



Duty to inform

How to protect yourself when issuing conditional consents.

COUNCILS OUGHT TO CONSIDER ADVISING LANDOWNERS TO TAKE INDEPENDENT LEGAL AND TECHNICAL ADVICE.

Councils commonly receive applications to construct or alter a building on land containing a natural hazard. In certain circumstances a council is required to issue a “conditional consent” pursuant to s72 of the Building Act 2004. This may carry implications for the council and the property owner. What steps can the council take to protect itself in this situation?

Natural hazards are a feature of the New Zealand landscape. While they come in various forms, s71(3) of the 2004 Act defines them as land subject to erosion, falling debris, subsidence, inundation and slippage.

When faced with an application to build on land featuring a natural hazard, councils must refuse to grant consent if the land is subject to one or more natural hazards, or the building work is likely to accelerate, worsen or result in a natural hazard on that land, or any other property.

The restriction does not apply when the council is satisfied that adequate provision has been or will be made to protect the land, building work, or other property from natural hazards; or restore any damage to that land or other property.

What constitutes “adequate provision” will be site specific. Councils can confirm compliance by requiring provision of a site specific report from a chartered professional engineer in support of the building consent application. The report should record that the applicable statutory requirements will be satisfied by specific reference to those requirements and a detailed description of the method of compliance.

A PS1 certification of the design and assessment of compliance with the New Zealand Building Code should also be required.

Despite s71, the council must issue a building consent for building work on land subject to a natural hazard if the work will not accelerate, worsen, or result in a natural hazard on the land, or any other property; the land is subject or is likely to be subject to one or more natural hazards; and it is reasonable to grant a waiver or modification of the building code in respect of the natural hazard concerned (s72).

Each time an “s72” consent is issued the council must impose a condition on the consent and notify the Registrar-General of Land under s73. This notification alerts prospective purchasers (and those such as lenders or insurers) via the certificate of title (CT) that the land is subject to a natural hazard.

In terms of protecting the council’s potential liability, s392 of the Building Act provides that the council is protected from civil liability where a notice has been issued under s73.

However, thought also needs to be given to whether the council is obliged to advise the land owner of the additional implications of a “conditional consent”. These implications can be onerous, for example, if the owner makes an EQC claim for damage caused by the type of natural hazard that caused the entry to be made, EQC has the discretion to decline the claim.

Councils ought to consider advising landowners to take independent legal and technical advice so that they understand and acknowledge the nature of the hazards and any legal ramifications arising from a notification registered on their CT. Written confirmation on the council’s property file that this step has been taken would also be of assistance if issues arise from the natural hazard at some time in the future. **LG**