

# Natural Hazard Provisions

Guidance on complying with Sections 71 to 74 of the Building Act 2004

VERSION 1

OCTOBER 2023





**Ministry of Business, Innovation and Employment (MBIE)**  
**Hīkina Whakatutuki – Lifting to make successful**

MBIE develops and delivers policy, services, advice, and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

The Natural Hazard Provisions Guidance is produced by the Building System Performance branch.

This document is issued as guidance under section 175 of the Building Act 2004 (the Act) and may also be used in accordance with section 19(2)(b) of the Act.

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**MORE INFORMATION**

Information, examples and answers to your questions about the topics covered here can be found on our website: [www.mbie.govt.nz](http://www.mbie.govt.nz).

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# Purpose

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The intent of this guidance document is to support the understanding of the requirements of the natural hazard provisions in sections 71 to 74 of the Building Act 2004.

## **This guidance seeks to:**

- outline considerations to meet the requirements of the natural hazard provisions
- provide information on what constitutes a natural hazard
- provide information on inundation (flooding).

## **Who is this guidance for?**

This guidance is for building consent authorities (BCAs), who are responsible for processing, granting, and issuing of building consents. It may also be useful for other building sector professionals, such as builders, engineers and consumers.

## **Acknowledgements**

We would like to acknowledge and thank those who have contributed to the development of this guidance, in particular Christchurch City Council, Wellington City Council, Whakatāne District Council, Marlborough District Council, the Ministry for the Environment and Toka Tū Ake EQC.



### Features of this document

Hyperlinks are provided to cross-reference within this document and to external websites. These hyperlinks appear with a [blue underline](#).

### Limitations of this guidance

This document is a general guide to support the interpretation and application of the natural hazard provisions in sections 71 to 74 of the Building Act 2004.

While MBIE has taken great care in preparing this guidance, it is not definitive. Importantly, it should not be read as replacing the relevant legislation. Readers must refer to the Building Act, Building Code, and the regulations as their primary source documents, and be aware that for specific situations or problems, it may be necessary to seek independent legal advice.

This guidance concerns only the natural hazards provisions in the Building Act.

The definition of natural hazard in section 71(3) of the Building Act is different to the definition of natural hazard under the Resource Management Act 1991 (RMA), meaning that this guidance is unlikely to be relevant to consideration of natural hazards under the RMA.

Be aware that other legislation, such as the RMA, may include additional considerations or requirements for natural hazards that should be accounted for.

Figure 1 below illustrates where this guidance document sits with the building regulatory system.

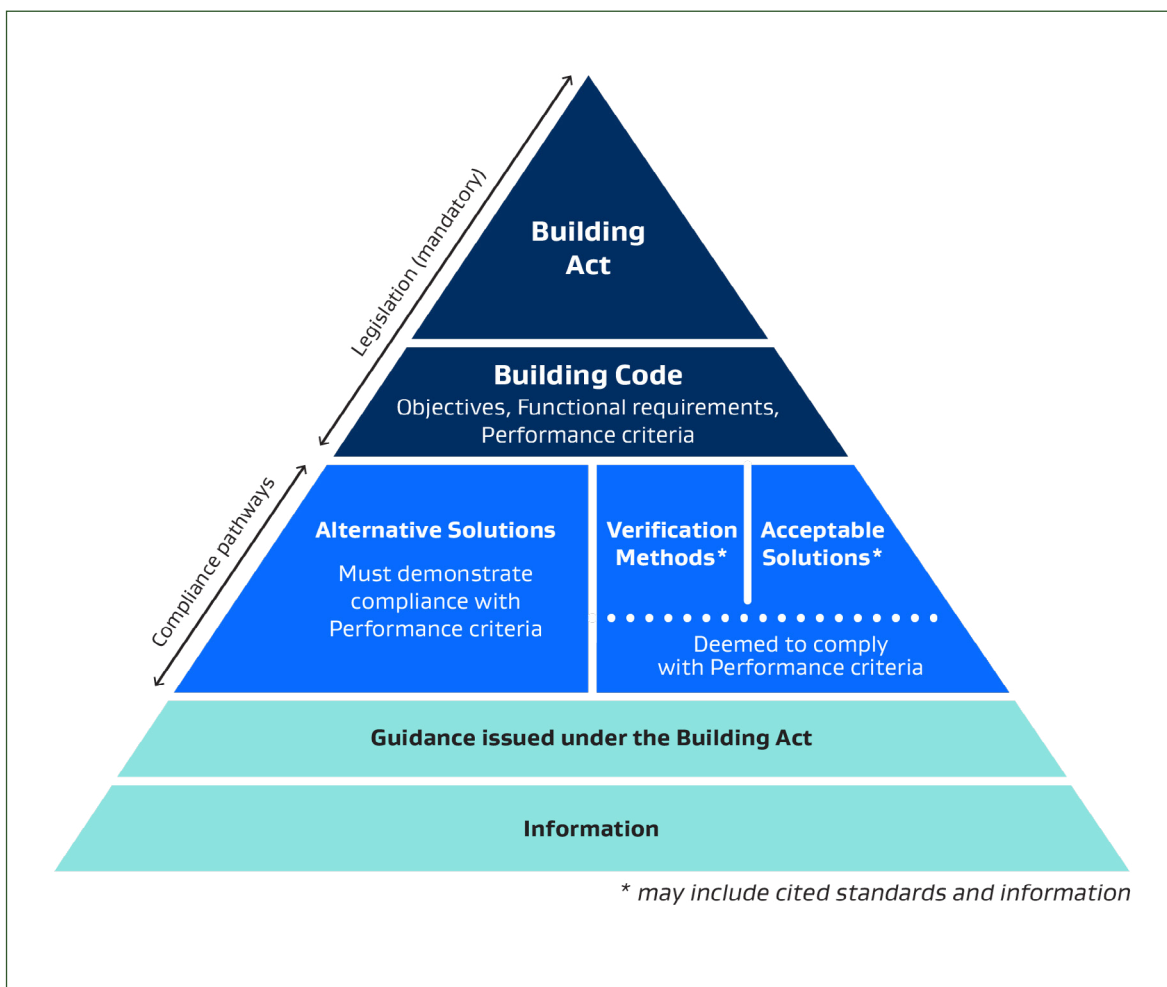


Figure 1: The building regulatory framework

# Background

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Aotearoa New Zealand is a country prone to natural hazards. These natural hazards result from geological processes, such as erosion and landslides, and meteorological processes, such as wind and heavy rain that can cause flooding.

Due to an increasing population, land-use intensification, and a changing climate, damaging events such as wide scale flooding are increasing in intensity and frequency.

The Building Act 2004 repealed the Building Act 1991. It strengthened the building system and introduced new requirements; however, the intent of the natural hazard provisions has largely remained unchanged.

The natural hazard provisions of the Building Act and the provisions of the RMA work together to manage natural hazard risks in Aotearoa New Zealand.

The RMA provides a framework for managing natural hazard risks through the control of the use of land, while the natural hazard provisions in the Building Act focus on building work at an individual property level.



# Impacts and causes of flooding

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## THE IMPACT OF FLOODING ON LAND AND BUILDINGS

Floods are a natural process that can occur at irregular intervals, and no two floods are the same.

Floods can create hazardous conditions in which buildings and places, and the communities that occupy them, are particularly vulnerable.

Fast-flowing shallow water or slow-flowing deep water can both have a significant impact on people, land and buildings.

Structural and non-structural elements of buildings can be damaged by fast-flowing floodwater and debris, while slow or stagnant water can result in ponding causing damage over time.

## FLOOD WATER ALSO HAS A SIGNIFICANT IMPACT ON THE HEALTH AND WELLBEING OF PEOPLE

- **Physical danger** – Fast-flowing and deep water can pose a direct physical danger, particularly to children and vulnerable people who may not have the strength or awareness to navigate such conditions.
- **Health risks** – Floodwaters are often contaminated with various pollutants, including sewage and debris. Exposure to these contaminants can lead to waterborne diseases, infections, and other health issues. The increased moisture in buildings due to flooding may cause mould which can also lead to health issues such as respiratory illness.
- **Disruption of essential services** – Flooding can cause power outages, damage to buildings, land, accessways, infrastructure, and disruptions to essential services, such as water supply and electricity. This can create challenges in accessing clean water, and basic necessities, putting vulnerable people, including children, at greater risk. People with disabilities or limited mobility may find it challenging to leave their properties or to access necessary resources during a flood.

## CAUSES OF FLOODING

- **River flooding** – also known as fluvial flooding, occurs when water overflows the riverbanks into the floodplain. Factors that cause flooding in rivers include: the size and shape of the catchment and waterway areas, vegetation in and around the river, and water levels downstream.
- **Pluvial flooding** – occurs when an extreme rainfall event creates a flood independent of an overflowing water body such as a river.
- **Groundwater flooding** – occurs when the water table rises during a prolonged event. Low lying areas are more likely to experience groundwater flooding.
- **Coastal flooding** – is likely when high tides, storm surge and/or large waves occur at the same time. Sea level rise will also have an impact.

Flooding is one example of inundation, alongside overland flow, storm surge, tidal effects, and ponding. For the purposes of this document the term flooding and floods will be used as these are the terms that are in common use.



## FLOOD MODELLING IS ESSENTIAL FOR MANAGING RISK

Flood modelling information will usually be held by the regional or local council or their water services companies. Information will vary depending on what has occurred or has been modelled for the property location.

Flood modelling is complex, and it is important that the information that councils rely on is kept up to date, and accounts for the impacts of climate change.

Flood models may include:

- potential sources and extent of flooding
- the expected frequency of events of certain sizes occurring
- the amount of freeboard included
- historic flood information, including maps and photographs
- the predicted effects of climate change
- the capacity of existing infrastructure.

Some councils provide site-specific flooding assessments, which are used for plan changes, subdivision, building consent and resource consent applications.

In complex situations or where there is a dispute, the building owner may need to engage a specialist to undertake a flood risk assessment.

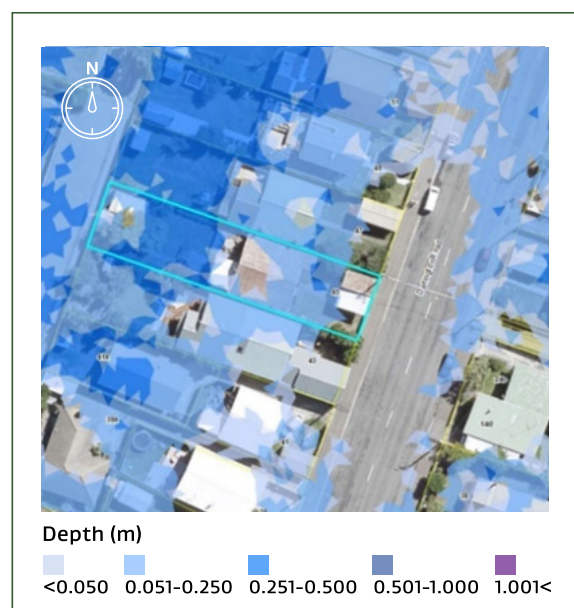
### ALLOWING FOR THE EFFECTS OF CLIMATE CHANGE IN FLOOD MODELLING

Climate change will have an influence on the future frequency and severity of flooding. There is significant uncertainty in predicting the impacts of climate change and so it is pragmatic to include an allowance for sea level rise and increased rainfall intensity when modelling future flood levels so that the impact of inundation is considered for the whole of life of the building.



### THE RESULTS OF FLOOD MODELLING MAY INCLUDE:

- the frequency of an event of a certain size happening
- the possible duration of the event
- the maximum predicted depth of water on the site (measured in millimetres (mm))
- flow speed/velocity (measured in meters per second (m/s))
- top water level (measured in meters above mean sea level (MAMSL))
- a minimum floor level requirement in some cases
- overland flow paths.



**Figure 2: An illustrative example of flood modelling**

# Overview of the natural hazard provisions

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The natural hazard provisions ensure that natural hazards are identified and considered when a building consent is applied for.

## **THE INTENT OF THE NATURAL HAZARD PROVISIONS IS SO THAT:**

- natural hazards are identified, including the risks created by these hazards to the land, building work and other property
- the effect of the building work on the natural hazards is considered
- where possible, building work, land, and other property are protected from the natural hazard
- any damage to land or other property caused by building work on land subject to a natural hazard is restored
- building work can take place in some cases, even when the land is subject to, or may be subject to, a natural hazard
- future owners are aware that a building has been constructed on land that may be subject to a natural hazard
- the BCA will be exempt from liability for any damage arising from the natural hazard (see section 392 of the Building Act)
- Toka Tū Ake EQC has discretion when making decisions about insurance cover or claims.

The Court of Appeal in the case [Logan v Auckland City Council \(2000\) 4 NZ ConvC 193,184](#) commented on the natural hazard provisions as follows:

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 [a matter] of course unless adequate provision is made to protect the land concerned as well as the building work itself from the listed hazards.

## **WHAT THE LAW SAYS:**






The natural hazard provisions of the Building Act are contained in sections 71 to 74. These sections outline:

- what a natural hazard is for the purposes of the Building Act
- when a building consent must be refused if the land on which the building work is to be carried out is subject to a natural hazard
- when a building consent can be granted with a condition requiring notification of the consent, such as to the Registrar-General of Land
- the steps that need to be taken after notification, such as the Registrar-General of Land entering details of the natural hazard on the record of title for the land, and when such entries can be removed.

## WHAT IS A NATURAL HAZARD?

Natural hazards are naturally occurring events that have a potential to cause damage to land or buildings.

A natural hazard is defined as any of the following events:

				
<b>Erosion</b>	<b>Falling debris</b>	<b>Subsidence</b>	<b>Inundation</b>	<b>Slippage</b>
including: <ul style="list-style-type: none"><li>• coastal erosion</li><li>• bank erosion</li><li>• sheet erosion.</li></ul>	including: <ul style="list-style-type: none"><li>• soil</li><li>• rock</li><li>• snow</li><li>• ice.</li></ul>		including: <ul style="list-style-type: none"><li>• flooding</li><li>• overland flow</li><li>• storm surge</li><li>• tidal effects</li><li>• ponding.</li></ul>	

### WHAT THE LAW SAYS:

The Building Act defines natural hazards in section 71(3)(d). Inundation includes flooding, overland flow, storm surge, tidal effects and ponding.

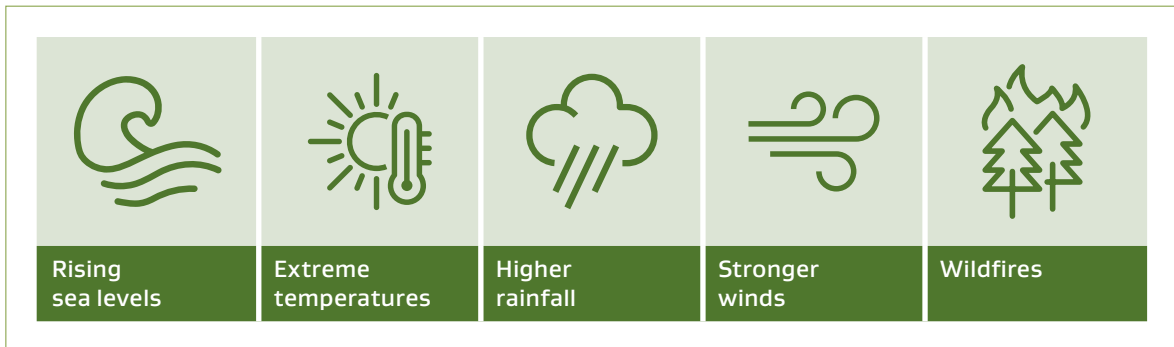
## WHAT IS NOT A NATURAL HAZARD?

**Earthquakes** – As earthquake shaking can occur anywhere in Aotearoa New Zealand. Earthquakes and their effects such as liquefaction are not within the provisions of section 71 to 74 of the Building Act. Earthquake risk is addressed by the Building Code and earthquake-prone provisions of the Building Act. If a hazard such as rockfall is caused by an earthquake it is not itself a natural hazard. Equally, a tsunami is not a natural hazard.

**Natural hazards as defined elsewhere** – the definition of natural hazards in the Building Act is different to the definition of natural hazard under the RMA.

**Climate hazards** – As our climate changes, we can expect damaging environmental events to increase in frequency and severity. Climate hazards and risks are not natural hazards as defined by the Building Act, however, impacts of climate change such as higher rainfall will increase the frequency and severity of flooding, which is a natural hazard.

The key climate change risks to buildings in Aotearoa New Zealand are:



The Ministry for the Environment's (MfE) national climate change risk assessment provides more information on climate change hazards, see:

[The Ministry for the Environment \(MfE\) national climate change risk assessment](#)

# The natural hazard provisions and the building consent system

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The natural hazard provisions are triggered by a building consent application.

## THE NATURAL HAZARD PROVISIONS APPLY WHEN:

- an application for a building consent is made
- the building work is for a new building, or major alterations to an existing building
- the land connected to the building work is subject to or likely to be subject to a natural hazard.

## THE NATURAL HAZARD PROVISIONS DO NOT APPLY WHEN:

- building work does not require a building consent, including
  - urgent work or energy work
  - building work listed in schedule 1 of the Building Act, or
  - work for which an exemption under schedule 1(2) has been granted).
- issuing a certificate of acceptance.

## ROLES AND RESPONSIBILITIES

It is the role of the BCA to decide to grant or refuse a building consent. The BCA must also be a territorial authority (TA) if it is making decisions to grant a building consent under section 72.

[MBIE's building consent guidance](#) has more information on roles and responsibilities and the building consent process.

<b>71(1)</b>	Requires the refusal of a building consent for a new building or major alterations to an existing building if the building work is carried out on land subject to a natural hazard, or if the building work is likely to create or worsen a natural hazard as defined in section 71(3).
<b>71(2)</b>	Permits a building consent to be granted if adequate provision is made to protect the land, building work or other property, or to restore any damage to the land or property resulting from the building work.
<b>72</b>	Applies if adequate provision cannot be made under section 71(2), a hazard has been identified but the building work does not make the hazard worse or create a new one. In which case a building consent can be granted subject to a section 73 condition.
<b>73</b>	Describes the condition that must be imposed on a building consent granted under section 72, which requires notification of the existence of the natural hazard to parties such as the Registrar-General of Land.
<b>74</b>	Describes the steps that must be taken by the party who was notified under section 73, such as entering details of the natural hazard on the record of title for the property and provides for the removal of entries when they are no longer required.

**Table 1 : Summary of the natural hazard provisions**

# The process for considering the natural hazard provisions

The below flow chart table outlines the general process for considering the provisions.

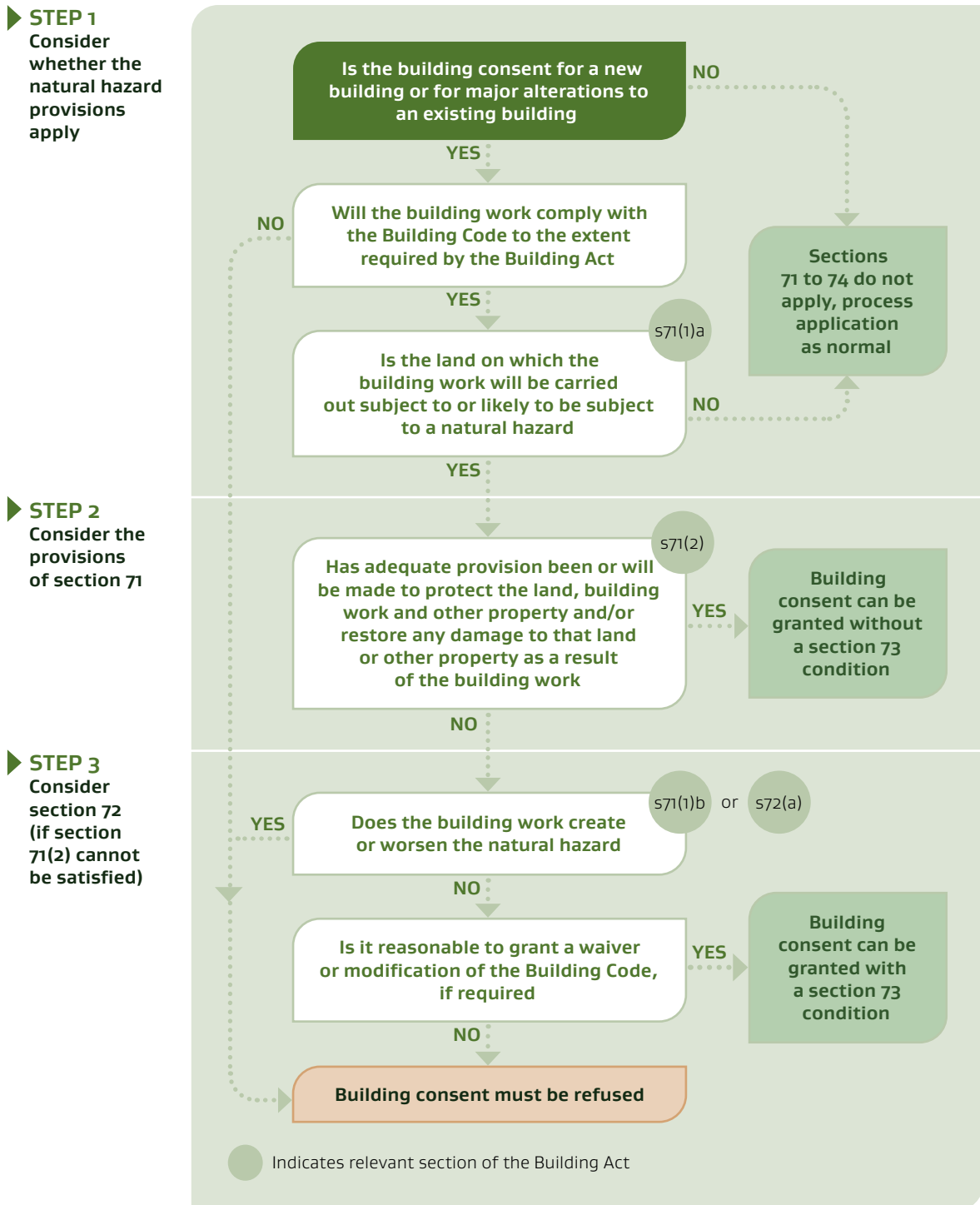


Figure 3

## ► STEP 1: CONSIDER WHETHER THE NATURAL HAZARD PROVISIONS APPLY

There needs to be an application for a building consent for the natural hazard provisions to be triggered, and the building work must be for a new building or major alterations to an existing building.

The natural hazard provisions do not apply to exempt building work that is listed in Schedule 1 of the Building Act. In addition, territorial authorities and regional authorities can use their discretion to exempt proposed building work if it is likely to comply with the Building Code or, if it does not comply, is unlikely to endanger people or property.

When deciding whether to give a discretionary exemption, consideration will be given to whether the building work is to occur on land that is subject to a natural hazard.

Any exempt building work that occurs on land that is subject or likely to be subject to a natural hazard must still comply with the Building Code and other relevant legislation.

[Exempt building work guidance](#)

### WHAT THE LAW SAYS:

Schedule 1 of the Building Act covers work that is exempt from needing a building consent (under sections 41(1)(b) and 42A of the Building Act).

Schedule 1(2) allows territorial authorities and regional authorities to give discretionary exemptions from building consents.

[Building Act 2004 No 72 \(as of 07 September 2022\), Public Act Schedule 1 Building work for which building consent not required – New Zealand Legislation](#)



### Is the building work for major alterations?

If the building work includes alteration to an existing building the new building work needs to fully comply with the Building Code, the provisions of section 112 also apply. This means that the building may need to be upgraded with regard to its means of escape from fire and in some cases with access for people with disabilities (ie those buildings to which section 118 applies). The building must continue to comply with the Building Code to the same extent as before the building work.

### What are major alterations?

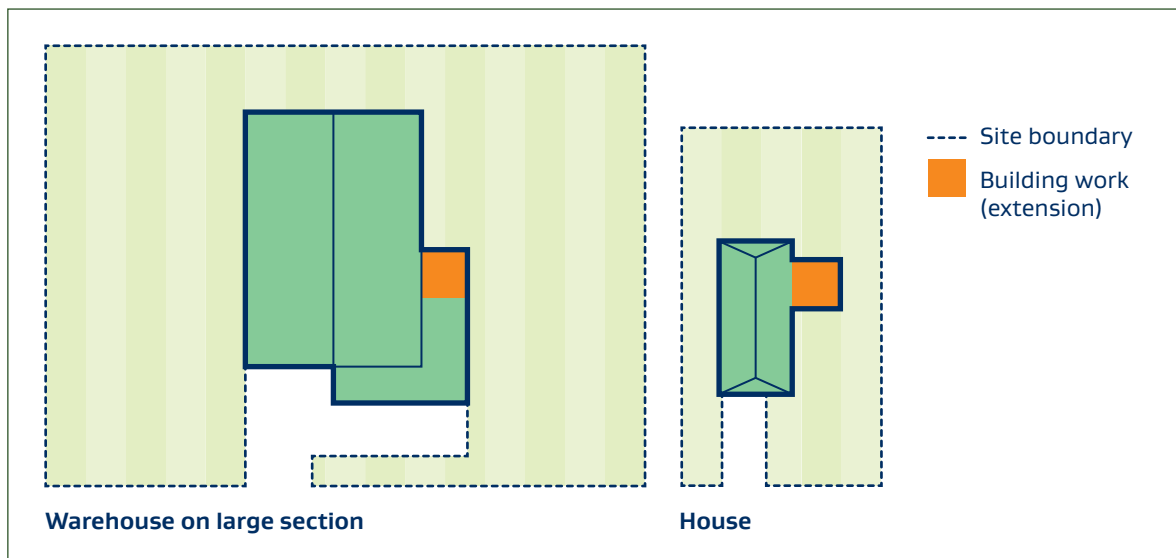
Not all alterations are considered to be major alterations even if they require a building consent.

Whether an alteration is considered to be a major alteration is ultimately a judgement call for the building consent authority to make, taking into account all the circumstances.

The Building Act does not define major alterations. However, the following matters should generally be considered when deciding if building work amounts to major alterations:

- how much the work differs from that which would be exempt from a building consent
- the size of the alteration in relation to the total size of the existing building
- the percentage increase in the building's footprint and site coverage
- the complexity of the construction that is to be undertaken
- the intended use of the building.

Figure 4 drawing shows the same size extension on a large building and on a small residential building, illustrating that the size of the site and the existing building needs to be taken into account.



**Figure 4: Alterations on a large and small building**

A relatively small extension to a large building may not be considered to be a major alteration, but the same size extension to a smaller building may be considered to be a major alteration.

When undertaking repair work following flooding, the decision about whether the building work is a “major alteration” will depend on the extent of work needed to the foundations, the superstructure, and the services. In general, work is unlikely to be a major alteration if the foundation work is confined to releveling and repairs, as opposed to completely rebuilding foundations. However, if there is significant work on other parts of a building in addition to re-leveling and repair work to the foundations then this may likely amount to major alterations.



## **Building Code compliance**

Regardless of whether a building consent is required the building work must comply with the Building Code (section 17) to the extent required by the Building Act.

The main Building Code clauses that relate to inundation are E1 Surface water, B1 Structure and B2 Durability. When considering finished floor levels, consideration should also be given to the accessibility requirements of clause D1. Even though accessibility requirements are not required for housing, it is good practice to design and adapt houses in a way that enables people to live in their own home for longer.

### **Building Code Clauses B1 Structure and B2 Durability**

Clause B1 sets the performance requirements for how buildings should withstand physical conditions to protect lives and other property. Flooding has the potential to undermine foundations, and to damage bracing elements such as plasterboard which may compromise the structural stability of the building. Flood waters can also lift homes off their foundations, or simply break through the building envelope due to significant hydrodynamic pressures.

Clause B2 Durability must always be considered when demonstrating compliance with each of the clauses of the Building Code, particularly clauses B1 and E1.

### **Building Code Clause E1 Surface water**

Buildings and site work must be constructed in a way that protects people and other property from the adverse effects of surface water. For housing, communal residential, and communal non-residential buildings, a proposed floor level providing protection from an event having a 2% annual exceedance probability (AEP) is required to comply with the building code and is also considered to be adequate provision to protect the building work.

#### **WHAT DOES THE BUILDING CODE SAY?**

Relevant performance requirements of Building Code Clause E1

E1.3.1 – Except as otherwise required under the Resource Management Act 1991 for the protection of other property, surface water, resulting from an event having a 10% probability of occurring annually and which is collected or concentrated by buildings or sitework, shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.

E1.3.2 – Surface water, resulting from an event having a 2% AEP shall not enter buildings.

The minimum floor levels that may be required to comply with the requirements the Building Code may not be the only floor level requirements. There are often floor level requirements in the district/ city plan, and these requirements can require a greater level of protection.

### **Limitations of clause E1.3.2**

This clause applies only to housing, communal residential and communal non-residential buildings. This means that other buildings do not have a minimum floor level requirement. However, even if no minimum floor levels apply, it is important to consider the durability of building elements that might be damaged or be affected by flood water entering the building.

An allowance, called a freeboard, is added to account for any uncertainties associated with historical data and hydraulic assessments, and other environmental factors such as the effect of wave action generated by vehicles.

## ► STEP 2: CONSIDER THE PROVISIONS OF SECTION 71

Section 71 applies when the land on which the building work will take place is subject to or likely to be subject to a natural hazard and the building work makes the existing hazard worse or creates a new hazard.

**The provisions of sections 71 give rise to the following questions:**

- When is the land “likely” to be subject to inundation?
- What is adequate provision to protect the land building work and other property?

### WHAT THE LAW SAYS

#### 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.

If the land is not likely to be subject to a natural hazard or if adequate provision has been made in line with section 71(2), then the building consent can be granted as normal without a section 73 condition.

#### **When is the land likely to be affected by inundation?**

For section 71 to apply, the land on which the building work is to be carried out must be subject or likely to be subject to inundation. The Building Act does not define the term “likely”, or set a threshold for the extent, size, frequency, or impact of a flooding event in order for it to be “likely”.

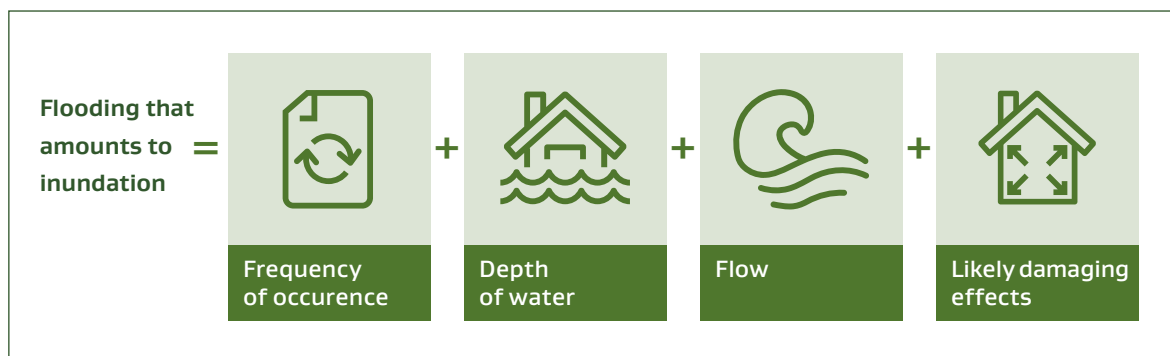
There are two main considerations:

- Does risk of flooding amount to inundation?
- What is meant by “land on which the building work is to be carried out”?
  - In other words how much, or what part of the property, must be taken into consideration when deciding if the land on which the building work is being carried out is subject to a natural hazard?

### Does the risk of flooding amount to inundation?

The natural hazard of inundation includes flooding, overland flow, storm surge, tidal effects, and ponding. Water may from time to time enter, or pond on, most properties, but not all water entering land or buildings will amount to inundation. Inundation is not normal surface water, but is a specific, extreme event which results in normally dry land being flooded by an overflow of a large amount of water.

The Building Code defines surface water as all naturally occurring water, other than sub-surface water, which results from rainfall on the site or water flowing onto the site, including that flowing from a drain, stream, river, lake, or sea.



For flooding to be considered a natural hazard (inundation) consider:

- the expected frequency of occurrence (annual exceedance probability (AEP))
- predicted maximum depth of water
- predicted velocity of the flow
- likely damaging effects of the natural hazard on land building and other property
- the duration of any water likely to pond on the land.

The type of flooding event that may amount to inundation could differ from region to region and in applying these factors a measured and precautionary, but not worst-case approach should be taken.

In [Logan v Auckland City Council](#), the Court of Appeal commented at paragraph [33] that

We should add that in determining whether the statutory risk threshold under [section 71(1) (a)] . . . has been reached, . . . a territorial authority can be expected to take a common-sense approach. Whether the risk is at a level and frequency to justify the expense and other implications of making adequate provision to protect the land, and if not require a [section 73] 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.

## Frequency of occurrence or annual exceedance probability (AEP)

One of the factors that needs to be taken into account is the expected frequency of occurrence known as an annual exceedance probability (AEP).

Describing a flood as having a 1% AEP means that there is a 1% chance (or 1 in 100 chance) every year of a flood of that particular size happening.

A 2% AEP means that there is a 2% chance, or (1 in 50 chance), every year of a flood of that particular size happening.

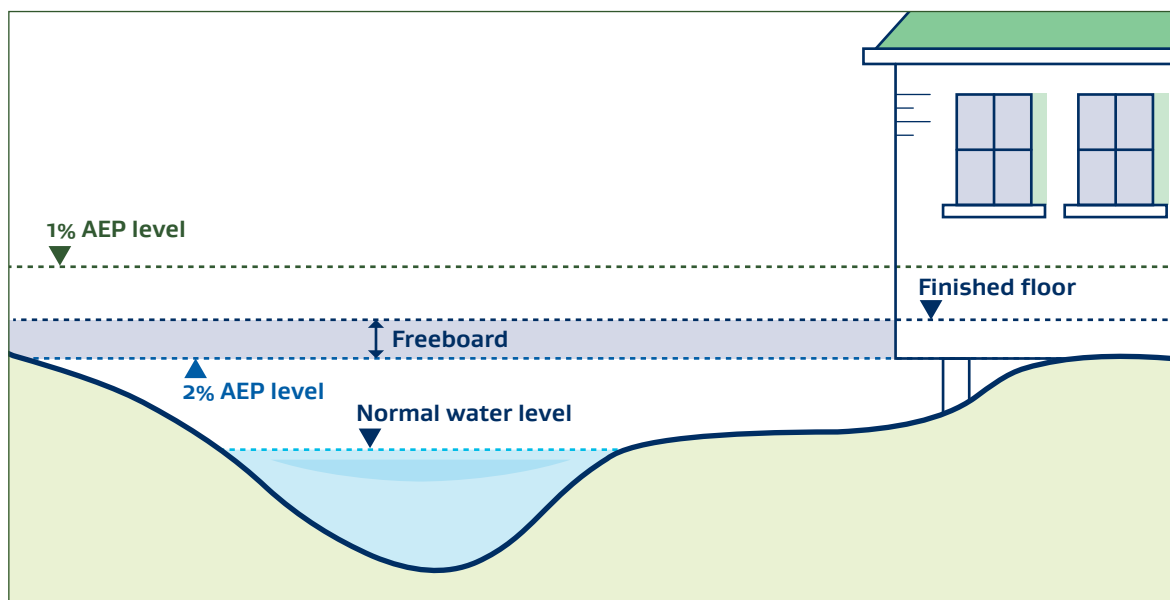
A flood that has a 1% AEP will be a bigger, and possibly more damaging flood, than a flood that has a 2% AEP. However, a 2% AEP flood is more likely to happen than a 1% AEP event.

Average recurrence interval (ARI) is another way to describe flood risk but it is not the same as AEP. ARI is the average time period between floods of a certain size. For example, a 1 in 100-year ARI event may occur on average once every 100 years but a 1% AEP flood has a 1% (or 1 in 100) chance of occurring each year.

A flooding event with a 1% AEP is considered to be the threshold for flooding that amounts to inundation. If the inundation risk does not exceed 1% AEP, the land is not likely to be subject to the hazard for the purposes of section 71.

For housing, communal residential, and communal non-residential buildings, a proposed floor level providing protection from an event having a 2% AEP is required to comply with the Building Code.

If a building is built to a minimum floor level that complies with the building code, then this is adequate provision for protection of the building work, however the building consent may still be granted with a section 73 condition if adequate provision has not been made to also protect the land and other property.



**Figure 5: Possible water levels in a 1% and 2% flooding event**

What constitutes a flood with a 1% AEP, or a 2% AEP may change over time because of climate change. A flood that has a 2% AEP today, will be a different size flood than would have had a 2% chance of happening 50 years ago, or in 50 years' time.



The impact of climate change on buildings will depend on the period being considered. If the hazard is not likely to impact the land or building within a certain reasonable timeframe the provisions will not apply.



This period of time is not specifically defined in the Building Act; however, the economic life of a building is generally considered to be between 75 to 80 years based on:

- Building Code, Clause B2.3.1 (a) states that building elements that provide structural stability to the building or those that are difficult to replace are required to continue to satisfy the performance requirements of the Building Code for the life of the building, being not less than 50 years
- case law and past determinations have all stated that the building life should be greater than 50 years without stating any specific timeframe
- BRANZ house condition surveys show that only a small proportion of Aotearoa New Zealand houses are older than 80 years.

#### **What is meant by “land on which the building work is to be carried out”**

Section 71(1) refers to “the land” on which building work is to be carried out.

The land on which the building work is to be carried out will be the land that is ‘intimately connected’, or closely associated, with that building work.

The High Court in [Logan v Auckland City Council](#) (HC Auckland AP77/99) noted that the words ‘protect the land’ should be read as an obligation to protect against the inundation of “the site itself where, at least the building and the site are intimately connected”.

For land to be intimately connected with the building work, there needs to be some connection other than just ownership.

Land “intimately” connected may include:

- the accessway to the building from the road or other public, or private, access point
- the accessway to and around ancillary buildings associated with the principal building
- the access to amenity features such as detached garages and swimming pools
- septic tank systems and their drainage fields.

Land not “intimately connected” with building work might include:

- any land that is relatively distant from where the building work is taking place, even though it is part of the same property.

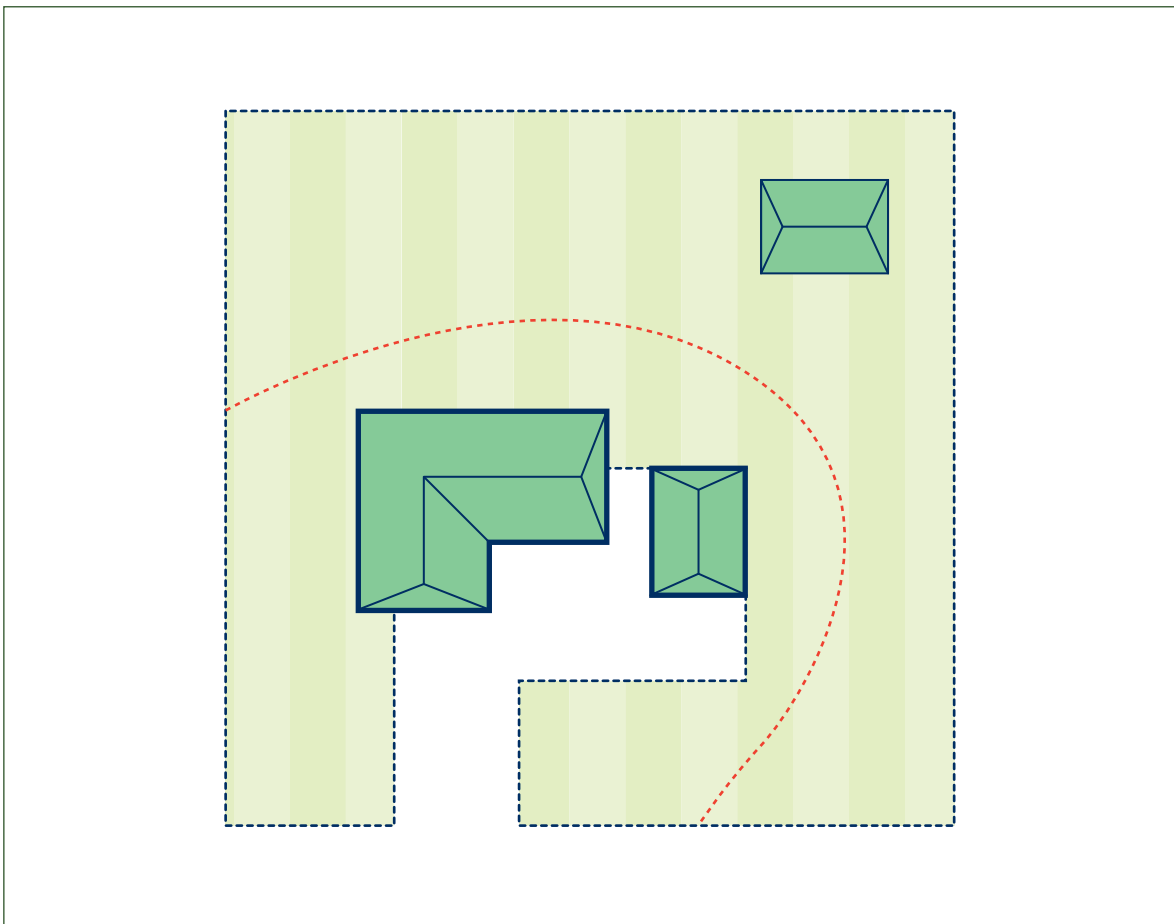
In deciding if there is an intimate connection between the land and the building work, the following factors should be considered:

- the size of the property relative to the area occupied by the building work
- the position of the building work on the property relative to that part of the land affected by the hazard.

For most residential sections, it is reasonable to assume that the land intimately connected with the building work will be the entire section or lot. For larger properties such as lifestyle blocks or farms, the land intimately connected to the building work is likely to be just part of the section or lot.

Figure 6 drawing shows the land that is intimately connected to the building work. This image is of a house and a garage on a lifestyle block. There is also a shed that is remote from the house and garage. The building work being undertaken is to the house.

The land intimately connected to the building work is likely to be the area within the red dotted line, which includes the house, the garage, the access ways to both the house and garage, and the land around the house and garage. However, the land outside the red dotted line, which is distant from where the building work is being carried out, may not be intimately connected with the building work.



**Figure 6: Land intimately connected**

## What is adequate provision to protect the land, building work and other property?

The building consent can be granted if adequate provision has been made to protect the land, building work and other property, or restore any damage to the land or other property. Adequate provision does not require the elimination of all risk and a council can be expected to take a pragmatic and measured common-sense approach to the level of protection on a case-by-case bases.

### WHAT THE LAW SAYS

#### Section 71(2)

- (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.

The Court of Appeal, in [Logan v Auckland City Council](#), considered the use of “or” in each of paragraphs (a) and (b), and also the “or” between paragraphs (a) and (b) (albeit in relation to the earlier version of this section in the Building Act 1991).

The Court commented that these uses of “or” must be read as “and” where each of the listed matters is relevant.

If adequate provision requires protection, then the BCA will need to be satisfied that the land and the building work, and other property are all sufficiently protected.

Similarly, if adequate protection requires restoration of damage, then the building consent authority will need to consider restoration of both the land and other property.

If both protection and restoration are needed in a particular situation, then the BCA must satisfy itself on both counts. In practice, paragraph (b) will become relevant only where the building work is likely to cause damage, whether to the land or other property or both.

If the right protective measures are put in place to protect and restore, then a building consent can be granted in the usual way and section 72 does not need to be considered.

If, for example, only the building work is protected, but not the land, then it may still be possible to grant the building consent under section 72 with a section 73 condition.

### Adequate provision to protect the building work

Compliance with the Building Code is adequate provision to protect building work from inundation, however as mentioned above, the land and other property must also be protected to allow the building consent to be granted without the need to consider section 72.

The risk of inundation may not be fully eliminated even if the building work complies with the requirements of the Building Code.

### Adequate provision to protect the land

It is only the land that is intimately connected with the building work that needs to be protected from inundation.

The building work and other property must also be protected to allow the building consent to be granted without the need to consider the section 72 provisions.

Figure 7 drawing contains two scenarios (A and B) for the extent of possible flooding on the site.

- In Scenario A, the natural hazard is affecting the land associated with the building work.
- In Scenario B, the natural hazard is not affecting the land associated with the building work.

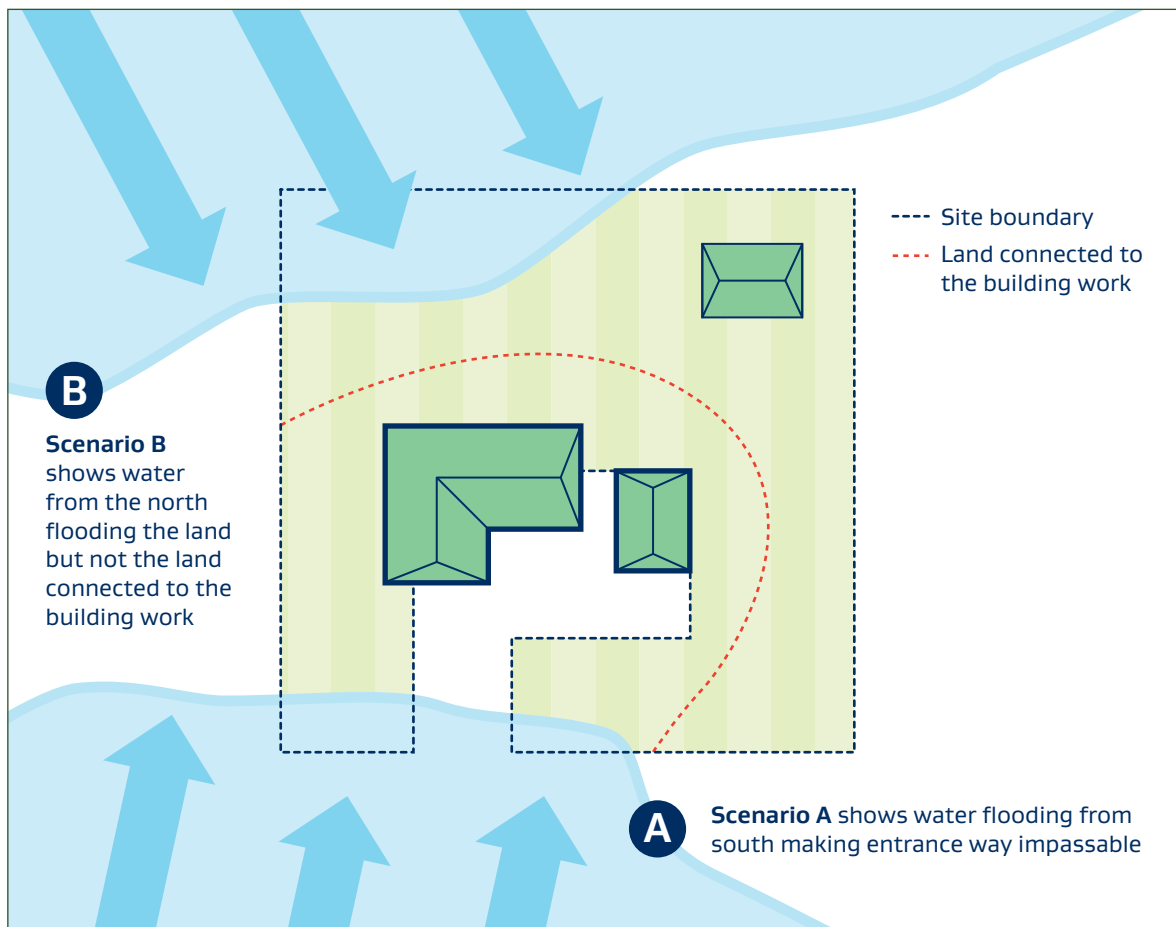


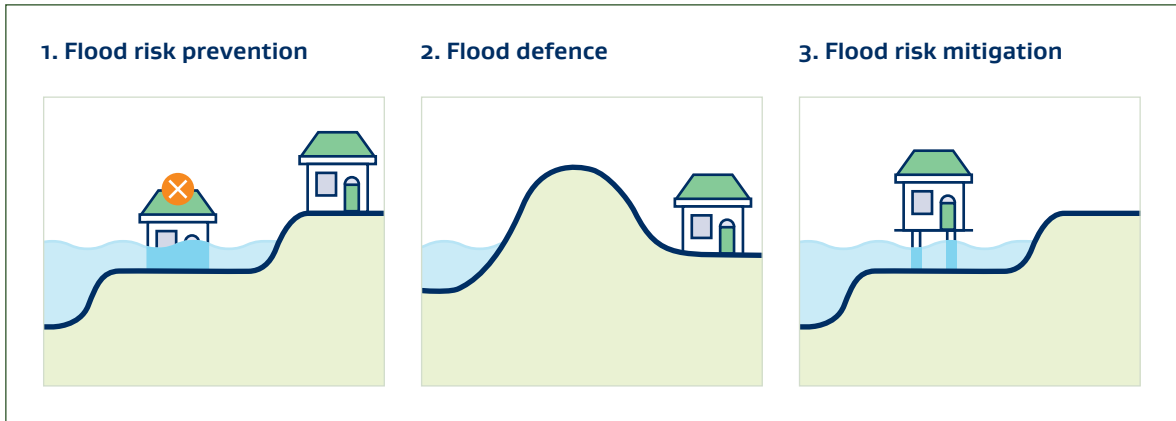
Figure 7: Adequate provision to protect the land



### Examples of types of flood protection

Risk prevention, defence, and mitigation are types of flood protection. In all cases the protection must be adequate and must not make the flooding worse on the land or other property.

Figure 8: In the drawing below 3 illustrates flood risk mitigation, the building work is protected but the land is not, so a section 73 condition would still be required.



**Figure 8: Flood protection**

Where a building owner proposes to design a structure as part of flood defence to protect the land, building, or other property, the structure should:

- be located on the same property, or if located on other land, there should be a connection such as an easement on that other property
- be designed to protect the building for its intended life
- require no or low maintenance
- have all the necessary approvals such as a building consent and resource consent
- where existing protective structures are relied on, ensure issues such as maintenance are considered.



### ► **STEP 3: CONSIDER SECTION 72 (IF SECTION 71(2) CANNOT BE SATISFIED)**

Section 72 applies when the land is subject to a natural hazard, but the building work does not make the existing hazard worse or create a new hazard and adequate provision cannot be made under section 71(2).

If adequate provision has been made in line with section 71(2), then the building consent can be granted as normal without a section 73 condition.

If adequate provision cannot be made and the building consent cannot be granted under section 71(2)(a), then it may still be possible for a building consent to be granted, subject to a section 73 condition.

This section requires a building consent authority to grant a building consent subject to a section 73 condition if the following criteria are met:

- the proposed building work must not make the natural hazard worse, or result in a new natural hazard, both in relation to the land on which the building work will occur and any other property
- the land must be subject to a natural hazard
- that any waiver of modification of the building code relating to the natural hazard must be reasonable.

It may not always be necessary to grant a waiver or modification of the Building Code for the building consent to be granted.

Consideration of whether it is reasonable to grant a waiver of modification needs to occur only if one is required or requested.

#### **WHAT THE LAW SAYS**

##### **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.

## Waivers and modifications

In some cases when a building consent is to be granted with a section 73 condition, it may be necessary to modify or waive certain Building Code clauses.

A waiver or modification of the Building Code is not always required and so if a waiver or modification is not requested and/or not required, then the building consent can still be granted with a section 73 condition.

In making a call to waive or modify a whole or part of a Building Code clause, TAs should satisfy themselves that there is a substantive justification for the waiver and modification and that it is reasonable to do so (section 72(c)). This will need to be done on a case-by-case basis.

The types of factors TAs should consider in determining reasonableness are:

- the extent of the non-compliance with the specific performance clause
- the possible consequence of the non-compliance with the specific performance clause
- the availability of other reasonably practicable solutions that would result in the building work fully complying with the Building Code
- any special and unique circumstances of the building work
- the extent to which the waiver will still be consistent with the Building Act's purposes and principles.

This is not an exhaustive list and TAs may take into account other factors that they consider to be relevant in the circumstances.

Care needs to be taken when drafting a waiver or modification. Ideally, a waiver or modification should make the least change to the Building Code as possible. Ensuring that it is drafted as narrowly as possible will also contribute to its reasonableness. For example, if the non-compliance with the Building Code relates to performance during inundation, the waiver or modification should target inundation matters only.

TAs should consider whether a modification is feasible before moving to a waiver, as modifications are likely to have a lesser impact on the Building Code.

For buildings other than houses, raising floor levels can potentially create compliance issues with Building Code clauses relating to access and facilities for people with disabilities.

Only the Chief Executive of MBIE (not TAs) can grant a waiver or modification of the Building Code relating to access and facilities for people with disabilities, under section 69 of the Building Act.

If a building consent is granted subject to a waiver or modification, it will stay that way (unless the building consent is amended prior to the issue of a code compliance certificate).

This is different from what happens with a section 73 notice on the property title which can be removed if it is no longer required. There is no equivalent power to remove or alter a waiver or modification after a code compliance certificate has been granted.

TAs should engage with building consent applicants on any proposal to issue a building consent subject to a waiver or modification to ensure they understand the permanency and consequences of a waiver or modification.

MBIE's [Waivers and modifications of the Building Code](#) webpage has more information.

### Granting the building consent subject to a section 73 condition

Section 73 requires that a building consent granted under section 72 is subject to a condition that a notification be made, which results in an entry on the record of title for the property.

- (a) in the case of an application made by, or on behalf of, the Crown, the appropriate Minister and the Surveyor-General; and
- (b) in the case of an application made by, or on behalf of, the owners of Māori land, the Registrar of the Māori Land Court; and
- (c) in any other case, the Registrar-General of Land

### WHAT THE LAW SAYS

#### 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 –
  - (a) in the case of an application made by, or on behalf of, the Crown, the appropriate Minister and the Surveyor-General; and
  - (b) in the case of an application made by, or on behalf of, the owners of Māori land, the Registrar of the Māori Land Court; and
  - (c) in any other case, the Registrar-General of Land.
- (2) The notification under subsection (1)(a) or (b) must be accompanied by a copy of any project information memorandum that has been issued and that relates to the building consent in question.
- (3) The notification under subsection (1)(c) must identify the natural hazard concerned.

### Consequences of a building consent being granted with a section 73 condition

- An entry on the record of title for the property, which will notify possible future purchasers of the existence of a specific natural hazard on the land.
- The BCA will be exempt from liability for any damage arising from the natural hazard (see section 392 of the Building Act).
- Toka Tū Ake EQC can legally decline to provide cover, depending on the nature of the hazard.
- Insurance companies may decline to offer cover or may exclude cover.
- Banks may decline a mortgage application (often due to the lack of insurance).

## Section 74 – Entry and removal of a hazard notice

Section 74 describes the steps taken after notification and provides for the removal of entries when they are no longer required. The various parties who receive notification under section 73 have certain obligations under section 74.

Where a building consent applicant is the Crown, notification will have been made to the appropriate Minister and to the Surveyor-General. On receipt of notification, the Surveyor-General must make an entry in their records of the particulars of the notification.

Where a building consent applicant is the owner of Māori land, notification will have been made to the Registrar of the Māori Land Court. On receipt of notification, the Registrar must make an entry in their records of the particulars of the notification.

In all other cases the notification will have been made to the Registrar-General of Land. On receipt of notification, the Registrar-General must make an entry on the record of title for the property, which provides that a building consent has been granted under section 72 and notes the natural hazard concerned.

If the BCA determines that the entry is no longer needed, then it can be removed. This request is usually started by the building owner who sends a request to the BCA.

For a BCA to agree that an entry should be removed, evidence will need to be provided that the hazard no longer exists, or that adequate provision to protect the land, building work, or other property, or to restore any damage to the land or other property, has now been made. This may require a specialist report along with any other relevant evidence.

### WHAT THE LAW SAYS

- (1) On receiving a notification under section 73, –
  - (a) the Surveyor-General or the Registrar of the Māori 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 record 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 record 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 Māori 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 record of title.

# Other considerations

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## **SUBDIVISIONS**

When subdividing or developing a new section, both a resource consent and a building consent may be required. The resource consent process may highlight the existence and extent of a natural hazard but the BCA when determining whether to grant the building consent, must be satisfied that the requirements of the Building Act and Building Code are met.

## **CROSS LEASES**

In cross-lease situations, where one owner proposes new building work in an area subject to a natural hazard and a section 73 condition applies to the building consent, the resulting entry on the record of title would apply only to that part of the land on which the building work is taking place (ie to just the particular leaseholder's record of title).



Photo credit: Steve Legal, NIWA

# Managing natural hazard risk through insurance

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The most obvious role for insurance is the provision of cover for natural hazards, enabling the settlement of claims through the payment of money to recompense loss or the reinstatement of damaged property.

A less visible but important risk reduction role for insurance is to influence land-use and development towards more appropriate risk taking through 'risk signalling'. This is achieved by highlighting the location, nature and scale of natural hazard risk through the availability of insurance cover and the underwriting rules and pricing applied to it. The strength of this signal grows as the premium increases to reflect greater risk or as the cover is reduced through underwriting to remove excessive risk. Ultimately cover is not provided at all. As industry continues to adopt greater risk-based pricing, this strengthens the risk signalling potential of insurers' pricing and underwriting.

If the record of title for the property has a natural hazard entry (or similar entry under section 36(2) of the Building Act 1991 or section 641A of the Local Government Act 1974), this may affect EQC and insurance cover.

If an EQC claim for damage is made that is caused by the same type of natural hazard that the section 72 notice relates to, the EQC claim may be:

- declined in full
- accepted in part
- accepted in full.

When making this decision, the insurer (as an agent of Toka Tū Ake EQC) will look at the particular circumstances of the property, the natural hazard entry on the record of title and the claim.

## **GENERAL INSURANCE COVER**

If a record of title for a property has a natural hazard entry, the property owner will usually be obliged to disclose this to their insurer. This information is material to the insurer when they are considering the terms of cover. If this information is not disclosed, it may affect any claim that is made for damage to the property caused by a natural hazard. Insurance contracts differ between insurers, and it is important that property owners discuss how these matters might affect cover.



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