

Determination 2025/011

An authority's decision to grant a building consent under section 72 for building work adjacent to neighbouring land subject to the natural hazard of slippage

70 Gargan Road, Tauriko, Tauranga

Summary

This determination considers an authority's decision to grant a building consent under section 72 for a new building on land adjacent to a neighbouring property that is subject to the natural hazard of slippage.

The matter turns on whether the neighbouring land is intimately connected with the land on which the building work is being carried out.

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. 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, Andrew Eames, Principal Advisor Determination 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. R Braithwaite, an owner of the property who applied for this determination (“the applicant”).
 - 1.2.2. H Cooney, the second owner of the property (“the second owner”).
 - 1.2.3. Tauranga City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The matter to be determined, in terms of section 177(1)(b) and (2)(a), is the authority’s decision to grant building consent BC331457 under section 72 subject to notice being given to the Registrar-General of Land under section 73(1)(c).
- 1.4. In deciding this matter, I consider whether the neighbouring land, which is subject or likely to be subject to the natural hazard of slippage, is intimately connected with the land on which the building work is being carried out.

Issues outside this determination

- 1.5. The determination will not consider compliance of any building work with the Building Code.
- 1.6. The parties in their submissions consider that the neighbouring property is subject or likely to be subject to slippage, so I have not considered the likelihood of the hazard on the neighbouring property any further.

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

2. The building work

- 2.1. The building consent is for a new 1,256m² storage facility placed centrally on a level industrial property² of approximately 2.1 hectares.
- 2.2. There are four existing industrial buildings on the property to the north of the storage facility site, with a collection of smaller structures, a carpark area and an existing residential dwelling to the south.
- 2.3. The neighbouring property to the east includes a 30m-high “densely vegetated” slope with an average slope angle of 33 degrees which drops down towards the east. The boundary between the two properties is adjacent to the storage facility site and within 10m of the crest of the slope. This slope is the subject of the determination.
- 2.4. The building consists of a new lightweight steel frame storage facility structure on a reinforced concrete slab and incorporates stormwater collection and disposal via sumps.
- 2.5. The storage facility’s eastern wall is approximately 10m from the eastern boundary with the neighbouring property and within 20m of the crest of the slope. The building consent plans show part of the stormwater disposal system including a stormwater sump for the eastern driveway area. (figure 1).

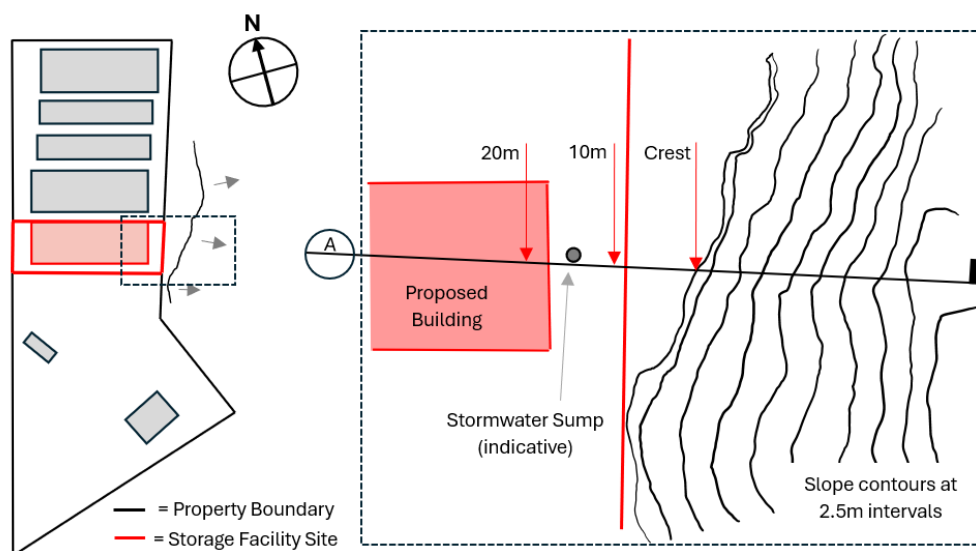


Figure 1: Property and storage facility site plan (not to scale)

² I have used ‘the property’ for the overall legal allotment and ‘storage facility site’ for the area that the building work which is the subject of this determination is being carried out on.

3. Background

- 3.1. Between 2016 and 2018, an area of rural land was developed into a multi-allotment industrial estate, with the property containing the storage facility site being one of those allotments.
- 3.2. In 2023, an application for building consent (BC331457) was submitted to the authority for the proposed building work which included plans, specifications, engineering information and a geotechnical report confirming there was “good ground”³ on the storage facility site.
- 3.3. On 18 October 2023, the authority requested further information in relation to the consent application and the general slopes in the surrounding area, which stated:

...The site is located in [the authority’s] regression slope stability overlay on [its] GIS⁴. Please have a slope stability assessment carried out by a category 1 geotechnical engineer that addresses all relevant scenarios.
- 3.4. A geotechnical report dated 30 January 2024 was provided to the authority following site-specific investigations. The investigation comprised “Cone Penetrometer Tests ... pushed to depths of up to 30m to define the ground model to provide parameters for slope stability analysis” as well as utilising the results of previous boreholes and scala penetrometer tests.
- 3.5. The geotechnical report considered factors of safety⁵ for both the static and transient conditions⁶, and generated three scenarios; the “worst case”, a 10m setback from the crest and a 20m setback from the crest (Table 1).
- 3.6. Following the Ministry’s request for information, I understand the “worst case” scenario has an initiation point at the crest of the slope. For the purposes of this determination, I will use the term *crest initiation scenario* to identify this scenario.
- 3.7. The geotechnical report concluded that the design “adequately addressed ... the results of [the] slope stability assessment”. Based on the results, with the building being set back more than 10m from the slope crest, the report concluded the ground “achieves acceptable slope stability Factors of Safety under static conditions”.

³ Section 1.3 of NZS3604:2011 *Timber-framed buildings* defines ‘good ground’ as: “Any soil or rock capable of permanently withstanding an ultimate bearing capacity of 300 kPa” with some exclusions.

⁴ This is the authority’s GIS map system where the property is shown in a slope hazard zone derived from 2023 reports of the wider Tauranga area.

⁵ See paragraph 5.13 for an explanation of Factors of Safety.

⁶ The applicant’s geotechnical engineer has described the static (also known as prevailing) long-term conditions as drained soil conditions with normal groundwater and transient short-term conditions as undrained soil or elevated groundwater.

Table 1. Site-specific factor of safety results

Location	Scenario	Slope Stability Factor of Safety	
		Static Condition	Transient Condition
Section A (see figure 1)	Crest Initiation	1.31	1.01
	10m Crest Setback	1.57	1.44
	20m Crest Setback	1.88	1.87

- 3.8. On 5 April 2024, the applicant and second owner signed an *Application for Section 72 Building Act Certificate* at the authority's request. This confirmed they understood the property on which the building work was being carried out was subject to the natural hazard of slippage and the issued building consent would be conditioned to notify the Registrar-General of Land for an entry to be made on the property's record of title.
- 3.9. On 11 April 2024, the authority issued the building consent and included as a condition "Section 71 – 73: As the building is on land subject to a natural hazard specifically slippage, the Building Consent Authority will on issue of the building consent, notify the consent to the Registrar-General of Land in accordance with section 73 of [the Act]".

4. Submissions

The applicant

- 4.1. The applicant believes that the building consent should not have been granted under section 72 as "the land on which the building work is to be carried out, and intimately connected to, is not subject or likely to be subject to a natural hazard". They have submitted, in summary:
- 4.1.1. "[The] effect of the natural hazard on the proposed building work is considered minimal or trivial, given the [approximately] 4m offset..." between the slippage hazard and the building location.
- 4.1.2. The natural hazard of slippage:
- (1) is "of sufficient offset from the building and its future ongoing use and so in the event of the slippage natural hazard, would be [of] temporary and minimal effect".
 - (2) "has no potential [to affect] the proposed building or other property in such a way as to require protection".
 - (3) "does not have the potential for causing damage that will need to be restored".

- 4.1.3. The applicant and second owner were “compelled [by the authority] to sign the application for [section] 72 certificate” in order to obtain the issued building consent.

The second owner

- 4.2. The second owner did not provide a submission.

The authority

- 4.3. The authority believes sections 71 – 74 are relevant and that it “was correct to [grant] the building consent under [section] 72” as the land on which the building work is to be carried out is “likely subject to a natural hazard”. It has submitted, in summary:
- 4.3.1. In the applicant’s geotechnical report, it was “found that in a [crest initiation scenario] over the 50-year design life of the building, the required factor of safety would only be met at a distance of 10m from the crest of the [slope]”.
- 4.3.2. The “area of the property on which the building work will... occur, ha[s] been identified as being located in a regression zone immediately adjacent to land that is highly susceptible to landslide [based on the authority’s GIS maps and associated technical report]”. The authority has identified this area as being the concrete driveway which it notes is intended to have cars parked at the entries or beside the storage units when they are in use. In identifying this, the authority has referencing *Logan v Auckland City Council*⁷ (“Logan”) and previous Determination 2024/025⁸ and believes that as part of the storage facility site is affected by the slippage hazard, this land is intimately connected with the building work.
- 4.3.3. The applicant’s geotechnical report “did not specifically address the [authority’s] concerns around landslide susceptibility in the event of rainfall or the resultant slope hazard on the land [on which the building work is to be carried out] in respect of the areas identified [in the authority’s GIS maps]”. Rather it only focussed on the proposed building.
- 4.3.4. Based on the authority’s GIS information:
- (1) The storage facility site “is immediately adjacent to a slope that has been identified... as highly susceptible to a landslide from rainfall” and,
 - (2) “If a slip does occur on that highly susceptible land, the regression zone [above the identified slope failure zone] will also be vulnerable to slippage”.

⁷ *Logan v Auckland City Council* (2000) 4 NZ ConvC 193, 184 (CA)

⁸ Determination 2024/025 ‘An authority’s decision to grant building consents under section 72’ at paragraph 6.12.

5. Discussion

- 5.1. The matter being determined is the authority's decision to grant a building consent under section 72 subject to notice being given to the Registrar-General of Land under section 73(1)(c). The authority required the building consent to be granted under section 72 as it believes the land to which the building consent relates is intimately connected to a neighbouring property which is subject or likely to be subject to the natural hazard of slippage.

Legislation

- 5.2. The legislative provision relating to construction of buildings on land that is subject to natural hazards can be found in sections 71 to 74 of the Act.
- 5.3. Section 71(1) provides that an authority must refuse to grant a building consent for certain types of building work on land that is subject to a natural hazard, while section 71(2) creates exceptions where subsection (1) does not apply.

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.
- 5.4. Section 72 identifies situations where an authority must still grant a building consent for building work, even though the land on which the work is being carried out is subject to a natural hazard.

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.
- 5.5. Section 73 describes the conditions that must be included in a building consent when it is granted under section 72, including notification of the consent to the Registrar-General of Land.⁹ Upon receiving the notification, the Registrar-General of Land must record on the property's record of title an entry confirming that a building consent has been granted under section 72 and the natural hazard to which it relates.
- 5.6. As discussed in previous determination 2024/025, one of the purposes of this entry on the record of title is to make prospective purchasers of land "aware that council would receive specific statutory immunity from liability in return for permission to undertake building work".
- 5.7. In this case, the relevant natural hazard as described in section 71(3)(e) is 'slippage'. I note that the parties, in their submissions, consider that the slope on the neighbouring property is subject or likely to be subject to this hazard.
- 5.8. As I do not need to consider the likelihood of the hazard, I turn now to consider whether the area that is subject or likely subject to slippage is connected to the land on which the building work is being carried out.

Is there 'intimate connection' to the building work?

- 5.9. Previous determinations¹⁰ have discussed the provision of section 71(1)(a) "the land on which the building work is to be carried out ...". Based on the findings of *Logan*, this is the land 'intimately connected' with the building work.
- 5.10. However, as discussed in another previous determination 2024/045¹¹, a hazard may be generated outside a property, such as from neighbouring land. Being on other property does not mean the land on which building work is being carried out is not connected to the hazard.

⁹ The Surveyor-General and the Registrar of the Maori Land Court are not applicable in this case.

¹⁰ See Determination 2018/057 'Regarding the decision to grant a building consent subject to notification under section 73 for building work on land subject to natural hazards at 177 Fitzherbert East Road, Aokautere' and Determination 2021/004 'Regarding the proposed decision to grant a building consent conditional on a natural hazard being recorded on the property title for 76 Kaiteiteri-Sandy Bay Road, Kaiteiteri, Motueka'.

¹¹ 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' at paragraph 4.8.

- 5.11. The consideration in this case is therefore whether the storage facility site is intimately connected with the neighbouring land which is subject or likely to be subject to slippage.
- 5.12. The authority has considered that slippage on the storage facility site is likely, based on the geotechnical report and using the crest initiation scenario where the factors of safety for static and transient conditions are less than 1.5 and 1.2 respectively.
- 5.13. Factors of safety are used in geotechnical engineering to “define acceptable levels of safety for soil slopes”¹². Territorial authorities and other Crown agencies commonly provide guidance on ‘typical’ values that can be used and/or met when considering the safety of a slope.
- 5.14. In this case, the authority is both the building consent authority and the territorial authority and has provided publicly available guidance which sets these typical factors of safety, and these have been used in the geotechnical report relating to the property which is the subject of this determination (Table 2). I have not considered seismic-induced slippage in this case¹³.

Table 2. The authority’s required factor of safety values

Condition	Required Factor of Safety
Static/Prevailing long-term conditions (drained soil conditions, normal groundwater)	1.5
Transient short-term conditions (undrained soil or elevated groundwater)	1.2

- 5.15. In the geotechnical report, the results shown in Table 1 detail analysis of the slope on the neighbouring property. These results are based on the geotechnical engineer’s judgement given site-specific factors and it is noted that an acceptable factor of safety for this site may not be acceptable for another site.
- 5.16. I note the authority’s submission contains information sourced from its GIS system and reports which were used to create these GIS maps. The authority has submitted that part of the storage facility site is in a mapped regression zone which, based on a 2023 technical report provided to me, is the area above a slope but set back from the crest at a ratio of 3H:1V. While I agree that part of the storage facility site is shown within the generalised regression zone, the 2023 report indicates that this is not based on site-specific data related to the property for which this determination relates.

¹² Paragraph 10.3.2.1 of *Slope Stability Geotechnical Guidance Series, Unit 1 - General Guidance*, October 2024

¹³ Earthquakes and effects from seismic events are not listed as natural hazards in section 71(3).

- 5.17. The site-specific results from the geotechnical report show that at a 10m and 20m setback from the crest of the slope, the factor of safety will be above the minimum factor of safety requirements of 1.5 and 1.2. However, the crest initiation scenario does not meet these minimums, with the static factor of safety being 1.31.
- 5.18. Based on the geotechnical engineer's results, "the slip failure plane¹⁴ depicts a rotational failure" with material slipping down and away from the property. The geotechnical engineer's modelling does not show any undermining or slippage of material behind the crest. As such, the crest initiation scenario does not reduce the distance between the building work and the crest near the property boundary.
- 5.19. The property boundary is approximately 8m from the crest initiation point. As described above, the modelling does not show this distance being reduced in any significant way should a slip occur.
- 5.20. In the geotechnical report, scenarios have been considered for the crest and at a 10m setback from the crest where the factor of safety is above the static 1.5 minimum value. At 8m from the crest, which is the property boundary, I consider the static factor of safety would be closer to 1.5 than 1.3, and that a similarly increased transient factor of safety would also be achieved.
- 5.21. Due to this setback and the expected factors of safety at the property boundary, I consider the land on which the building work is being carried out is not intimately connected to the neighbouring property which is subject or likely to be subject to the natural hazard of slippage.
- 5.22. Therefore, sections 71 to 74 are not applicable to the building consent and the consent should have been granted in the normal way under section 49.
- 5.23. In its submission, the authority has raised a concern that the owners "signed a written approval" confirming their understanding that the building consent was to be granted under section 72 and that they "agree that the land ... is subject to a slippage hazard". The authority believes that applying for a determination afterwards defeats the purpose of the approval.
- 5.24. I understand various authorities have similar processes in place that require property owners to give written approval for the issued building consent to be conditioned as per section 73. However, this approval process is not a requirement under the Act. Section 73 only requires that when granting a consent under section 72, an authority must include a condition on the consent that the Registrar-General of Land (in this case) will be notified to place an entry on the record of title.

¹⁴ The surface along which sliding of a block or wedge occurs.

6. Decision

- 6.1. In accordance with section 188, I determine that the building consent should have been granted under section 49 of the Act and I modify the authority's decision to remove the section 72 condition from the building consent. It is for the authority to communicate this decision with the Registrar-General of Land.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 February 2025.

Andrew Eames

Principal Advisor Determinations