BUILDING PERFORMANCE

Determination 2025/017

An authority's decision to grant a building consent under section 72

11 Maruia Place, Te Puna, Tauranga

Summary

This determination considers an authority's decision to grant a building consent under section 72 of the Building Act 2004. The authority's decision gave rise to a natural hazard notice being entered on the record of title for the property where the building work was to take place.

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, Andrew Eames, Principal Advisor, 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. CD Hurley, DK Hurley and P C Stuart Trustees Limited ("the owners") who, in their capacity as trustees of the Hurley Family Trust, are the registered owners of 11 Maruia Place ("the property")

1.2.2. Western Bay of Plenty District Council ("the authority"), carrying out its duties as a territorial or building consent authority.

1.3. This determination relates to building consent 80768 ("the building consent") which, on 4 June 2010, was granted by the authority for building work at the property. During the processing of that consent, the authority informed the owners of its decision to grant the building consent under section 72. After the building consent was granted, the authority gave notice to the Registrar-General of Land according to section 73(1)(c).[2] This resulted in an entry on the record of title for the property which says, "Notification that a building consent issued pursuant to Section 72 Building Act 2004 identifies subsidence and slippage as natural hazards."

1.4. The owners consider the building consent should have been granted in the ordinary way[3] and not under section 72. They consider the entry should not have been made on the record of title for the property and, therefore, should be removed under section 74.

1.5. The matter to be determined, in terms of section 177(1)(b) and (2)(a) of the Act, is the authority's decision to grant the building consent under section 72 and give notice to the Registrar-General of Land under section 73(1)(c).

1.6. In making this determination, I consider whether:

[1] The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.
[2] The Registrar-General of Land is an independent statutory officer established by the Land Transfer Act 1952 with specific responsibility for the land titles registration system.
[3] Under section 49.

1.6.1. the land on which the building work is to be carried out is likely to be subject to one or more natural hazards for the purposes of section 71(1)(a)

1.6.2. adequate provision will be made to protect the land and building work for the purposes of section 71(2)(a).

Issues outside this determination

1.7. The determination will not consider the Resource Management Act 1991 and/or District Plan requirements for the area.

2. Building work and background

2.1. The property is a 5,403 m2 section located in the Minden Rural-Residential Zone, an undulating region of Te Puna, near Tauranga. Minden was assessed for land stability by Tonkin & Taylor in 1984. In its ensuing report, Tonkin & Taylor set out their findings regarding the instability of Minden and delineated areas into zones ("the Minden zones") according to their instability risks.[4] Later those zones were revised in a subsequent report.[5] The Minden zones have been incorporated by reference into various iterations of the District Plan for the Western Bay of Plenty.

2.2. An aerial photograph, taken in 2009, shows an existing residential dwelling near the southern boundary of the property and set back approximately 14 metres from the top of a slope. It also shows an orchid shade house which extends from the bottom of the same slope towards the northern boundary of the property.[6]

2.3. In February 2010 the owners applied for building consent ("the original application for building consent") to:

2.3.1. make additions and alterations to an existing dwelling, and

2.3.2. replace an existing orchid shade house with a new shed.

2.4. During assessment of the building consent, the authority noted the proposed building works were to be constructed in areas delineated within the applicable District Plan as stability risk areas B1 and B2 and that the building sites were possibly subject to instability.[7] The authority requested the owners provide a geotechnical report for "all foundation works in [areas] B1 and B2".

[4] *Stability Assessment, Residential Land Minden and Maketu, Tauranga County*, Tonkin & Taylor Ltd, July 1984.
[5] *Geotechnical appraisal Minden Area Western Bay of Plenty District Council*, Tonkin & Taylor, January 1992 (I refer to this as "the 1992 report").
[6] This building of 1000m^2 was demolished, in late 2009 or early 2010, prior to the commencement of the building work concerned.
[7] I understand the proposed shed and the slope were within an area delineated 'B1' and the proposed dwelling alterations (at the top of the slope) within an area delineated 'B2'.

2.5. The District Plan, applicable at that time, describes these areas as follows:

> Area B1 is land where mass movement is evident or where the slope gradient is such that instability or erosion could occur, particularly if developed.
>
> Area B1 may be summarised as land potentially subject to instability...
>
> Area B2 is land where the slope gradient is such that instability is not considered likely to occur, and no mass movement is evident, but is similar to land where instability and erosion has occurred elsewhere in the Western Bay of Plenty in similar materials due to cutting and/or filling and/or on site disposal of stormwater.
>
> The risk of instability or erosion is greater in areas delineated B1 than B2.
>
> Area B2 may be summarised as land potentially subject to instability but less so if there is no on-site disposal of sewage or stormwater concentration, no significant vegetation removal, no significant cutting or filling.

2.6. The owners commissioned a geotechnical engineering firm which produced a report ("the geotechnical report").[8] The report contains a description of the geology of the wider area, site-specific observations, the results from subsurface investigations,[9] an engineering evaluation and recommendations (which included two remedial options, and an engineer designed solution).

2.7. The report notes "[the property] is situated over a moderate to steeply graded north-west trending ridge feature and associated escarpment[10] that appears to have been earthworked[sic] to create the current landform." According to the report, the slope spanned approximately 30 metres, comprising ground ranging from 25 to 45 degrees from the horizontal.

2.8. The report notes the owners' proposal, "to construct additions to an existing dwelling above moderate to steeply sloping topography and construct a 7 x 12 metre shed on level ground some 7 metres beyond the toe of the same sloping topography."

2.9. The report noted the presence of a "low cut batter" at the bottom of the slope which it considered to have been "newly formed" ("the pre-existing batter").[11]

[8] I note the geotechnical report pre-dates the authority's approved amendments to the consent (which include building works to construct a new deck).
[9] The investigations included six hand auger boreholes to depths of up to 5.2 metres below the surface, in conjunction with in-situ shear vane tests. Dynamic cone penetration (DCP) tests where completed at the base of selected boreholes where stiff substrata were encountered.
[10] In geological terms, an 'escarpment' is a steep slope or cliff between two relatively level areas.
[11] I have seen inspection notes dated 31 May 1994 which detail a tyre crib batter running the length of the slope; it records the settlement of that batter, indicated by "minor" tension cracking on the concrete capping at its top, and "minor" water seepage at its base. A different type of batter is described in the geotechnical report; therefore, I assume the tyre crib batter had been removed by then.

2.10. The report says:

> The upper portion of the escarpment directly below the existing dwelling is moderately steep (25 degrees to the horizontal) where fill soils appear to have been pushed out over the original slope. The lower portion is steep to very steep (45 degrees to the horizontal), where excavations have been completed into the escarpment toe associated with previous land use activities.

2.11. The report includes a site plan, and cross section of the proposed site and the slope. These drawings show an area of fill ("the pre-existing fill") which appears to have been placed directly over the former ground. It is present from the perimeter of the existing dwelling, extending about 12 metres to the top of the slope, and then downslope a further 16 metres approximately. From there, the remaining slope is a cut made by earthworks, spanning about 10 metres, with several layers of differing subsoils exposed.

2.12. Both drawings show the dwelling additions (as proposed at that time) sited partially over the pre-existing fill (by around 4 metres).[12] The northern perimeter of those additions is shown approximately 8 metres away from the top of the slope. The shed (as proposed at that time) is shown approximately 3.5 metres away from the pre-existing batter at the bottom of the slope.

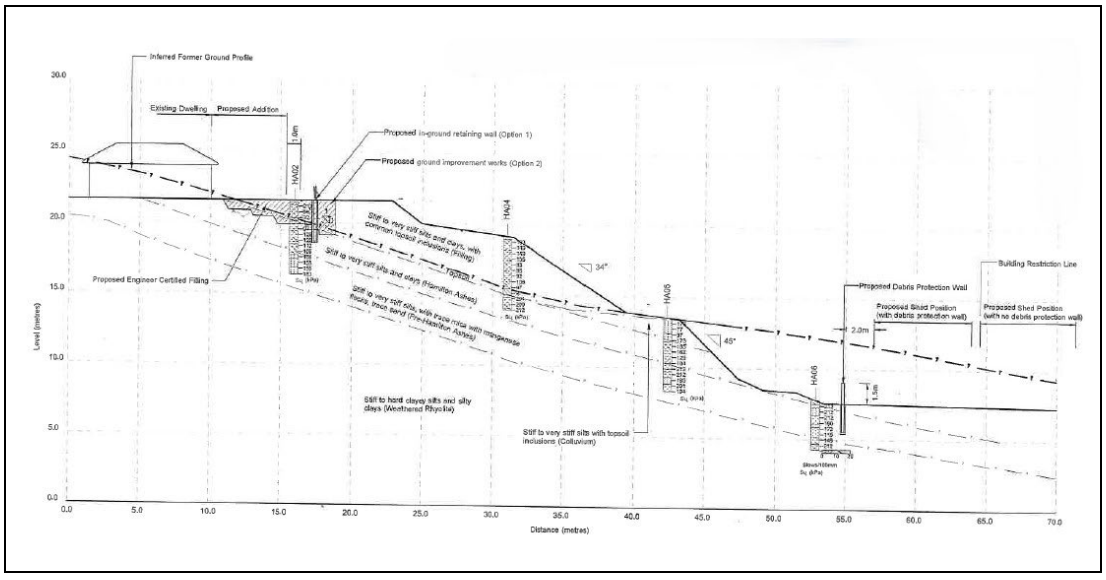

Figure 1: Cross section of proposed building sites and sloping topography

[12] I note that these drawings do not show the deck which was later included by way of an amendment to the building consent.

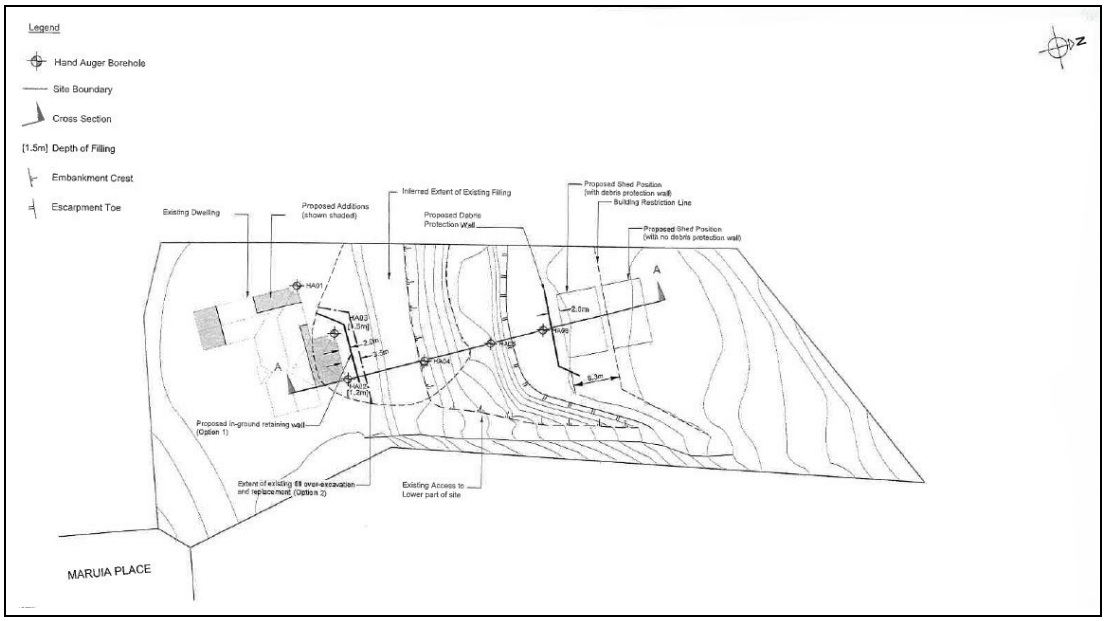

Figure 2: Site plan

2.13. The report identifies risks both in terms of loss of soil from below the proposed dwelling additions and in terms of failure of the slope above the proposed shed. It then sets out remedial options and an engineer designed solution for areas of the slope where factors of safety were lower than the minimum factor of safety set by the report's author.

2.14. In relation to the dwelling additions (as proposed in the original application for building consent), the report set out two remedial options which it considered appropriate to protect those additions from instability risks:

> Option 1 considers construction of an in-ground retaining wall to intercept potential failure surfaces so that the required seismic slope stability factor of safety is achieved for the proposed building additions. The appended results [in the report] show that for this scenario the building additions achieve a slope stability factor of safety of greater than 1.3 during the ULS seismic event.
>
> Option 2 considers the over-excavation and replacement of existing the filling and underlying topsoil horizon from beneath the proposed building additions. In this instance, the appended results [in the report] show that a slope stability factor of safety greater than 1.6 is achieved during the ULS seismic event.

2.15. Further, the report noted the owners were seeking consent to build a shed "on level ground some 7 metres beyond the toe of the [escarpment]."[13] If the shed was built in that position, the report required construction of a debris protection wall as a

[13] The report determined a building restriction line (BRL) beyond the escarpment toe. The report shows the proposed shed within that area.

"precautionary measure to provide protection in the event of a landslip and to contain potential landslip debris."[14] I refer to this as the "debris barrier".

2.16. The report specified that the debris barrier be constructed on flat ground 1.5 metres in front of the pre-existing batter and with a height of 1.5 metres above the ground. These specifications were to provide for a debris collection area behind the debris barrier.

2.17. The report also said the "design of the [debris barrier] should consider impact loads arising from fluidised slip debris." It also provided a preliminary assessment that the debris barrier should comprise:

> … 225mm SED x 3.4 metre long, H5 treated timber poles concrete encased within a min. 450mm diameter x 1.9 metre deep hole at 1.0 metre centres. 150mm x 50mm H4 treated rails should be fixed behind the poles in a hit and miss pattern and spanning a minimum 3 poles.

2.18. After the authority was provided the geotechnical report, it advised the owners that building consent would be granted under section 72 and notified to the Registrar-General of Land under section 73. The authority asked for an acknowledgement of this, which the owners gave in writing.

2.19. The building consent was granted to the owners 4 June 2010. In the cover letter for the building consent, the authority said that it would issue building consent for the proposed building work "subject to [a] section 73 (building act 2004) endorsement on [the] title [for the property]…".

2.20. Subsequently, the authority notified the District Land Registrar that it had granted the building consent under section 72 on the grounds that "the land [at the property] is subject to [the natural hazards of subsidence and slippage]." An entry was made on record of title for the property about the consent and the two natural hazards identified by the authority.

2.21. Shortly after the building work commenced, ground improvement works were undertaken at the property.[15] Once complete, those works were inspected by the geotechnical engineering firm, who produced a draft letter[16] which said that they were carried out in accordance with the recommendations in the report.

2.22. Later, two sets of building consent amendments were approved by the authority. The first set of amendments included modifications to the dwelling additions, while the second included the construction of a new deck ("the amended dwelling additions"). In relation to the deck, the authority noted, "As this is an amendment

[14] The report said that the debris barrier would not be required if the proposed shed was constructed outside the BRL.
[15] Those works are one of two remedial options set out in the geotechnical report. That being option 2.
[16] No final version of this letter has been provided.

the deck will be part this [building consent therefore] the deck is covered by the [section] 73 on the original application."

2.23. The deck foundations were placed into the pre-existing fill, unlike the originally consented dwelling additions which were constructed over the ground improvement works.[18]

2.24. Later, the shed was built and was sited within the BRL. Consequently, to meet the requirements of the geotechnical report a debris barrier should have been constructed between the pre-existing batter and the shed.[19] This was not done. Instead, the pre-existing batter was removed and replaced with a retaining wall ("the retaining wall"). The retaining wall was built against the slope and retains ground to a depth of 1.5 metres. Notably, the top of the retaining wall is level with the ground behind.

2.25. On 26 March 2012 the authority issued a code compliance certificate for the building work.

2.26. In 2019 the owners requested that the authority take steps under section 74 to have the entry, regarding the building consent and natural hazards, removed from the record of title for the property. The authority responded by letter saying that it was not willing to do so as it considered "[notice] was appropriately given [to the Registrar-General of Land] and registered against the title in accordance with sections 72 and 73 of the Act."

3. Submissions

The owners

3.1. The owners submit, during the application process for the building consent, the authority made it clear to them that agreeing to the notification was a pre-requisite for obtaining building consent. Consequently, they signed a form acknowledging the consent would be granted under section 72 and notified to the Registrar-General of Land under section 73.

3.2. The owners submit that the authority should have granted the building consent in the ordinary way and without requiring that the Registrar-General of Land be notified under section 73. The owners submit:

> In respect of the building work to the [existing dwelling] constructed within the B2 Minden zone:[20]

[18] It appears some of the top of the pre-existing slope may have been excavated in order to construct the deck as designed.
[19] See paragraph 2.15 above.
[20] I note that the owners say that this submission also applies to the deck, which was included in the building consent by way of an amendment. They confirmed that the deck foundations extend out over the pre-existing fill but, in their view, were placed in "good ground". They note that the deck and its

(i) The land on which the building work was carried out was not subject to or likely subject to a natural hazard, nor likely to accelerate or worsen a natural hazard pursuant to s 71(1) of the Act.

(ii) Alternatively, adequate provision was made to protect the land and building work from the natural hazard pursuant to s 71(2)(a) of the Act by an engineered design solution contained in the Geotechnical Report.

In respect of the [shed] that was constructed within the B1 Minden zone:

(i) The [shed] was a replacement outbuilding pursuant to Clause 7 of Schedule 1 of the Act, so did not require a building consent.

(ii) Alternatively, adequate provision was made to protect the land and building work from the natural hazard pursuant to s 71(2) of the Act by an engineered design solution contained in the Geotechnical Report.

3.3. The owners refer to *Logan v Auckland City Council* (2000) 4 NZ ConvC 193, 184 (CA) ("*Logan*") at [33] and submit "a territorial authority is required to exercise common sense and discretion when applying the natural hazard provisions of the Act."

3.4. The owners refer to Determination 2017/055 at paragraph 6.2.7 and say:

> Each element of s 71 requires considerations of fact and degree. These considerations include whether a natural hazard is of such minimal effect that it would not be appropriate to apply s 71.

3.5. The owners say, "In applying the natural hazard provisions of the Act, a territorial authority must be mindful of the potential impacts of a s 73 notice" and then quote *Logan* at [33]:

> Whether the risk is at the level and frequency to justify the expense and other implications of making adequate provision to protect the land and, if not, to require a warning notice, which is a blot on the title and may have significant insurance implications, will always be a sensible assessment involving considerations of fact and degree.

3.6. The owners submit that the authority did not establish that the property was subject to a natural hazard and state:

> …considered the [owners'] property to be subject to a natural hazard **because** it fell with the Minden B1 and B2 stability zones, and this was notified on the LIM.

3.7. The owners say:

> …the Minden B2 zone, is 'land where the slope gradient is such that instability is **not considered likely** to occur, and **no mass movement is evident** but is similar to land

foundations were subject to the usual Council inspection regime and that code compliance was issued in respect of the deck.

> where instability and erosion has occurred elsewhere in the Western Bay of Plenty' and 'may be summarised as land potentially subject to instability'
>
> [owners' emphasis]

3.8. The owners submit:

> For [section 71 to apply], the [owners'] property has to be more than just sloping. Rather, it needs to have the risk characteristics of a history of slippage and subsidence, which it did not, or a likelihood of slippage or subsidence which, in the [authority's] own words, it did not.[21] At best, there was "potential instability' based on its similarity to land elsewhere in the region. It is submitted that this falls well short of the requirements of the Act.

3.9. The owners say, "even if it is accepted that the slope of the [owners'] property is a natural hazard, it is submitted the [authority] ought to have granted building consent under s 71 of the Act and not under s 72 as was the case."

3.10. In support of this view, owners submit that they made adequate provision to protect the land and the building work from the identified natural hazards. They highlight the ground improvement works (at the top of the slope) and the construction of the retaining wall (at the bottom of the slope).[22]

3.11. In relation to the retaining wall (constructed at the bottom of the slope), the owners say, "…as a code compliance certificate was issued … it is reasonable to presume that the [authority] was satisfied that any consent conditions [in relation to the building work] were met."

3.12. The owners submit that, in any event, the natural hazard provisions cannot apply to the shed, despite its inclusion in the building consent, because the Act provides an exemption from the requirement to obtain consent for that work (by way of clause 7 of Schedule 1 of the Act). They go on to say, "If MBIE accepts [this submission], it follows that a building consent under s 72 was not required, and any questions relating to the retaining or design of the retaining wall are not relevant to whether a s 73 notice should be on the title."

3.13. The owners submit that "nothing turns on the amended consent and it is referenced [by the owners] only for completeness, and to explain the delay in obtaining code compliance…". They say, if the authority had insufficient grounds in June 2010 to grant consent under section 72, later events (such as the amendments

[21] I have not seen any evidence of the authority acknowledging that the property is not likely to be subject to subsidence or slippage.

[22] The owners say that they cannot recall why a retaining wall was favoured over the debris barrier that was recommended in the geotechnical report. They say that the retaining wall is the same height as the debris barrier (1.5m) and the shed is much further away from the wall than the minimum required distance of 2m. The owners note that code compliance was issued for the shed so they consider any arrangement must have been agreed with the authority otherwise code compliance would not have been granted.

to the consent) cannot be used to justify notification to the Registrar-General under section 73.

3.14. In any event, they note that the deck, which was added to the consent by an amendment, was placed in "good ground"[23] and was subject to inspections by the authority. They note that a code compliance certificate was issued, following the completion of the consented works, and that it confirms all the building work, including the deck, was completed in accordance with the building consent.

3.15. The owners conclude that the authority had no basis to place a notice on the title of the property under section 73, and no basis to refuse their request to remove the notice under section 74.

The authority

3.16. The authority submits:

(a) The land on which the building work was carried out is likely to be subject to a natural hazard, namely subsidence and/or slippage (section 71(1)(a));

(b) while adequate provision was made to protect the building work from the natural hazards (section 71(2)(a)), the land remains subject to those natural hazards; and

(c) It therefore was, and remains, appropriate and lawful for the building consent to be granted under section 72 and subject to a natural hazard notice under section 73 of the Act in relation to the risk of subsidence and/or slippage of the land.

3.17. The authority says that the building consent included the condition that they would notify the consent to the Registrar-General of Land. It submits that condition is set out in the letter which notified the owners that the building consent had been issued.[24]

3.18. The authority submits:

> …given that the existing house area at the time of the building consent application was 186m² and the total additional area was proposed as 112m²…, the building works would be considered "major alterations" for the purposes of section 71(1).

3.19. The authority submits that it is appropriate to treat 'the land', for the purposes of section 71(1)(a), as relating to the property as a whole because, in their view, of the connection between the higher land, where the dwelling is located, and the lower portion of the property, and both areas being within Minden stability zones.

[23] This is despite confirming that the deck was constructed on the pre-existing fill.
[24] I note that the building consent, in its prescribed form, did not include this condition. This matter is addressed below in the section titled "Remedies".

3.20. The authority submits the hazards of subsidence and slippage meet the threshold of "likely" because the land has been identified as 'land potentially subject to instability' and that means that subsidence and slippage could well happen.

3.21. The authority submits that the building work "would not itself accelerate, worsen or result in [subsidence or slippage] on the site or any other property."

3.22. The authority provided a statement setting out observations in relation to the available evidence and further explains the "[authority's] position on the need for the section 73 natural hazard notice to remain on the property's title."

4. Discussion

4.1. The matter for determination is the authority's decision to grant the building consent under section 72.

4.2. To determine whether the Act requires the building consent to be granted under section 72, I must consider whether the statutory threshold in 71(1)(a) applies[25] and, if so, whether adequate provision will be made for the purposes of section 71(2)(a).

4.3. Section 71(1)(a) provides, "…[a] building consent authority must refuse to grant a building consent for construction of a building, or major alterations to a building, if… the land on the which the building work is to be carried out is subject to or is likely to be subject to 1 or more natural hazards".

4.4. In order to decide whether section 71(1)(a) applies to this particular set of circumstances, I consider each of its requirements in turn.

4.5. First, whether the building works are "construction of a building" and/or "major alterations" for the purposes of section 71(1).

4.6. I note that the existing dwelling was 186m^2 when the owners applied for building consent. The consented building work, as set out in the original set of approved plans and specifications, alters elements within the existing dwelling and adds a further 112m^2 to its floorplan. The deck amendment adds a further 66.6m^2 to the dwelling. The consented building work and the amendments increase the floorplan of the dwelling by 49%. Therefore, I consider this to be 'major alterations' for the purposes of section 71(1).

4.7. I consider the building work in relation to the shed, as set out in the building consent, to be the 'construction of a building' for the purposes of section 71(1)(a).

[25] I understand that the parties agree that the proposed building work is not likely, for the purposes of section 71(1)(b), to accelerate, worsen, or result in a natural hazard on that land or any other property. It is disputed, however, whether the land where the building work is being carried out is subject to, or is likely to be subject to, natural hazards under section 71(1)(a).

4.8. Next, I consider whether there is sufficient evidence to merit an assessment of section 71(1)(a) in relation to the consented building work.

4.9. According to the Minden reports, land at the property has the potential to slip or erode.[26] I note the proposed building sites were within Minden zones B1 and B2 and were close to a slope which had earlier undergone development including cutting and filling. I also note the authority's inspection notes which record the presence, in May 1994, of water seepage and the tension cracking with respect to a tyre crib batter on the slope. These factors give rise to a concern that the proposed building sites are or will be affected by one or more natural hazards (for example, slippage).

4.10. Therefore, I consider that it is appropriate to assess, under section 71(1)(a), whether the land where the building work is to be carried out is likely to be subject to one or more natural hazards. In doing so I will take account of the consented building work (which includes the subsequent amendments.

4.11. I note the proposed building work:

4.11.1. is not confined to one area at the property; notably, most of the work was to take place at or near the top of the slope, with other work to be constructed, some 40 metres away, at or near the bottom of the slope.

4.11.2. occupies a relatively small area at the property.[27]

4.12. As a first step, I consider which, if any, hazards are relevant to the assessment under section 71(1)(a).

4.13. Importantly, the Act limits the application of the natural hazard provisions to a specified list of hazards ("the listed hazards").[28] The Act does not provide definitions for these hazards. Although, for some, it does provide a list of the things the word or phrase can include. For example, the listed hazard of 'falling debris' includes 'soil, rock, snow, and ice'.

4.14. I understand, at the time the consent was processed, land instability at the property could cause:

4.14.1. the undermining or destabilisation of land where the dwelling additions were to be carried out ("the upper area")

4.14.2. the inundation, by soil, of land where the shed was to be built ("the lower area").

[26] Notably, the 1992 Minden Report, at page 6, says "Landslippage, and to a lesser extent tunnel and tunnel/gully erosion, presents an identifiable hazard to development in the Minden area. Particularly at risk are any structures situated on, immediately above or below hillslopes susceptible to landslippage."
[27] The size of the property is 5,403m^2 while the coverage of the new building work is 451m^2.
[28] See section 71(3).

4.15. I consider that the word 'slippage' most appropriately describes the former and the phrase 'falling debris' the latter.[29]

4.16. As a second step, I consider whether these listed hazards are *likely* for the purposes of section 71(1)(a).[30]

4.17. There are a broad set of factors which indicate the risks from land instability to both the upper area and the lower area were significant:

4.17.1. The property was located within the broader Minden area, which has been identified by the Minden reports as vulnerable to slips and erosion.

4.17.2. The slope, and land extending out from the bottom of the slope, was within Minden zone B1. This is "land where mass movement is evident or where the slope gradient is such that instability or erosion could occur, particularly if developed."

4.17.3. The land extending from the top of the slope was within Minden zone B2. This is land which "is similar to land where instability and erosion has occurred elsewhere in the Western Bay of Plenty in similar materials due to cutting and/or filling and/or on site disposal of stormwater."

4.17.4. The slope comprised of uneven ground ranging from 25 to 45 degrees from the horizontal and spanning about 30 metres.

4.17.5. The slope and the land extending out from the top and bottom of the slope had earlier been developed. As a result of that development:

- fill extended back from the top of the slope about 10 metres over level ground
- the top two thirds of the slope was covered with fill (spanning about 16 metres, with a depth of up to 4 metres).
- the lower third of the slope was a cut (spanning about 10 metres, where soils up to a depth of 5 metres had been excavated).

4.17.6. The geotechnical report says, "It must be accepted that there will always be some likelihood of future ground movement due to the moderately to steeply sloping terrain in this area."

4.17.7. The factors of safety for the "existing slope" (calculated by the owner's geotechnical engineer for prevailing groundwater and elevated pore

[29] I note that, in addition to 'slippage', the authority identified 'subsidence' as a hazard relevant to the building consent. I have received no evidence that any of the land where the building work was to be carried out was subject or likely to be subject to 'subsidence'.
[30] In this determination, I consider it appropriate to apply the same meaning to 'likely' as applied in Determination 2024/025 at paragraph 6.18.

pressure conditions)[31] were *lower* than their target minimum factors of safety.[32] [33]

4.17.8. The geotechnical report says "[at the property] there is likely to be a tendency for short term piezometric pressures to develop with confined sandy layers during and immediately following prolonged or intense rainfall."

4.17.9. The owner's geotechnical engineer set a BRL approximately 10 metres out from the bottom of the slope.

4.17.10. The geotechnical report recommends that vegetative cover is kept (or improved) on the slope to manage land instability risks.[34]

4.17.11. In 1994 there had been a tyre crib at the property which appears to have extended the entire length of the slope; at the time of the consenting process, there was a new low-cut batter at the bottom of the slope.

4.17.12. The geotechnical report says, "A small wedge of colluvium was encountered at the lower part of the escarpment, comprising stiff to very stiff silts with abundant topsoil inclusions to 1.7 metres depth… It is inferred that these materials would have accumulated at the toe of the former slope over many years as a result of soil creep and minor episodes of soil instability, prior to the subsequent excavation"

4.18. I acknowledge there are some countervailing factors which suggest the instability risk may not have been as significant as indicated by the factors above.[35] However, having the considered the weight of the available evidence, I am persuaded that:

4.18.1. the upper area, as it presented, was likely to be undermined or destabilised due to land instability below or downslope.

4.18.2. the lower area, as it presented, was likely to be inundated by soil due to land instability above.

[31] I consider that seismic-induced ground movement does not fall within the meaning of 'natural hazard' in the Act. Therefore, I have not used the seismic stability analyses (including the seismic factors of safety), set out in the report, to determine whether the threshold in section 71(1)(a) is met.
[32] Factors of safety are a common measure of a slope's stability. I note that it is a quantitative measure, which, while useful evidence, does not on its own calculate the probability of slope failure.
[33] The geotechnical report also provides factors of safety for "below [dwelling] additions" and states, "Results show that the proposed building additions meet the required stability factors of safety under prevailing groundwater and elevated pore pressure conditions." I note, however, these factors of safety, do not take account of the deck amendment, which extends further towards the slope than the originally consented work. Therefore, I give these factors of safety for the proposed building additions less weight.
[34] I note that vegetation does not constitute building work and, therefore, is not regulated by the Act.
[35] For example, the geotechnical engineer's observation that there was no obvious evidence of settlement or cracking of the existing dwelling (which had been constructed near the top of the slope 30 years prior).

4.19. Therefore, I find that the land where the building work was to be carried out is *likely* to be subject to the natural hazards of 'slippage' and 'falling debris'

4.20. Next, I consider whether, for the purposes of section 71(2), adequate provision was made to protect the land and the building work. If adequate provision was made for *both*, section 71(1) will not be applicable and, in turn, the building consent should have been granted without a hazard notice being entered on the property title.

4.21. I note that ground improvement works were undertaken at the upper area.[36] Those works, however, do not extend below the deck (which was added to the consent by way of an amendment). I consider the deck and the land immediately below to be intimately connected.[37]

4.22. The deck was built on top of the pre-existing fill. Having considered the building work undertaken, I am not satisfied that adequate provision has been made to protect the land associated with the deck from the hazard of slippage.

4.23. As an aside, I note that neither party has given me sufficient information to determine whether adequate provision has been made to protect the building work on the upper area from slippage.[38] Therefore, I make no finding in this respect.

4.24. I note that the owner's geotechnical engineer recommended the construction of the debris barrier on the lower area to protect the shed. A debris barrier, however, was not constructed. Instead, an existing batter was removed and replaced with a retaining wall.[39] The retaining wall does not have the ability to prevent falling debris from overtopping the wall and running out onto the land beyond the bottom of the slope and the shed. Having considered the building work undertaken, I am not satisfied adequate provision has been made to protect the shed, or the land associated with the shed, from the hazard of falling debris.

4.25. As adequate provision for the purposes of section 71(2) has not been made in these circumstances, the only way for consent to be granted is by achieving the criteria set out in section 72. In this case the criteria are met because:

4.25.1. the building work will not accelerate, worsen or result in a natural hazard on the land concerned or other property and

4.25.2. the land concerned is likely to be subject to one or more natural hazards (those being slippage and falling debris).

[36] See paragraph 2.22 above.
[37] In considering the need to "protect the land" for the purpose of section 71(2), it is the land intimately connected with the building work that is relevant.
[38] For example, it is unclear whether the deck foundations are of sufficient length to go through the pre-existing fill into the pre-development soils.
[39] See paragraph 2.25 above.

4.26. In these circumstances, section 72(c) is not applicable because no waiver or modification was considered in relation to the proposed building work.[40]

4.27. Therefore, I consider there were grounds to grant the building consent under section 72. Consequently, the authority was required under section 73 to include, as a condition of the consent, that they would, on issuing the consent, notify the consent to the Registrar-General of Land and identify the natural hazards concerned.

5. Remedy

5.1. Under section 188(1) I have the power to confirm, reverse or modify the decision by the authority to grant the building consent.

5.2. I note that the prescribed form for a building consent contains a field to enter any conditions that the consent is subject to.[41] The building consent provided by the authority to the owners did not include the condition required by section 73.

5.3. From the information available to me it is clear that:

5.3.1. the owners were made aware by the authority (prior to and at the time of issuing the consent) that the building consent would be or was granted under section 72 and subject to the condition that notice would be given to the Registrar-General of Land under section 73 regarding the consent and the listed hazards of 'slippage' and 'subsidence'

5.3.2. the authority intended to grant the building consent under section 72 and subject to the condition of notification to the Registrar-General of Land under section 73

5.4. Based on this, I am of the view that the section 73 condition was missed off the issued building consent; put another way, it was an omission or error.

5.5. In these circumstances, it is appropriate to modify the issued building consent to include the condition (which is required under section 73) to notify the consent, and the natural hazards of slippage and falling debris, to the Registrar-General of Land.

[40] Earlier determinations have considered this criterion to be met where the proposed building work will comply with the Building Code in all respects. For example, see Determination 2007/110.
[41] See Form 5, Schedule 2 of the Building (Forms) Regulations 2004 for the prescribed form for building consents.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that there were grounds for the building consent to be granted with the condition that the Registrar-General be notified under section 73. I modify the decision to grant the building consent to include the condition under section 73 to notify the consent, and the natural hazards of slippage and falling debris, to the Registrar General of Land.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 4 April 2025.

Andrew Eames

Principal Advisor Determinations