority under section 392(3)]. Significantly, that exemption protects the [building consent] authority against being charged with issuing a building consent in the knowledge that either the building or the land was or was likely to be subject to damage (or inundation) arising from the listed hazards.

4.9.3 Thus the provisions ensure consideration is given to the effects of building work on natural hazards, and impacts on the land on which the building work is to be undertaken or on other property. Where building work is to be undertaken on land that is subject to a natural hazard and the effects cannot be adequately mitigated, but the building work will not accelerate or worsen the natural hazard, the provisions serve to:

- notify the existence of a natural hazard by placing a notice on the record of title, so that future purchasers and other interested parties are aware that the land is subject to a natural hazard
- give a building consent authority certain protections from liability, under section 392 of the Act, relating to its decision to grant a building consent notwithstanding the natural hazard.¹⁰

4.10 Natural hazards decision tree

4.10.1 In the course of preparing several past determinations, a natural hazards decision tree has been developed to clarify the steps involved in applying the natural hazards

⁹ *Logan v Auckland City Council* (2000) 4 NZConvC 193,184.

¹⁰ Section 392(2) and (3) provide that if a building consent is issued subject to notification under section 73, and the building is damaged by the natural hazard, then the building consent authority is not liable in any civil proceedings.

provisions. The decision tree is contained in Appendix B, with annotations relevant to this particular case.

4.10.2 It is important to note that:

- the decision tree is a simplified tool and there will be a number of factors that need to be considered at each step of the process in any given case
- a decision tree designed to inform the basis of a decision in one particular case may not apply to all cases, primarily because of the case specific weighting of factors involved.

5. Discussion

5.1 The matter to be determined is whether the authority was correct to grant the building consent under section 72, subject to notification that the land is subject to a natural hazard in terms of section 73.

5.2 In order to decide whether the authority correctly exercised its powers in this case when it granted a building consent subject to notification under section 73, I have to first consider whether section 71(1) applies.

5.3 Section 71(1) – the gateway to the natural hazards provisions

5.3.1 The applicants are of the view that section 71(1) is the “gateway” provision, with “major alterations” the first hurdle. If the building work is not major alterations it fails the first test, and sections 71 to 74 do not apply.

5.3.2 I agree with the applicants’ description of section 71(1) as the gateway to the natural hazards provisions. This is demonstrated by the natural hazards decision tree at Appendix B. While the preliminary enquiry relates to compliance with the Building Code if there is no natural hazard, the first main enquiry is whether the building work is construction of a new building or major alterations to a building in terms of section 71(1).

5.3.3 Section 71(1) sets out when a building consent authority must refuse to grant a building consent. The two requirements are:

- (i) the building work is for construction of a new building, or major alterations to a building; and
- (ii) either:
 - (a) the land on which the building work is to be carried out is subject or is likely to be subject to one 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.

5.3.4 Considering these requirements in this case, in relation to the second requirement there is no dispute between the parties that the land on which the building work is to be carried out is subject to a natural hazard, namely inundation by flooding.

5.3.5 In relation to the first requirement, the building work is for alterations to an existing building. The issue is whether the alterations are major or not.

5.4 Major alterations

- 5.4.1 I agree with the applicants that the first step is to consider whether the building work is major alterations. As stated above, the natural hazards provisions will only apply if the building work constitutes major alterations to a building.
- 5.4.2 The building work in this case is set out at paragraph 2.10 and includes some recladding, various repairs, replacements and alterations, and upgrades of the passive and active fire systems.
- 5.4.3 I note at this point that the applicants contend that the fire system upgrades should not be included in any assessment of whether the building work is a major alteration. However, I do not agree with the applicants on this point. The fire system upgrades should be included because they form part of the building work covered by the building consent, and it is this work that the authority would have considered when assessing whether the alterations are major or not.
- 5.4.4 In my view it does not follow that because the upgrades are required by the Act or the Building Code or the authority's policy, that they should not be included in the building work for the purposes of establishing whether alterations are major. If it did follow, other elements of the building work in this case (if not all) would also potentially be excluded.

Meaning of major alterations

- 5.4.5 There is no definition of "major alterations" in the Act, either in section 7 (interpretation) or in sections 71 to 74.
- 5.4.6 "Alter" is defined in section 7 as follows:
- alter**, in relation to a building, includes to rebuild, re-erect, repair, enlarge, and extend the building
- 5.4.7 It follows that alterations include rebuilding and repairs, as the building work in this case does.
- 5.4.8 As there is no definition of "major" or "major alterations" in the Act, it is appropriate to adopt the ordinary meaning. The Oxford English Dictionary defines the adjective "major" as "greater in size, importance, etc. Designating the greater (in various senses) or relatively greater of or of two things, classes, etc., that have a common designation (opposed to minor). Also, unusually important, serious, or significant; main, chief, principal, leading."¹¹
- 5.4.9 Considering this definition of "major", I am of the view that alterations will be major if they are significant, in the context of and relative to the building and the site they relate to. I also consider that the terms "major" and "major alterations" should be interpreted in light of the purpose of the natural hazards provisions and the purposes and principles of the Act.

Relevant factors

- 5.4.10 Previous determinations¹² have identified a number of factors to take into account in assessing whether building work is major alterations:
- To what degree the building work differs from building work that would be exempt from requiring a building consent in terms of Schedule 1 of the Act.

¹¹ Definition of "major", Oxford English Dictionary, oed.com (12 February 2020).

¹² See Determination 2011/034 (refer footnote 5); Determination 2017/055 (refer footnote 7); Determination 2019/059 Regarding the issue of a building consent with a section 73 condition (27 November 2019).

The Schedule is a comparison tool to assist in considering whether alterations can be defined as major, with major alterations likely to be significantly different in nature and extent from the type of building work exempt under Schedule 1.

- The intended use and degree of design and construction complexity.
- The size of the alteration compared with that of the existing building.
- The increased footprint of the building, and the percentage increase in site coverage.
- Allowance for the replacement of existing structures with new work.
- The extent to which the performance of the building work in question is likely to be affected by the hazard conditions. For example, whether the likely effects of the hazard can be mitigated by, say, a specific design.

5.4.11 These factors are not exhaustive. In addition, no one factor will be determinative and the weight to be given to each factor will depend on the circumstances of the case.

5.4.12 As will be clear from the foregoing discussion, whether building work constitutes major alterations is a factual inquiry, decided on a case by case basis. Because each case will depend on its own particular circumstances, comparison with other cases is of limited assistance. Other cases can provide guidance, but ultimately each case will turn on its own facts.

Application of the factors to this case

5.4.13 Considering the factors set out above in relation to the building work in this case, I make the following observations.

5.4.14 Clause 1(1) and (2) of Schedule 1 state that repair and replacement of a component in a building is exempt from requiring a building consent provided comparable materials or components are used. However clause 1(3) excludes repair or replacement of any component or assembly that has failed to satisfy the requirements of the Building Code for durability (e.g. external moisture requirements). Despite the fact that some of the building work in this case is not exempt, in my view the nature and extent of the work does not differ from exempt work to a significant degree.

5.4.15 The intended use of the building is unchanged, and the nature of the building work (being replacement of existing elements and discrete replacement or repairs) are not complex in themselves, nor do they contribute to an increase in the complexity of their design and construction.

5.4.16 In relation to the size of the alteration compared with that of the building, the authority contends that the assessment should be on the amount of the building affected by the proposed work. I accept that there are a number of elements of the building that are to be repaired or replaced or altered to address aspects of the building that require remediation. However, the nature of the work is predominantly to reinstate or restore existing elements of the building and on balance do not result in considerable alteration to the building as a whole.

5.4.17 As no new building is to be constructed, nor any addition to the existing building, the building footprint will not increase. Similarly, there will be no increase in site coverage.

- 5.4.18 The performance of the building work is not likely to be adversely affected by the hazard conditions because minimal work occurs to the basement and ground floors, those being the areas that will be affected by the hazard. Most of the work is occurring above the ground floor and will not be affected by the hazard.
- 5.4.19 Taking the above factors into account, together with the purpose of the natural hazards provisions, it is my view that the building work in this case does not constitute major alterations. The predominant nature of the building work is to rebuild and repair existing elements, and I do not consider that the alterations are significant when compared with the scope of the original building construction.

5.5 Conclusion

- 5.5.1 I conclude that the building work the subject of the building consent is not major alterations to the building, and therefore section 71(1) does not apply. As that section is the gateway to the natural hazards provisions, they do not apply.
- 5.5.2 It follows that granting the building consent under section 72, subject to notification under section 73, was incorrect as those provisions have no application. Based on this conclusion, there was no need for the building consent to be granted under section 72 and a section 73 notice to be placed against the applicants' records of title alerting people to the presence of a hazard.
- 5.5.3 The authority should now:
- issue an amended building consent, under section 49 rather than section 72 and with the condition relating to notification under section 73 removed
 - apply to the Registrar-General, in accordance with section 74(3)(a) and (4), to have the section 73 notification 11526166.1 removed from the records of title for the applicants' units.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to grant the building consent under section 72 subject to notification under section 73. Accordingly, I modify the authority's decision to grant the building consent as set out in paragraph 5.5.3 of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 September 2020.

Katie Gordon
Manager Determinations

Appendix A: Legislation

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

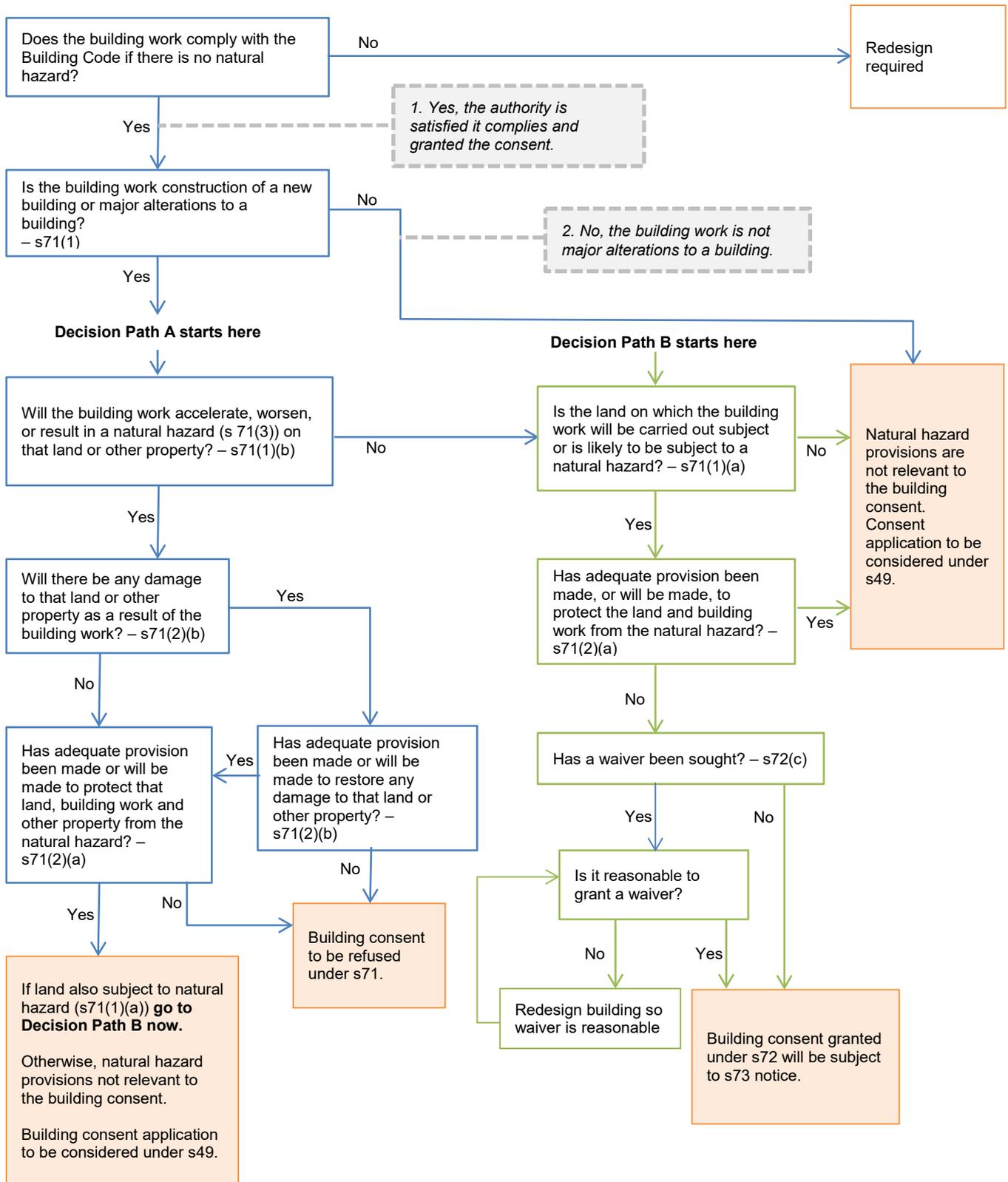
- (1) A building consent authority that is a territorial authority that grants a building consent under section 72 must include, as a condition of the consent, that the building consent authority will, on issuing the consent, notify the consent to,—
 - ...
 - (c) in any other case, the Registrar-General of Land.

74 Steps after notification

- (1) On receiving a notification under section 73,—
 - (a) the Surveyor-General or the Registrar of the Maori Land Court, as the case may be, must enter in his or her records the particulars of the notification together with a copy of any project information memorandum that accompanied the notification:
 - (b) the Registrar-General of Land must record, as an entry on the certificate of title to the land on which the building work is carried out,—

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

Appendix B: Natural Hazards Decision Tree¹³ (with annotations specific to this determination in italics)



¹³ Note: this is as simplified tool developed to clarify the steps in applying the natural hazard provisions of the Act and there are a number of factors to consider at each step of the process.