

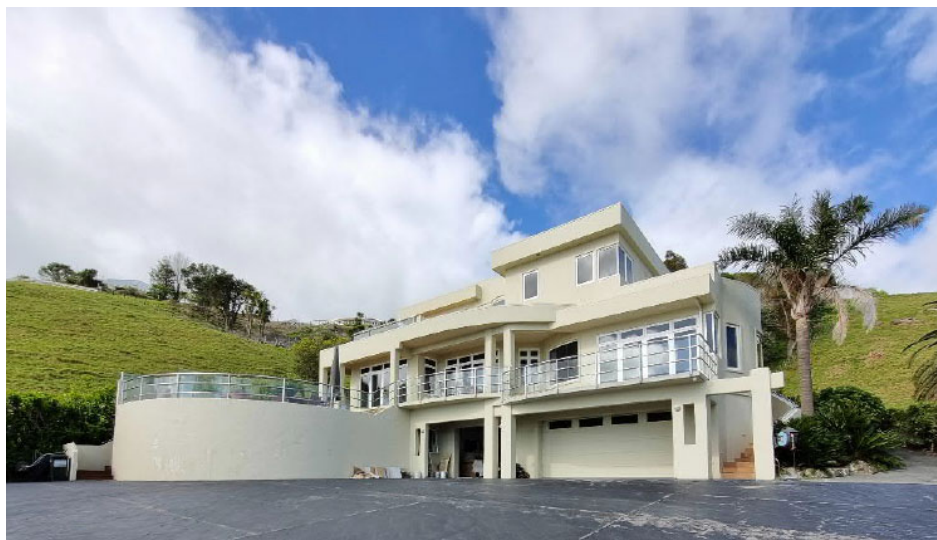
Determination 2024/045

Regarding an authority's decision to refuse to remove an entry on the record of title relating to a natural hazard under section 74

54/71 Manganese Point Road, Tamaterau, Whangarei

Summary

This determination considers an authority's decision to refuse to remove an entry on the property's record of title relating to a natural hazard. It discusses whether the property is subject or likely to be subject to the natural hazard of slippage.



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. HTE Holdings Limited, the owner of the property and the applicant for this determination (“the owner”).
 - 1.2.2. Whangarei District Council (“the authority”), carrying out its duties as a territorial or building consent authority.
- 1.3. This determination arises from the authority’s decision to refuse to remove an entry (“the hazard notice”) from the property’s record of title relating to natural hazards under section 36 of the Building Act 1991 (“the former Act”).
- 1.4. When an entry, such as a natural hazard notice, is added to a property’s record of title under section 36(2) of the former Act, it must be treated as if it had been made under the provisions of the Act which are sections 71-74².
- 1.5. Therefore, the matter to be determined³ is the authority’s decision to refuse to remove the hazard notice from the property’s record of title under section 74(3) of the Act.
- 1.6. In deciding this matter, I must consider whether the property is subject or likely to be subject to a natural hazard, and if it does, the nature and extent of that hazard.
- 1.7. This determination does not consider the authority’s decision in 1997 to issue the building consent that was subject to a condition under section 36(2), or their record keeping in relation to this.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² As set out in section 434 of the transitional provisions of the current Act.

³ Under section 177(1)(b) and (2)(a).

2. The background and building work

- 2.1. The property is a 1,452m² moderately sloping site on Manganese Point peninsula near Whangarei. The dwelling is situated within the southern half of the property, with the ground level having been cut into the site to create a partial basement with some retaining walls on the west and southern sides.
- 2.2. On 30 May 2023, the owner applied to have a section 36(2) hazard notice⁴ removed from the property's record of title. The hazard notice was added to the title in 1997 after the building consent for the original dwelling was approved with a section 36(2) condition.

The 1997 building consent

- 2.3. In 1997, the former owners of the property ("the former owners") applied for building consent BC23615 to erect a new 3-storey dwelling.
- 2.4. On 27 February 1997, a project information memorandum (PIM) noted that:

This property is subject to a Geotechnical Report [the 1983 report, see below for details] ... The general area is known to [the authority] as being stability sensitive and having poor soakage...

Construction: foundations are to be taken through fill, and groundwater control may be necessary.

- 2.5. The geotechnical report ("the 1983 report")⁵ was completed by a geotechnical engineer following a slope stability investigation at the Manganese Point subdivision in 1983. The report summarised the slope stability of the property (referred to as section 54) as follows:

... approximately 0.5m of fill and original topsoil was encountered at borehole 16 in section 54. ... Some low strength material was encountered at section 54 and should not be used for building foundations...

In section 54 ... [where] fill has been placed over the old topsoil, building foundations must be constructed on medium to high strength ground beneath the old topsoil layer. Groundwater control may be necessary for a building on section 54 if a basement cut into the ground is planned...

- 2.6. In the context of the wider subdivision, the 1983 report only provides a brief overview that "there are no existing major unstable areas affecting the sections although soil creep is active on steeper slopes".

⁴ The entry on the title reads "...certificate that a building consent has been issued in respect of a building on the land that is described in section 36(2) Building Act 1991...".

⁵ 'Manganese Point Subdivision Slope Stability Investigation', 17 May 1983.

- 2.7. On 27 June 1997, a structural engineer engaged by the former owners (“the structural engineer”) issued a Producer Statement PS1 – Design for structural calculations for the new house. On 30 June 1997, the structural engineer confirmed that a covering of fill and high groundwater levels were both present at the property, and noted that:

The design of the foundations has proceeded on this basis ... there are no stability concerns and there is no reason why the building consent cannot proceed.

- 2.8. On 25 July 1997, the authority advised the former owners that the building consent application had been suspended until the following information was provided:

Natural hazards are covered by section 36 of the NZ Building Act 1991.

Your engineer, upon appropriate investigation and analysis, should categorise the hazard/s as follows:

1. No hazard exists.
2. Hazard exists but can be mitigated by specific engineered solutions.
3. Hazards exist and can not be mitigated by specific engineered solutions.

The above statements should be supported by information supplied by your engineer.

- 2.9. On 29 July 1997, the structural engineer advised the authority that:

Based on original investigations [in the 1983 report], penetrometer testing was carried out to assess the fill. No concerns were apparent. Groundwater levels are high and a cutoff trench upslope of the dwelling recommended. There are therefore no stability concerns, as stated.

- 2.10. On 31 July 1997, in a handwritten note appended to the authority’s 25 July 1997 letter, the authority stated that:

... [The structural engineer] confirms that hazard does exist: but is dealt with by way of specific design. Issue consent subject to section 36(2) [Building Act 1991].

- 2.11. The authority proceeded to issue the building consent subject to a condition of a section 36(2) entry, being the hazard notice, on the record of title.
- 2.12. On 21 November 2001, a code compliance certificate was issued for the completed building work.

The current dispute

- 2.13. In response to the owners’ request to remove the hazard notice from the title, on 31 May 2023, the authority advised the owner that “[although] the basis of the

decision of the [authority] is not well recorded in the file...it was clearly the intention that the building consent was issued under [section] 36(2).”

- 2.14. The authority was unable to confirm, based on information provided by the owner, that a natural hazard risk was no longer present at the property, and so it declined the owner’s request to remove the hazard notice.
- 2.15. On 17 October 2023, a geotechnical engineer engaged by the owner reviewed stormwater management and flooding risks at the property based on observed performance during recent events and made conclusions in relation to inundation, finding that there was not a natural hazard of this kind on the property.
- 2.16. On 21 June 2023, the authority advised it would “be happy to progress with the removal of the [section] 36(2) [hazard notice]” if the owner presented a geotechnical assessment confirming there was no natural hazard on the property.
- 2.17. The owner subsequently applied for a determination.

3. Submissions

The owner

- 3.1. The owner is of the view that the hazard notice on the record of title is not required because there is currently no natural hazard on their property and that the hazard notice was registered in error. They have referred to previous determinations 1999/010⁶ and 2013/022⁷ in support their position. Their submissions on these views are summarised as follows.

That there is currently no natural hazard on the property

- 3.1.1. The consent file does not show that a subsidence or slippage hazard exists at the property because “there is no record nor comment making reference to ‘subsidence’”, and the former owner’s engineer consistently stated there were no stability concerns.
- 3.1.2. The engineer and authority’s compliance record (which references the engineer’s report) both state that there are no stability concerns at the property. As a result, there can also be no concerns related to subsidence or slippage because subsidence or slippage and stability are “intrinsically linked”.
- 3.1.3. The 2023 report by the second geotechnical engineer found it “unlikely that the property will be subject to the natural hazard of inundation (including

⁶ Determination 1999/010 *Section 36(2) – Condition on the building consent for a house on a flood-prone site*, (issued 10 September 1999).

⁷ Determination 2013/022 *Whether the authority was correct in issuing building consents subject to section 36(2) notifications for 7 lots in a subdivision*, (issued 3 May 2013).

flooding, overland flow, storm surge, tidal effects and ponding) on the basis of the slope stormwater management adequately protects [sic] the site”.

- 3.1.4. The property has not experienced erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage since 1997 when the dwelling was completed.

That the notification was registered in error

- 3.1.5. Information on the property file, including the 1983 report, indicates there were no stability concerns at the site, and as such the section 36 hazard notice was “applied in error and without basis and therefore should be removed”.

- 3.1.6. Information on the building consent file indicates that the dwelling was constructed in accordance with the structural engineer’s design recommendations, which were “calculated and designed to remediate any fill in the footing areas noted in [the 1983 report]”.

The authority

- 3.2. The authority believes that the entry on the record of title should not be removed. Its submissions are (in summary):
- 3.2.1. For the hazard notice to be removed, the onus is on the owner to provide a geotechnical report showing that the property is no longer at risk from a natural hazard, and this has not been done.
- 3.2.2. The hazard notice should not be removed on the basis of error. The hazard notice is not specific about the natural hazard risk but was added following discussions with the structural engineer about the property’s specific hazard risks.
- 3.2.3. Knowledge relating to the current nature and extent of any natural hazard at the property is derived from Geographic Information System (GIS) maps which are based on the 1983 report, and from information on the original consent file.
- 3.2.4. The 1997 consent file and the 1983 report indicate that the hazard risk which resulted in the section 36(2) hazard notice relates to “subsidence or land instability”, not inundation or flooding.

4. Discussion

- 4.1. The matter to be determined is the authority’s decision to refuse, under section 74(3) of the Act, to remove a section 36(2) natural hazard notice that was entered

on the property's record of title as a condition of a building consent issued under the former Act.

- 4.2. In deciding this matter, I must consider whether a natural hazard currently exists at the property, and if it does, the nature and extent of that hazard. In this case, in response to a question from the Ministry, the authority has confirmed that the natural hazard that the hazard notice is for is slippage.

Legislation

- 4.3. As noted in Determination 2015/043⁸, section 434 of the current Act requires an entry on a certificate/record of title under section 36(2) of the former Act to be treated as if it had been made under sections 71-74 of the current Act.

- 4.4. According to section 74(3):

Subsection (4) applies if a building consent authority determines that any of the following entries is no longer required:

...

(c) an entry under section 36 of the former Act.

- 4.5. Section 74(4) requires an authority to notify the relevant registrar or Survey-General when an entry on a record of title is no longer required.
- 4.6. In this case, I will consider whether, as per section 74(3), the entry on the property title is 'no longer required', rather than whether the entry should have been entered onto the title at the time the consent was issued.

The decision to refuse to remove the hazard notice

- 4.7. For an authority to consider whether a hazard notice is no longer required under section 74(3), the onus is on the owner (or the applicant) to provide evidence that the land is no longer subject to the natural hazard, or that the hazard no longer poses the same level of risk.
- 4.8. As referenced in *Auckland City Council v Logan*⁹, I must consider whether the hazard is generated outside of the property, such as from neighbouring land, as well as whether it is being caused by something on the property itself.
- 4.9. The authority's GIS information (which is based on reports and analysis completed in 2008) indicates there is a low to medium risk that slippage could occur on the property, while the 1997 building consent information demonstrates that any slippage will not be caused by something on the property. I therefore consider this

⁸ Determination 2015/043 *Regarding the authority's powers of decision in relation to a natural hazard identified on a building consent for a property*, (issued 7 July 2015).

⁹ *Auckland City Council v Logan* HC Auckland AP77/99, 1 October 1999.

information sufficient to confirm that the natural hazard is not being caused by something on the owner's property.

- 4.10. I have not been provided with any information from either party regarding relevant external factors, such as the height or pitch of the land bordering the property to the south ("the adjoining property") (figure 1).
- 4.11. However, I can conclude from the GIS maps that the foot of the slope on the adjoining property appears to be higher than the roof of the dwelling and is within 10-12m of the boundary. I also note that vegetation on the slope has recently been removed (based on the photographs provided by the owner). The GIS information indicates there is a moderate to high risk of slope instability on the adjoining property (figure 2).

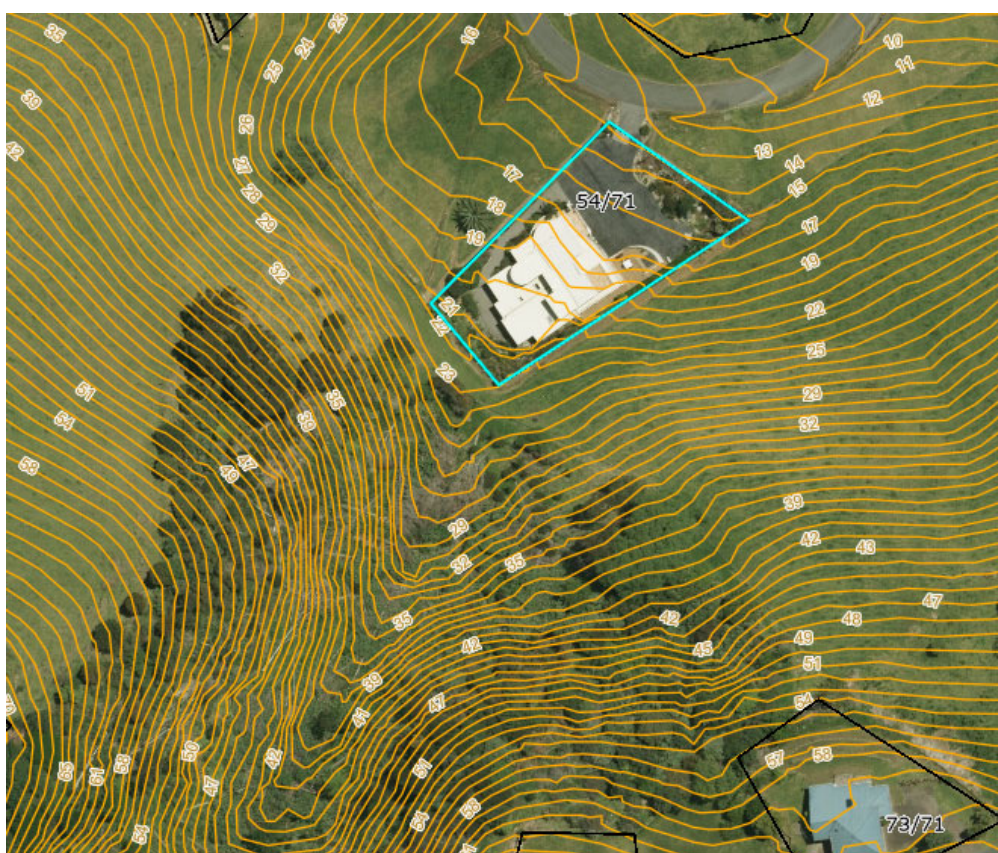


Figure 1: Whangarei District Council GIS aerial view with contours

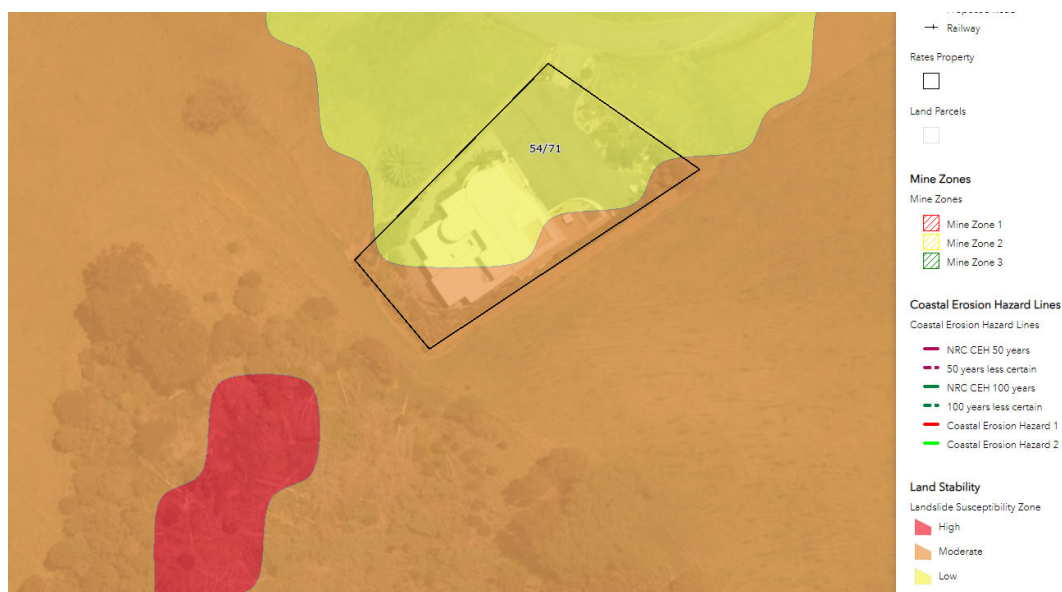


Figure 2: Whangarei District Council GIS Land Stability Map

- 4.12. The owner has provided photographs that show water run-off from the neighbouring slope being diverted around the property during a high rainfall event. However, despite the diversion, I consider the slope would experience increased susceptibility to slippage during these types of events due to elevated ground moisture levels.
- 4.13. The 1983 report, while not commenting specifically on this slope, has indicated that “soil creep is active on steeper slopes” in the area, which I consider when combined with elevated ground moisture levels, would pose a risk of a land slid occurring on the owner’s property.
- 4.14. Consequently, given the slope’s proximity to the owner’s property, and in the absence of evidence otherwise, I am of the opinion the slope poses a risk to the owner’s property and therefore, the land is still subject or likely to be subject to the natural hazard of slippage.
- 4.15. The owner has provided a report from their geotechnical engineer dated 17 October 2023 with their submission. However, I note that the report discusses inundation only, and does not address the natural hazard of slippage which is the hazard relevant to the entry on the record of title.
- 4.16. I agree with the authority that the hazard notice on the record of title can only be removed if the owner provides evidence that the land is no longer subject to or likely to be subject to the natural hazard of slippage. In this case, the owner has not provided that information.
- 4.17. Based on the evidence provided to me, I consider that the property is still subject to or likely to be subject to the natural hazard of slippage.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that there is insufficient evidence to demonstrate that the entry on the record of title is no longer required and I confirm the authority's decision under section 74(3) to refuse to remove the hazard notice.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 August 2024.

Peta Hird

Lead Determinations Specialist

APPENDIX A – Legislation

Building Act 1991

36 Building on land subject to erosion, etc

...

(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 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 related 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.

(3) Where the territorial authority determines that the entry referred to in subsection (2) of this section is no longer required, it shall send notice of the determination to the District Land Registrar who shall amend his or her records accordingly.

...

Building Act 2004

71 Building on land subject to natural hazards

...

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

(c) subsidence

...

(e) slippage

...

74 Steps after notification

...

(3) subsection (4) applies if a building consent authority determines that any of the following entries is no longer required:

(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 record of title.

...

434 Transitional provision for certain entries on certificates of title made under former Act

(1) This section applies to any of the following entries that is made before the commencement of this section:

(a) an entry on a certificate of title under section 36(2) of the former Act; and

(b) an entry in the records of the Surveyor-General or the Maori Land Court under section 36(7) of the former Act; and

(c) an entry under section 641A of the Local Government Act 1974.

(2) On and from the commencement of this section, an entry to which this section applies must be treated as if it had been made under this Act and the provisions of this Act apply accordingly with all necessary modifications.