

# Determination 2024/065

**The authority's decision to make changes to a building consent after the building consent had been issued.**

**969B State Highway 2, Waiotahe, Ōpōtiki**

## **Summary**

This determination concerns an authority's decision to re-issue a building consent, adding a condition for natural hazard notification under section 73, after it had already issued a building consent for the same building work. The determination considers whether the authority had the power to re-issue the building consent.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at [www.legislation.govt.nz](http://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](http://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”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. NJ Hutson, WJ Hutson, Ergo (HTSL) Limited and Aesculapian (HTSL) Limited (“the owners”), the owners of the property who applied for this determination.
  - 1.2.2. Ōpōtiki District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the decision of the authority to make changes to and re-issue a building consent on 3 July 2023, after it had already issued a building consent for the same building work on the 1 June 2023. The authority added a condition to the re-issued building consent, that the authority will undertake notification under section 73 of the Act. The owners dispute the authority’s power to modify the consent after it had been issued.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(a), is the authority’s decision to issue a building consent on 3 July 2023, with the addition of a condition under section 73, after it had already issued a building consent for the same building work on the 1 June 2023.
- 1.5. In deciding this matter, I must consider whether the authority had the power make changes to and re-issue the building consent on 3 July 2023.
- 1.6. The parties have used various terms such as ‘retrospectively modify’, ‘altered’ and ‘amend’ to refer to the authority’s action on 3 July 2023. For simplicity, I use the term ‘re-issue’ and/or ‘make changes to the building consent after it had issued the consent’. I consider it appropriate to use these terms because the building consent dated 3 July 2023 is for the same building work and has the same building consent number as the building consent issued 1 June 2023, having the effect of ‘re-issuing’

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

the building consent but under different provisions in the Act resulting in the addition of the section 73 condition.

## Matters outside this determination

- 1.7. The matter to be determined is limited to that outlined in paragraph 1.4 above. I have not considered:
  - 1.7.1. the building consent issued on 1 June 2023 which is outside the scope of this determination
  - 1.7.2. any other aspects of the Act<sup>2</sup> or of the Building Code, nor compliance with the Building Code of the proposed building work approved in the building consent
  - 1.7.3. whether the property is subject to a natural hazard under section 71(1)(a) and whether adequate provision to protect under section 71(2)(a) has been made. It is not necessary that I consider the application of the natural hazard provisions in order to determine the matter.

## 2. The background

- 2.1. On 1 June 2023 the authority issued Building Consent Number 4031 to the owners for the following building work:

New single storey dwelling on poles, with surrounding deck areas; Timber framed dwelling to have 2 bedrooms, 2 bathrooms, and is constructed out of [solid timber plank structural wall system]. Roof traditional timber rafters with [profiled metal] roofing. Existing septic tank / existing water tank / stormwater disposal systems are used.

- 2.2. On 3 July 2023 the authority sent a letter to the owners titled 's73 Certificate – BC4031', stating that there was an oversight in issuing the building consent without the consent condition under section 73 of the Act. The letter stated:

Due to an oversight at [the authority's] end, the Consent was issued without the requirement for a certificate under s73 of the Building Act ("s73 Certificate") to be registered on the Property's record of title.

Where a building consent is granted in relation to land subject to a natural hazard, s73 of the Building Act provides that [the authority] "must" include a consent condition requiring a s73 Certificate to be registered on the Property's record of title. The s73 Certificate notifies the Register General of Land about the Consent and identifies the particular natural hazard.

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<sup>2</sup> Including section 37.

- 2.3. The authority's letter of 3 July 2023 explained its reasons for making changes to and re-issuing the consent, it stated:

A building consent which has already been granted can be modified to include a condition requiring registration of a 73 Certificate in certain circumstances, such as where the failure to include such a condition was an administrative oversight, where the building consent was only recently granted, or where building work has not yet commenced.

Given building consent was only recently granted, and work has not yet commenced, [the authority] considers that it is required to notify the natural hazard to the Registrar of Land through the issue of a s73 Certificate. To enable this to occur, [the authority] intends to amend the Consent to include a condition for a 73 Certificate to be registered, and then prepare and register the Certificate.

- 2.4. The authority's letter also set out the potential consequences of proceeding with the project, drawing the owners' attention to section 392 of the Act which limits the authority's liability in respect of building consents granted under the natural hazard provisions of the Act. The authority attached the re-issued building consent with the additional condition stating:

This building consent is subject to the following conditions:

- a) the building consent has been issued with a notification under Section 73 of the Building Act that the land is subject to natural hazard."

- 2.5. On 5 July 2023 the owners responded to authority, questioning the authority's power to re-issue the building consent. The owners outlined that they are entitled to rely on the consent issued 1 June 2023, and had already incurred costs in doing so.
- 2.6. On 24 November 2023 the owners wrote to the authority again disputing the authority's decision to re-issue the building consent. The owners reiterated their reliance on the building consent issued 1 June 2023 and invited the authority to reverse its reissuing of the 3 July 2023 building consent.
- 2.7. On 20 December 2023 the authority responded to the owners stating:

The [authority] is not in a position to reverse that decision. The s73 notice is already registered in the title. The only basis for removing the notice is under s74(4) of the Act, which requires the building consent authority to determine that the entry is no longer required. Given that the land is still subject to a natural hazard (inundation), there is no basis on which [the authority] could reasonably remove the notification. Further, removing the notification could be taken to imply that the land is no longer subject to inundation..."

- 2.8. The authority drew the owners' attention to a 2022 letter from the Bay of Plenty Regional Council in respect of inundation, and stated:

... We consider that [the authority's] duty to ensure identification of the hazard, through the statutory requirement to provide notification under s73 where a building consent is granted (under s72) on land subject to a natural hazard, outweighs any inconvenience or frustration arising from [the authority's] oversight in not imposing the condition requiring the s73 notification at the outset.

- 2.9. The issue remained unresolved and the owners applied for a determination.

### 3. Submissions

#### The owners

- 3.1. In their application for determination, which duplicates some of their correspondence with the authority, the owners submitted (in summary):
- 3.1.1. There are no lawful grounds for the authority to re-issue the building consent on 3 July 2023, and it should be set aside.
- 3.1.2. The authority's error has denied the owners opportunity to make an informed decision about whether to proceed with the building work. It is "particularly egregious" that the re-issued building consent benefits the authority in limiting its future liability.
- 3.1.3. By the time the authority had re-issued the consent on 3 July 2023, the owners had relied on the consent issued 1 June 2023, and were therefore unable to reconsider the project or withdraw from contractual arrangements without substantial loss.
- 3.1.4. An invoice from the solid timber plank structural wall system company was raised 1 June 2023, and paid 2 June 2023, to allow for the materials to be ordered and cut to specifications, at a cost of approximately \$159,000. Date-stamped photos of 6 July 2023 show the timber plank components stacked and wrapped in a factory, ready for delivery. On the stacked timber is written "4/7/23 TREATED", referring to timber tanalised treatment. Payment also arose under the building contract.
- 3.1.5. Applying the factors considered in Determination 2019/006 to the present case would result in an unjust outcome.
- 3.1.6. Work commenced on site on 3 July 2023. (The owners provided photos date-stamped 4 and 5 July 2023, showing the building set-out and piles holes being bored.)

- 3.1.7. There is no natural hazard on the relevant land. However, if there is section 71(2) applies and issuing the building consent subject to a section 73 condition is wrong. In respect of section 71(2) adequate provision has been made to protect the land and building work from the natural hazard.

## **The authority**

### 3.2. The authority submits (in summary):

- 3.2.1. The site has a number of resource consent conditions in relation to the use of the land and protecting buildings from the effects of flooding, inundation and tsunami as far back as 1999. The Bay of Plenty Regional Council “have provided advice about the natural hazard on at least five occasions”.
- 3.2.2. The timeline and documents provided by the owners demonstrate their awareness of the inundation risk. In respect of a shed built by the owners, the owners sought and obtained consent to vary a resource consent condition, during which the owners accepted this risk.
- 3.2.3. The authority suggested a Project information Memorandum be sought prior to lodging a building consent application, but the owners did not seek one.
- 3.2.4. The building consent processing checklist “identifies that the land is subject to a natural hazard” and concluded “that the design solution (raised floor level of the dwelling), being 2.265 meters above ground, mitigated the risk of inundation in relation to the dwelling”. The checklist “clearly undertook a 71(2)(a) and s72(a) and (b) assessment, but ... failed to record [on the checklist] that s73 condition was required when a consent is granted pursuant to s72”.
- 3.2.5. Even if the building consent had been issued with a s73 condition on 1 June 2023, the applicant would not have changed their building plans or their decision to build a dwelling on the land. The owners booked building inspections and proceeded with construction works.
- 3.2.6. Section 73 of the Act is clear that, when a territorial authority grants a consent under section 72, it must include as a condition of the consent that it will undertake notification of the hazard concerned. On recognising there had been an oversight, the authority was legally obligated to modify the building consent to add a s73 condition, and to proceed with registration of a certificate on the record of title.
- 3.2.7. The factors considered in Determination 2019/006 affirm the authority’s approach to retrospectively impose notification of the natural hazard, and this discretion should generally be exercised in favour of imposing the condition given the clear statutory requirement of section 73.

- 3.2.8. It would only be in exceptional circumstances, where it was clearly inequitable for an applicant, that such a condition for notification under section 73 should not be retrospectively imposed. In this case, there is reasonable grounds for the retrospective imposition of the condition.
- 3.2.9. The notice is an important legal mechanism which serves to notify other parties, including prospective future owners. The authority is concerned that it lacks grounds for removing the notification on the title. A requirement to remove it without good reason could give rise to a misrepresentation that the land is no longer subject to the natural hazard.
- 3.2.10. The owners have not provided good reason for taking advantage of the authority's oversight when clear and timely notice (22 working days) was given of the oversight and before building had commenced.
- 3.3. Regarding references to Determination 2019/006,<sup>3</sup> I note the comments in that determination concerning the modification of a building consent were in relation to the exercise of the power under section 188(1)(a) which provides a determination may confirm, reverse or modify a decision or exercise of a power.

## 4. Discussion

- 4.1. The matter to be determined is the authority's decision to re-issue the building consent on 3 July 2023, with the addition of a condition under section 73 of the Act, after it had already issued a building consent for the same building work on 1 June 2023.

### Relevant legislation

- 4.2. To determine this matter, I must consider the relevant provisions of the Act, and whether the Act provides the authority the power to make changes to or to re-issue a building consent that has already been issued for the same building work.
- 4.3. Subpart 3 of the Act sets out the scheme for regulating building work through, among other things, building consents. Sections 40 through to 45 of the Act set out when building consent is required and how to apply, and section 48 sets out the processing of an application for building consent.
- 4.4. Section 49(1) of the Act provides a building consent authority must grant a building consent if it is satisfied that building work presented in the plans and specifications complies with the Building Code. However, if the building work is on land that is

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<sup>3</sup> Determination 2019/006 *Regarding the removal of an insanitary building notice and lack of notification of a natural hazard for a relocated building* (29 March 2019).

subject to a natural hazard for the purposes of the Act, sections 71 to 74 of the Act (“the natural hazard provisions”) must be applied.<sup>4</sup>

- 4.5. The natural hazard provisions provide for three outcomes. According to the relevant sections, a building consent must be refused under section 71(1), granted under section 49 (because adequate protection is made under section 71(2)), or granted under section 72 (which may be subject to a waiver or modification of the Building Code in respect of the natural hazard concerned).
- 4.6. If granted under section 72, a building consent authority must include, as a condition of the consent, that notification will be made under section 73. Upon notification, section 74 requires that a notice be given to the Registrar-General of Land for an entry to be placed on the Record of Title for the property with details of the natural hazard.
- 4.7. The building consent authority then receives immunity from civil liability should damage arise from the hazard identified to the building concerned, or the land on which the building is situated,<sup>5</sup> in return for permission to undertake building work. The notice entered on the Record of Title serves to alert prospective purchasers that an authority has statutory immunity from civil liability should damage to the building work or the land on which the building work is situated arise from the hazard concerned.
- 4.8. Once granted, a building consent can be issued in accordance with section 51 of the Act. Once issued to the owners, a building consent, issued under section 51, is a statutory decision authorising building work to be undertaken.<sup>6</sup>
- 4.9. Nothing in the Act provides a building consent and/or territorial authority the power to make changes to a building consent under its own initiative once it has been issued to the owners.<sup>7</sup>

### **Re-issuing of the building consent**

- 4.10. The authority received an application for a building consent to construct a new dwelling and processed the consent. The authority made its decision about the building work and finalised that decision by issuing building consent numbered 4031 on 1 June 2023 to the owners. The issuing of this consent authorised the owners to undertake the building work presented in the consent.

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<sup>4</sup> For a more detailed description of the natural hazard provisions refer Determination 2024/025, at paragraph 5.1 to 5.9.

<sup>5</sup> Section 392(2) and (3).

<sup>6</sup> Section 52 provides a building consent “lapses and is of no effect” if the building work concerned does not commence within 12 months of building consent issuance.

<sup>7</sup> An owner, on application to a building consent authority, may amend a building consent under section 45, requiring the authority to undertake an assessment of the amended building work with sections 48 to 51.



- 4.11. The owners relied on this authorisation, as they are entitled to. In doing so, the owners commenced building work on site, payment arose under the building contract, and the owners incurred costs relating to pre-cut and tanalised solid timber material to be used in construction.
- 4.12. There is no provision in the Act that gives the authority the power to make changes to the building consent in the way it has after the consent has been issued to the owners. The Act, in the absence of an explicit provision otherwise, intends a building consent, once issued, to be a final decision and statutory authorisation to undertake the work that is the subject of the building consent.
- 4.13. The lack of statutory basis is grounds to conclude the authority did not have the power to re-issue the building consent as it did on 3 July 2023.

### **Administrative oversight**

- 4.14. The authority's 3 July 2023 letter to the owners states it is able to make changes to and re-issue a building consent in cases where there has been an "administrative oversight, where the building consent was only recently granted, or where building work has not yet commenced".
- 4.15. In some circumstances a decision may be re-issued to correct an error. Section 46 of the Legislation Act 2019 provides a power "may be exercised to correct an error or omission in a previous exercise of the power" even though a power is not generally capable of being exercised more than once.
- 4.16. Section of 46 does not confer broad powers to revisit and make a new decision, rather it is limited to correcting an error or omission.
- 4.17. In this case, the authority added a condition to the building consent in the re-issuing of the consent on 3 July 2023. That condition being that the authority will undertake the notification process set out in sections 73 of the Act and section 74 provides a notice be entered on the property's Record of Title. This notice, among other things, alters and limits the authority's liability in respect of the building consent issued subject to section 73 notification. The consequences of this may impact the ability of the owner to insure the building work and/or obtain financing or may require re-design of the building work and the associated costs to do so.
- 4.18. Adding a condition as the authority has in this case and the impacts arising from that condition is a material change to the building consent. In my opinion section 46 of the Legislation Act 2019 does not provide a basis for the authority to re-issue the building consent in such a way.
- 4.19. The authority contends it undertook a '71(2)(a) and s72(a) and (b) assessment', referring to its building consent processing checklist in support of its view, and that it was an administrative oversight that resulted in the section 73 condition being omitted from the issued consent. Presumably, the authority means that when it

processed the building consent, it assessed the building work under the natural hazard provisions and granted the building consent under section 72.

4.20. Respectfully, I do not consider the authority's processing checklist supports this contention. In respect of the authority's checklist:

4.20.1. The section titled 's71 – Natural Hazard Assessment' is recorded as not applicable with no further reasoning.

4.20.2. The section titled "the building consent is also subject to the following conditions" is recorded as not applicable.

4.20.3. Under Building Code Clause B1 *Structure* notes "Land hazard identified and appropriate design solution proposed and accepted" and "expert opinion to address the hazard with respect to S71-73 requirements".<sup>8</sup>

4.20.4. Under Building Code Clause E1 *Surface Water* notes "Adequate flood level are provided."

4.20.5. There is no clear statement as to whether the building consent is being granted under section 72, nor 49.

## 5. Conclusion

5.1. There is no statutory basis in the Act that provides the authority the power to re-issue the building consent as it did subject to additional conditions on 3 July 2023, after it had already issued a building consent for the same building work on 1 June 2023. On this basis, I conclude the building consent re-issued on 3 July 2023 has no legal effect.

5.2. It follows that the authority also did not have the power to undertake notification under section 73 and have a notice entered on the property's Record of Title under section 74 of the Act.

5.3. The parties have made submissions in respect of the notice that is currently entered on the property's Record of Title, recording the particulars of a natural hazard. I acknowledge the importance of such notices as well as the impacts of such a notice.

5.4. In my view, the authority is not making a new decision about the building work, building consent, or whether a natural hazard is present. Rather, the authority is requesting the Registrar-General of Land correct an error; that the notice should not have been entered on the Record of Title because the building consent dated 3 July 2023, has no legal effect. I leave it for the authority to notify the Registrar-General of Land of this determination.

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<sup>8</sup> These comments indicate that adequate provision had been made under s71(2).

## **6. Decision**

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the authority did not have the power to make changes to and re-issue Building Consent Number 4031 on 3 July 2023.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 November 2024.

**Peta Hird**

**Lead Determinations Specialist**