

**IN THE DISTRICT COURT  
AT TAURANGA**

**I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA**

**CIV-2025-070-000014  
[2026] NZDC 7006**

BETWEEN	TAURANGA CITY COUNCIL Appellant
AND	LIBBY MEGAN WADDEL AND WILLIAM JAMES SPROAT WADDEL Respondents
AND	CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Interested Party

Hearing: 24 March 2026

Appearances: L Bielby for the Appellant  
K Barry-Piceno for the Respondents  
N Smith for the Interested Party

Judgment: 1 April 2026

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**RESERVED JUDGMENT OF JUDGE W LAWSON**

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## **Introduction**

[1] In 2023 Stacey and Jonathan Jones applied to the Tauranga City Council (TCC) for a building consent to complete building renovations on their property at 91 Valley Road, Mount Maunganui, Tauranga (the property).

[2] TCC were concerned about the risk of inundation so granted a building consent pursuant to s 72 of the Building Act 2004 (the Act) meaning that there is a requirement to register the inundation hazard on the title of the property. Mr and Mrs Jones believed that adequate provision had been made to protect the land from inundation, so the consent should not have been issued pursuant to s 72.

[3] Mr and Mrs Jones applied to the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) for a determination that adequate provision had been made to protect the land from inundation and therefore the building consent should not have been issued pursuant to s 72.

[4] The determination was issued on 1 October 2024 (the determination). The decision was that “adequate provision to protect the land from the natural hazard is not required and therefore building consent BC340028 should have been granted under section 49(1)”.<sup>1</sup>

[5] On 22 October 2024 TCC appealed the determination. On 12 May 2025 the court directed that MBIE file a report pursuant to r 18.16 of the District Court Rules 2014. The report was filed and the Chief Executive of MBIE appeared at the appeal as an interested party.

[6] Prior to the commencement of the appeal hearing, the property was sold. Consent orders were made removing Mr and Mrs Jones as the respondents and substituting Libby and William Waddel as the respondents.

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<sup>1</sup> Determination 2024/053 at [6.1].

## The determination

[7] The determination was completed by a Principal Advisor of MBIE duly authorised by the Chief Executive. The matter to be determined was the decision of TCC to grant the building consent BC340028 under s 72 and therefore subject to notice being given to the Registrar-General of Land under s 73(1)(c). The issue for determination was whether the owners land is likely to be subject to a natural hazard and whether adequate provision has been made to protect the land from the natural hazard.

[8] The determination decision reviewed the building work and material considered by TCC. The determination referred to the following:

- (a) A stormwater assessment and soakage design report that was provided by a geotechnical engineer. The report noted that the system had been designed to cater for a critical 1% AEP (100 year) storm event. The report said this was to “ensure that there were no negative onsite/offsite effects or nuisance caused to neighbouring properties”.<sup>2</sup>
- (b) TCC accepted that adequate provision had been made to protect the building work from the natural hazard but considered that the *land* will remain subject to a natural hazard. Therefore, the building consent should be issued under s 72.
- (c) Flood mapping carried out by TCC based on a 1% AEP (annual reoccurrence) storm event to the year 2130, shows the road as a major overland flow path and the flow path crosses the south-western end of the property including part of the driveway. The front third of the section, the driveway and garage area and approximately two-thirds of the land under the south-eastern side of the house are noted to be within the flood zone.

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<sup>2</sup> Determination 2024/053 at [2.4].

- (d) The owners acknowledged the property was subject to an inundation hazard but stated that s 72 of the Act did not apply because the building work would not accelerate, worsen or result in change in the hazard and adequate provision had been made to protect the land and building from the hazard.

[9] The determination made the following findings:

- (a) That the land is subject to or likely to be subject to an inundation.<sup>3</sup>
- (b) It is not sufficient that the property is likely to be subject to inundation “as s 71(1)(a) specifies that it is ‘the land on which the building work is to be carried out’ that must be likely to be affected”.<sup>4</sup>
- (c) Consideration must be given to the position of the building work on the property relative to that part of the land affected by the hazard. Observing that:
  - (i) Most of the alterations will take place in the upper level of the dwelling, but the upper-level extension is located over the area of property where it is anticipated that inundation will pool before it is removed by the drainage system.
  - (ii) The area outside the existing garage where the excavation creates a depression below the natural ground level is where additional building work was proposed including the construction of a carport and the installation of a new sump leading to the new soak holes.
  - (iii) The land that is likely to be subject to inundation is intimately connected to the proposed building work.<sup>5</sup>

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<sup>3</sup> Determination 2024/053 at [4.13].

<sup>4</sup> Determination 2024/053 at [4.14].

<sup>5</sup> Determination 2024/053 at [4.17].

- (d) The parties agreed that adequate provision has been made to protect the building work and other property leaving the only issue to be whether adequate provision has been made to protect the land on which the building work is carried out.<sup>6</sup>
- (e) Accepting the TCC modelling the result of a 1% AEP storm event even when modelled to 2130 “is likely to be within the range of only 100mm and 300mm with the exception of a very small area outside the driveway”.<sup>7</sup>
- (f) The underlying soils are sands and silts that are likely to be free draining so “...any inundation that does likely occur is likely to be short lived and of minimal inconvenience to the property’s occupants”.<sup>8</sup>

[10] The crucial aspect of the determination that gave rise to this appeal is set out in paragraph 4.23. The paragraph is set out in full:

4.23 While it is projected that inundation will occur, and I have considered it meets the ‘likelihood’ test of section 71(1)(a), as discussed in Determination 2024/025, inundation occurring in-of-itself is not considered inadequate provision to protect the land. As to its protection, the assessment should consider whether ‘the land on which the building [will be] situated... [is] likely to be, subject to **damage** arising, directly or indirectly from [the] natural hazard’ which is the threshold being set out in section 392(3) (**emphasis added**).

[11] The determination recounts TCC’s argument that damage may be caused to the property access, being the driveway and pedestrian paths and says that TCC has not identified what this damage will be or provided any evidence to support its view.<sup>9</sup> The determination findings regarding whether adequate provision has been made can be found in paragraphs 4.25 and 4.26:

4.25 Therefore, based on the submissions and information available to me, I consider that no damage to the land arising from the natural hazard has been identified. While the information provided by the authority only includes the data from a 1% AEP event to the year 2030 [sic] under an RCP 8.5 scenario. This was raised by the owner but they did not provide any additional modelling. However, I consider any

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<sup>6</sup> Determination 2024/053 at [4.19].

<sup>7</sup> Determination 2024/053 at [4.22].

<sup>8</sup> Determination 2024/053 at [4.22].

<sup>9</sup> Determination 2024/053 at [4.24].

revision model to a lower RCP scenario would not increase the likelihood of damage to the land. I therefore consider that no damage has been identified.

4.26 As discussed in paragraph 4.20, section 71(2)(a) allows that section 71(1) does not apply if adequate provision has been made or will be made to protect the land, building work and other property from the hazard. This requirement to protect assumes that damage will occur as a result of the hazard. Otherwise, there is nothing to ‘protect’ from. In my opinion, this is the case with the owners’ property. There is no evidence that an inundation event will damage the land and therefore demonstration of adequate provision to protect the land is not required. Section 71(2)(a) should instead be read as requiring only adequate provision to “...protect the building work, or other property”.

[12] The conclusion of the determination was that:<sup>10</sup>

- (a) The land on which the building work is being carried out is subject to or likely to be subject to a natural hazard, namely inundation; and
- (b) As no potential damage is identified to the land by the natural hazard, adequate provision to protect the land from the hazard is not required.

## **The Law**

[13] A Building Consent Authority (BCA) must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met.<sup>11</sup> Any refusal to grant an application for a building consent must be in writing and contain reasons for the refusal.<sup>12</sup>

[14] Sections 71 to 73 of the Act deal with the circumstances where a BCA must issue a building consent but subject to conditions. Section 71 states:

### **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

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<sup>10</sup> Determination 2024/053 at [5.1].

<sup>11</sup> Building Act 2004, s 49.

<sup>12</sup> Building Act 2004, s 50.

hazard on that land or any other property.

(2) Subsection (1) does not apply if the building consent authority is satisfied that adequate provision has been or will be made to—

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

(b) restore any damage to that land or other property as a result of the building work.

(3) In this section and sections 72 to 74, **natural hazard** means any of the following:

(a) erosion (including coastal erosion, bank erosion, and sheet erosion):

(b) falling debris (including soil, rock, snow, and ice):

(c) subsidence:

(d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding):

(e) slippage.

[15] A BCA is not liable for damage to a property from a natural hazard if a building consent is issued under s 72 of the Act.<sup>13</sup>

[16] Section 392(3) states:

The persons specified in subsection (4) are not liable in any civil proceedings brought by any person who has an interest in the building referred to in subsection (2) on the grounds that the building consent authority issued a building consent for the building in the knowledge that the building for which the consent was issued, or the land on which the building was situated, was, or was likely to be, subject to damage arising, directly or indirectly, from a natural hazard.

[17] All Counsel agree that there is no authority dealing with the interpretation of s 71 of the Act but there is Court of Appeal authority related to its predecessor, s 36 of the Building Act 1991 (the 1991 Act).<sup>14</sup>

[18] Section 71 of the Act is based on s 36 of the 1991 Act. Section 36 of the 1991 Act reads as follows:

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<sup>13</sup> Building Act 2004, s 392.

<sup>14</sup> *Logan v Auckland City Council* CA243/99, 9 March 2000.

(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.

(2) Where a building consent is applied for and the territorial authority considers that—

- (a) The building work itself will not accelerate, worsen, or result in erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage of that land or any other property; but
- (b) 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; and
- (c) The building work which is to take place is in all other respects such that the requirements of section 34 of this Act have been met—

the territorial authority shall, if it is satisfied that the applicant is the owner in terms of this section, grant the building consent, and shall include as a condition of that consent that the territorial authority shall, forthwith upon the issue of that consent, notify the District Land Registrar of the land registration district in which the land to which the consent relates is situated; and the District Land Registrar shall make an entry on the certificate of title to the land that a building consent has been issued in respect of a building on land that is described in subsection (1) (a) of this section. In any such case it shall not be necessary for the Registrar to record the like entry on the duplicate of the certificate of title.

[19] The Court of Appeal in *Logan v Auckland City Council* considered s 36 of the 1991 Act. The Court said:<sup>15</sup>

- (a) Sub-paragraphs (a) and (b) of s 36 deal respectively with the land on which the building work is to take place (para (a)) and the building work itself (para (b)). Sub-paragraph (a) of s 36 is directed to the risk to the land from the listed hazards and para (b) to the likely impact of the building work on that land or other property. Both (a) and (b) are concerned with the risk to the land on which the building work is to take place.<sup>16</sup>
- (b) The legislative policy suggests that it is not reasonable to issue a building consent unless adequate provision is made to protect the land concerned as well as the building work itself from the listed hazard.<sup>17</sup>
- (c) The statutory language does not allow the qualification that it is only those hazards that affect the integrity of the building as a building that are relevant when it comes to considering the protection of the land.<sup>18</sup>
- (d) 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 the territorial authority should consider:<sup>19</sup>
  - (i) Adequate provision for protection does not require the elimination of any possibility in all conceivable circumstances of inundation.
  - (ii) A territorial authority can be expected to take a common-sense approach.

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<sup>15</sup> *Logan v Auckland City Council*, above n 14.

<sup>16</sup> At [27].

<sup>17</sup> At [31].

<sup>18</sup> At [32].

<sup>19</sup> At [33].

- (iii) 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 consideration of fact and degree.

[20] The powers of the District Court on appeal are set out in s 211 of the Act:

**211 Powers of District Court on appeal**

- (1) On the hearing of an appeal under section 208, the District Court may—
  - (a) confirm, reverse, or modify the determination, direction, or decision of the chief executive; or
  - (b) refer the matter back to the chief executive in accordance with the rules of court; or
  - (c) make or give any determination, direction, or decision that the chief executive could have made or given in respect of the matter.
- (2) This section does not give the District Court power to review any part of the chief executive’s determination, direction, or decision other than the part against which the appellant has appealed.
- (3) Subject to any order of the District Court, every determination, direction, and decision of the chief executive against which an appeal is made continues in force and has effect according to its tenor pending the determination of the appeal.
- (4) The decision of the District Court on an appeal is final.

[21] The District Court has the power to review the parts of the determination which the appellant has appealed.

[22] The parts TCC has appealed are:<sup>20</sup>

- (a) The finding that “inundation occurring in-of-itself is not considered inadequate provision of the land.”
- (b) The finding that, in undertaking an assessment under s 71(2)(a) of the Act, the Council must consider whether there is evidence of damage to

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<sup>20</sup> Notice of Appeal on behalf of Tauranga City Council, dated 22 October 2024 at [3].

land arising from the natural hazard and, if there is no such evidence, demonstration of adequate provision to protect the land is not required by s 71(2)(a).

- (c) The finding that the threshold for s 72(1)(a) is set out in s 392(3) of the Act.
- (d) The finding that s 71(1) of the Act did not apply to BC340028 and the applicable pathway for granting consent was s 49 of the Act (not s 72 of the Act).

[23] This decision will consider whether damage to land is necessary, the interpretation of s 71 and the central issue as to whether adequate provision has been made to protect the land from inundation.

## **Discussion**

### *Whether damage to the land is necessary*

[24] The determination concluded that because no potential damage to the land by the natural hazard was identified, adequate provision to protect the land from the hazard was not required.<sup>21</sup>

[25] TCC submits that this conclusion is contrary to the plain meaning of the section. It argues that if the legislature had intended to require evidence of damage caused by the natural hazard, it would have expressly stated that in the section.<sup>22</sup> TCC submit that the plain reading of the section should be adopted.

[26] The wording of s 71 does not expressly require a consideration of the potential or actual damage from the hazard. The determination decision adds the requirement of damage by saying that the requirement to protect the land assumes that damage will occur from the hazard “otherwise there is nothing to protect from”.<sup>23</sup> In my view that

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<sup>21</sup> Determination 2024/053 at [5.1.2].

<sup>22</sup> Notice of Appeal on behalf of Tauranga City Council, above n 20, at [6.4].

<sup>23</sup> Determination 2024/053 at [4.26].

position is inconsistent with the definition of inundation as a natural hazard. Inundation includes flooding, overland flow, storm surge, tidal effects and ponding. Some of those events can occur without causing damage.

[27] The determination also relies on s 392(3) of the Act to support the conclusion that damage is a requirement. Section 392(3) is in a separate part of the Act which falls under the heading “Civil proceedings and defences”. TCC argue that the purpose of s 392(3) is to ensure that BCAs are not unduly burdened when enabling development of land that is subject to a natural hazard and the reference to “damage” in the subsection is because damage is a necessary requirement of a civil claim. Ms Beilby submits it does not contribute to the interpretation of s 71.

[28] I agree that the correct position is that taken by TCC. The two provisions serve different purposes and s 392(3) has no bearing on the interpretation of s 71. The determination erred by relying on s 392(3) and concluding that potential or actual damage to the land from a natural hazard is necessary when considering adequate provision to protect the land.

[29] The section deals with the protection of the land from the natural hazard that the land is or is likely to be subject to, not the damage from the natural hazard. Requiring damage is inconsistent with the words “subject or *is likely to be subject to*” in the section.

#### *Interpretation of s 71*

[30] The Court of Appeal in *Logan*, when considering s 36 in the 1991 Act, pointed out that the section was directed at risk to the land from natural hazards.<sup>24</sup> As set out above, the Court made the following points:

- (a) That adequate provision does not mean the elimination of any possibility in all conceivable circumstances of inundation.

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<sup>24</sup> *Logan v Auckland City Council*, above n 14, at [27].

- (b) 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, will always require a sensible assessment involving consideration of fact and degree.

[31] These matters are equally relevant to the interpretation of s 71 of the Act which is directed at managing the same risk. Adequate provision does not mean the elimination of any possibility of inundation. Rather, an assessment of the level of risk must be engaged and it is appropriate to require an assessment involving consideration of fact and degree.

[32] A decision that requires notification of the risk on the title is a significant one. It has implications to the property owner in the form of value and insurance issues, it has implications of liability for a BCA, and it has implications on future purchasers. The decision should be undertaken with care and reasons should be given.

[33] Notification is not necessary if a BCA is satisfied that adequate provision has been made to protect the land, building work or other property from the natural hazard. A BCA should be equally thorough in their assessment of adequate provision as they are when assessing the risk from the hazard.

[34] The correct approach is that upon finding that the land was likely to be subject to inundation, the determination should have moved to consider whether adequate provision had or would be made to protect the land from that inundation.

*Adequate provision made or going to be made to protect the land*

[35] It is necessary to determine whether adequate provision has or is going to be made to protect the land from inundation.

[36] The evidence from the determination on this point is that:<sup>25</sup>

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<sup>25</sup> Determination 2024/053 at [4.20]–[4.22].

- (a) Mr and Mrs Jones submitted that adequate provision to protect the land had been made through the existing and new stormwater disposal systems, which were designed to accommodate a 1% AEP event.
- (b) The determination noted that the stormwater collection area used in the calculations for the systems is based on the roofs of the dwelling and hard standings on the property (like the driveway) but does not take into consideration and provide soakage for flooding occurring on the property coming from the roading corridor.
- (c) The determination also noted that on the plans the new soak holes were proposed to be located within the 1% AEP flood modelled zone and may be underwater during an inundation event and hence less capable of providing additional drainage to that already naturally provided by the soil.
- (d) Inundation on the owner's property as a result of a 1% AEP storm event are likely to be within the range of only 100mm to 300mm, with the exception of a relatively small area immediately outside the garage. Mr and Mrs Jones' geotechnical engineer's testing and report shows that the soils underlying the owner's property are sands and silts and are likely to be free draining.
- (e) The determination found that "any inundation that does occur is likely to be short lived and of minimal inconvenience to the property's occupants".

[37] I accept the finding that any inundation is likely to be short lived and of minimal inconvenience. The determination considered all of the relevant material and reached a considered conclusion on this issue.

[38] Having considered all of the material I find that adequate provision has been made to protect the land from inundation. Therefore, s 71(1) does not apply and the building consent should have been issued under s 49(1).

## **Conclusion**

[39] In summary, I find that:

- (a) Assessment of damage is not a requirement of s 71.
- (b) The determination did not undertake the correct process when applying s 71. Upon finding that the land was likely to be subject to inundation, the determination should have then considered whether adequate provision had been made to protect the land from the inundation.
- (c) Adequate provision has been made to protect the land from the inundation and the building consent should have been issued under s 49(1).



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**Judge W Lawson**

**District Court Judge | Kaiwhakawā o te Kōti ā-Rohe**

**Date of authentication | Rā motuhēhēnga: 01/04/2026**