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Thursday, 7 September 2023

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*Te Hui o Te Kaunihera ā-Rohe o Heretaunga*  
**Hastings District Council**  
**Council Meeting**

*Kaupapataka*

# Attachments

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*Te Rā Hui:*  
Meeting date: **Thursday, 7 September 2023**

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*Te Wā:*  
Time: **1.00pm**

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*Te Wāhi:*  
Venue: **Council Chamber  
Ground Floor  
Civic Administration Building  
Lyndon Road East  
Hastings**

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**TE KAUNIHERA Ā-ROHE O HERETAUNGA**

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| 6.   | <b>HASTINGS DISTRICT COUNCIL - BUILDING CONSENT APPROACH POST CYCLONE GABRIELLE</b>  |      |
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## Guidance for Building Consent Applications in Te Matau a Māui / Hawke's Bay following Cyclone Gabrielle

### 1. Introduction

- 1.1 In February 2023, Te Matau a Māui Hawke's Bay faced devastation and loss from Cyclone Gabrielle – one of the largest natural disasters in the history of Aotearoa New Zealand. Across the region, communities have endured significant impact to their lives, livelihoods, whānau, homes, farms, orchards, vineyards and neighbourhoods.
- 1.2 On 1 June 2023 initial risk categories were identified that continue to be refined. Further information about that process is available at <https://www.hastingsdc.govt.nz/land-categorisation-hb/>. As Hawke's Bay progresses its recovery, the question of how councils will process building consents in categorised areas has come into focus.

### 2. Purpose of this Guidance Document

- 2.1 The purpose of this Guidance Document is to clearly outline how Hastings District, Napier City and Central Hawke's Bay District Councils (**councils**) will approach residential building consenting under the Building Act 2004 (**the Act**) across the region during Hawke's Bay's recovery from Cyclone Gabrielle.
- 2.2 This Guidance Document considers the applicability of sections 71-74 of the Act, which relate to natural hazards. It is designed to provide as much certainty as possible, to allow communities to make decisions that have future and inter-generational safety at their heart. We also don't want our communities spending money on building consent applications that may be unlikely to ever be granted due to the risk of natural hazards.
- 2.3 This is uncharted territory for how Aotearoa New Zealand deals with natural disasters of this scale and while we don't yet have all the answers, we are committed to sharing what we do know, when we know.

### 3. Important things to note

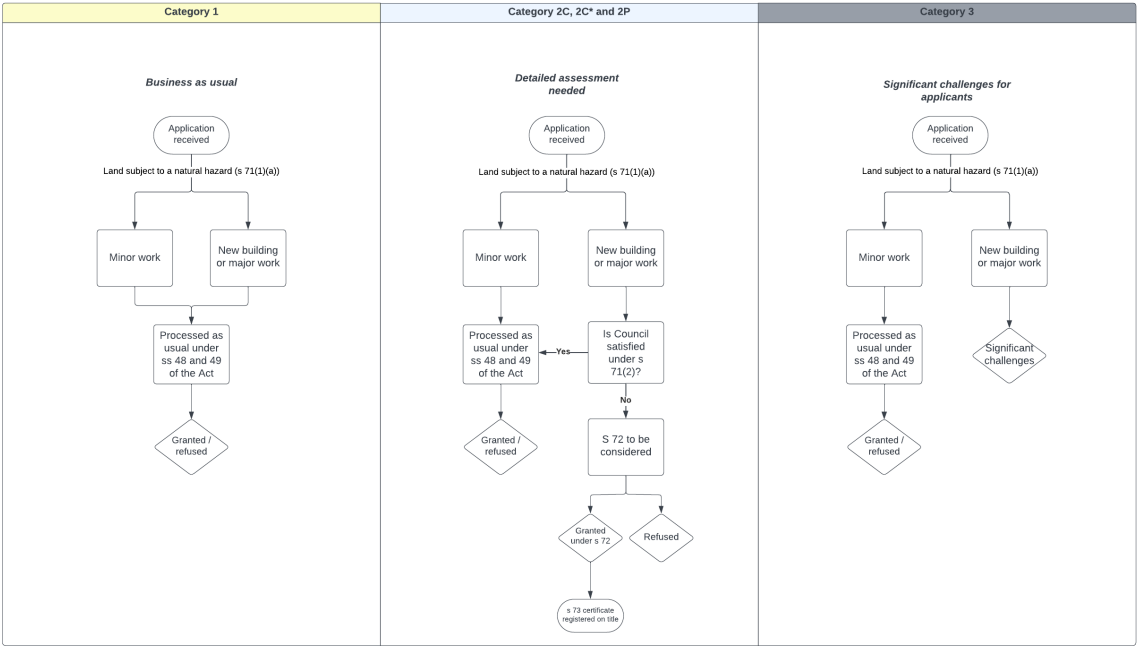
- 3.1 The councils will process all applications for building consents in accordance with the Act, on their individual merits.
- 3.2 This Guidance Document should be read alongside the Ministry of Business, Innovation and Employment's Guidance on sections 71 to 74 of the Act, which is published on the MBIE website.
- 3.3 This Guidance Document applies only to residential buildings or sleeping accommodation. Getting people back into their homes where possible is the priority right now and the councils will communicate their approach to consenting commercial buildings in due course.
- 3.4 Using the categories of land that Hawke's Bay Regional Council has identified, building consent applications in relation to:
  - a. Category 1 land will almost invariably be processed in accordance with s 71(2)(a) of the Act; and
  - b. Category 2C, 2C\*, 2P and 3 land will almost invariably be processed in accordance with s 72 of the Act.
- 3.5 Building consent processing in relation Category 2C, 2C\* and 2P land is likely to exceed the statutory timeframe provided in the Act and we ask for your understanding and patience as we try to get these difficult decisions right.

- 3.6 Category 2A, where significant further assessment is required, falls outside the Guidance Document. Once further assessment and re-categorisation of properties in this category has occurred, they will be considered in accordance with their new categorisation.
- 3.7 For all categories where minor building work is applied for, the Council will process those applications in accordance with sections 48 and 49 of the Act and the natural hazards provision in the Act (ss 71-74) do not apply.
- 3.8 Finally, this Guidance Document has been created on the basis of relevant information available to the councils at today's date. Should more comprehensive data becomes available from Hawke's Bay Regional Council, the Guidance Document will, to the extent necessary, be promptly updated.




Approach to Building consenting by Category

| Category 1 <sup>1</sup>   | Category 2C, 2C* and 2P  | Category 3   |
|---|--|--|
| <p><b>Business as usual</b></p> <ul style="list-style-type: none"> <li>All applications will be processed in accordance with the Act</li> <li>Applicants are encouraged to speak to Council before applying</li> <li>In reliance on assurances from HBRC, informed by expert advice, that flood protection measures have or will be reinstated to pre-Gabrielle standards, and that it is reasonable to assume the stopbanks will perform as designed, it is considered that adequate provision has been or will be made to protect this land, building work, or other property, from inundation under s 71(2) of the Act</li> <li>Building consents will be processed based on pre-Gabrielle finished floor levels but higher levels may be required on a case-by-case basis</li> <li>Applications must meet the test specified by s 49 of the Act</li> <li>Unlikely s 72 of the Act will be considered; or s 73 certificates will be issued for inundation specific to Cyclone Gabrielle</li> </ul> | <p><b>Detailed assessments needed</b></p> <ul style="list-style-type: none"> <li>All applications will be processed in accordance with the Act</li> <li>Applicants are encouraged to speak to Council before applying</li> <li>The land is subject to a natural hazard (inundation) and councils are unlikely to be satisfied that adequate provision has been or will be made to protect the land, building work, or other property from the natural hazard (s 71(2) of the Act)</li> <li>Applications are most likely to be granted if s 72 of the Act is satisfied</li> <li>Applications may be considered by an independent panel consisting of appropriate experts. The panel, if asked, will provide a recommendation to the relevant Council as to whether they consider s 72 is satisfied and in particular whether waiver or modifications should be granted in relation to Building Code clauses. The costs of this process will be met by the relevant Council and not passed onto the applicant</li> <li>Councils who engage the independent panel are not obliged to follow the recommendation and all decisions rest with the relevant Council</li> <li>Building consents, if granted under s 72, will require s 73 certificates to be registered on the property's title</li> <li>The need for s 73 certificates to remain on a property's title will be promptly reviewed once information becomes available from HBRC as to flood protection measures</li> <li>Not all s 73 certificates will be able to be removed from titles and some may remain indefinitely</li> </ul> | <p><b>Significant challenges for applicants</b></p> <ul style="list-style-type: none"> <li>All applications will be processed in accordance with the Act</li> <li>Applicants are encouraged to speak to Council before applying, as applicants for new buildings or major building work face significant challenges</li> <li>HBRC and Central Government consider that future severe weather event risk cannot be sufficiently mitigated and there is an intolerable risk of injury or death in these areas</li> <li>Permitting new buildings or major work to proceed or continue (including any active consents granted prior to Cyclone Gabrielle) may be contrary to the purposes of the Act, specifically to ensure that: <ul style="list-style-type: none"> <li>People who use buildings can do so safely and without endangering their health;</li> <li>Buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and</li> <li>Buildings are designed, constructed, and able to be used in ways that promote sustainable development.</li> </ul> </li> </ul> |

<sup>1</sup> Including Category 2C\* land recently migrated to Category 1.



Categorised areas as at August 2023

| Category |  |  |  | Region totals |
|----------|---|---|--|---------------|
| 1        | 679   | 178   | 374  | 1231          |
| 2C*      | 68  | 0   | 0  | 68            |
| 2C       | 147   | 0   | 0  | 147           |
| 2P       | 18  | 1   | 3  | 22            |
| 2A       | 90  | 0   | 78   | 168           |
| 3        | 298   | 20  | 0  | 318           |
| Totals   | <u>1300</u>   | <u>199</u>  | <u>455</u>   | <u>1954</u>   |

Note: Category 1  
has been  
calculated on the  
basis of all  
properties that  
have moved from  
other categorised  
areas.





## Attachment 2

### Land Categories

The categories under which the future of flood and landslide affected properties were announced on 1 May 2023 are:

1. Low Risk – Repair to previous state is all that is required to manage future severe weather event risk. This means that once any flood protection near the property is repaired, the home can be rebuilt at the same site.
2. Managed Risk – Community or property-level interventions will manage future severe weather event risk. This could include the raising of nearby stop banks, improving drainage or raising the property. (Category two is split into three sub-categories as outlined in table below).
3. High Risk – Areas in the high risk category are not safe to live in because of the unacceptable risk of future flooding and loss of life. Homes in these areas should not be rebuilt on their current sites.

| Category | Definition   | Example  |
|----------|--|--|
| 1        | Repair to previous state is all that is required to manage future severe weather event risk.   | Minor flood damage to repair but no need for significant redesign/retrofitting   |
| 2C       | Community level interventions are effective in managing future severe weather event risk.  | Local government repairs and enhances flood protection schemes to adequately manage the risk of future flooding events in the face of climate change effects.                        |
| 2P       | Property level interventions are needed to manage future severe weather event risk, including in tandem with community level interventions.  | Property specific measures are necessary e.g., improved drainage, raising houses is necessary. Benefits accrue to property owners but some may face affordability issues.            |
| 2A       | Potential to fall within 2C/2P but significant further assessment required.  | Interventions may be required / possible but insufficient information to provide initial categorisation (these may subsequently move between "2" categories or to categories 1 / 3). |
| 3        | Future severe weather event risk cannot be sufficiently mitigated. In some cases some current land uses may remain acceptable, while for others there is an intolerable risk of injury or death. | In the face of enhanced climate risks the property may face unacceptable risk of future flooding. Other property could be subject to unstable land that poses an ongoing risk        |





18 July 2023

Hawke's Bay CEOs

Dear Nigel, Louise, Kitea and Doug

#### FLOOR LEVELS FOR THE REBUILD

As we return Category 2C land to Category 1 signalling that those lands now have the 1% AEP that existed prior to Cyclone Gabrielle we are encouraging Hawke's Bay communities to move forward with their lives and plans.

This has stimulated building and development and in order not to unnecessarily impede that development and the rebuild we propose to provide interim advice as to the flood hazard levels and allow other legislation such as the Building Act and Local Government Act to not unnecessarily impede recovery matters.

Accordingly, while we currently await information from NIWA on the return period of rainfall and flood flows, we suggest that we signal that as with flood protection levels to 1% AEP pre-cyclone we likewise use flood levels for building and floor heights as they were pre-cyclone. We anticipate that in due course these levels may be reviewed and changed to take account of the cyclone however any building consented at the existing levels should not be required to be altered.

We will keep you informed and further this work as soon as information is available from NIWA. We would suggest caution and if there is a particular location or site that may warrant further consideration please do not hesitate to get in touch with Chris Dolley, Group Manager, Asset Management email [chris.dolley@hbrc.govt.nz](mailto:chris.dolley@hbrc.govt.nz).

Yours sincerely

**Dr Nic Peet**  
**Chief Executive**

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Te whakapakari tahi i tō tātau **taiao**. Enhancing our **environment** together.

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## Attachment 4

### Extracts of the Building Act 2004

#### *Limitations and restrictions on building consents: Construction of building on land subject to natural hazards*

#### **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.
- (3) In this section and [sections 72 to 74](#), **natural hazard** means any of the following:
  - (a) erosion (including coastal erosion, bank erosion, and sheet erosion);
  - (b) falling debris (including soil, rock, snow, and ice);
  - (c) subsidence;
  - (d) inundation (including flooding, overland flow, storm surge, tidal effects, and ponding);
  - (e) slippage.

#### **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.

### 73 Conditions on building consents granted under section 72

- (1) A building consent authority that is a territorial authority that grants a building consent under [section 72](#) must include, as a condition of the consent, that the building consent authority will, on issuing the consent, notify the consent to,—
  - (a) in the case of an application made by, or on behalf of, the Crown, the appropriate Minister and the Surveyor-General; and
  - (b) in the case of an application made by, or on behalf of, the owners of Māori land, the Registrar of the Māori Land Court; and
  - (c) in any other case, the Registrar-General of Land.
- (2) The notification under subsection (1)(a) or (b) must be accompanied by a copy of any project information memorandum that has been issued and that relates to the building consent in question.
- (3) The notification under subsection (1)(c) must identify the natural hazard concerned.

### 74 Steps after notification

- (1) On receiving a notification under [section 73](#),—
  - (a) the Surveyor-General or the Registrar of the Māori Land Court, as the case may be, must enter in his or her records the particulars of the notification together with a copy of any project information memorandum that accompanied the notification;
  - (b) the Registrar-General of Land must record, as an entry on the record of title to the land on which the building work is carried out,—
    - (i) that a building consent has been granted under [section 72](#); and
    - (ii) particulars that identify the natural hazard concerned.
- (2) If an entry has been recorded on a duplicate of the record of title referred to in subsection (1)(b) under [section 641A](#) of the Local Government Act 1974 or section 36 of the former Act, the Registrar-General of Land does not need to record another entry on the duplicate.
- (3) Subsection (4) applies if a building consent authority determines that any of the following entries is no longer required:
  - (a) an entry referred to in subsection (1)(b);
  - (b) an entry under [section 641A](#) of the Local Government Act 1974;
  - (c) an entry under section 36 of the former Act.
- (4) The building consent authority must notify the Surveyor-General, the Registrar of the Māori Land Court, or the Registrar-General of Land, as the case may be, who must amend his or her records or remove the entry from the record of title.

Attachment 5

**HON PAUL HEATH KC**

ARBITRATOR AND MEDIATOR

25 August 2023

Nathan Speir  
Rice Speir  
AUCKLAND  
By email: [nathan.speir@ricespeir.co.nz](mailto:nathan.speir@ricespeir.co.nz)

Copy to  
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Lauren Lindsay  
By email: [lauren.lindsay@bankside.co.nz](mailto:lauren.lindsay@bankside.co.nz)

Dear Nathan

**RE: RESIDENTIAL BUILDING CONSENTS IN HAWKES BAY FOLLOWING CYCLONE GABRIELLE**

**Introduction**

I refer to your letter of instructions of 11 August 2023, to my letter of 17 August 2023 and to subsequent correspondence. In addition, I refer to the helpful meeting at your office on 22 August 2023, which Lauren Lindsay, Bodene Robertson-Wright, you and I attended. Following our discussions on 22 August, you reformulated instructions, which were conveyed to me by email on 23 August 2023. A further draft of the proposed "policy" (now to be called the "Guidance Document") was made available for me to consider.

**Questions on which advice is sought**

You have sought advice on three questions:

- (a) Is the revised "Guidance Document" lawful and will it operate in a manner that does not expose Hastings District Council (the District Council) to any unnecessary legal risks? You have mentioned, in particular, concerns about potential civil claims, judicial review proceedings, investigations by MBIE under s 203A of the Building Act 2004 and insurance disputes. I call this the "lawfulness question".
- (b) Is it reasonable for the District Council to rely on documented assurances (or at least expert advice received to support the assurances) from Hawke's Bay Regional Council (the Regional Council) about current and future flood protection measures, particularly in relation to Category 1 properties? The issue here is whether the District Council can rely on those assurances for the purpose of deciding whether "adequate provision" is available to mitigate from natural hazards, in the sense contemplated by s 71(2) of the Building Act 2004. I call this the "reliance question".

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- (c) Is there any need for the “Guidance Document” to be the subject of public consultation under Part 6 of the Local Government Act 2002? I call this the “consultation question”.

I have worked closely with Lauren Lindsay, to whom I am grateful for her analysis of some of the legal issues. I am also grateful to the work that you and Bodene Robertson-Wright have undertaken, all of which has been most helpful. Having reviewed the various legal analyses that have been provided to me, undertaken my own analysis on contestable issues and considered the documents provided with your initial letter of instructions and subsequently, I am able to express my opinions succinctly. Should the District Council require any more detailed reasoning, please let me know.

#### **The “lawfulness question”**

In answer to the first question, I consider that the Guidance Document represents an elegant solution to a difficult problem. It acknowledges that the District Council is bound to follow procedures for the grant or refusal of building consents, either under the orthodox route or the natural hazard provisions of the Building Act 2004. It avoids any risk of the District Council being seen to have fettered its discretion or pre-determined how any particular category of land will be considered; namely, under the orthodox route or the natural hazard route. It explains to ratepayers and those involved in the consent process that the question whether the natural hazard provisions apply will necessarily need to be considered before the District Council can revert to the orthodox building consent process.

I am satisfied that the Guidance Document is lawful. While there will always be risks of civil claims (including judicial review) arising out of the grant or refusal of a building consent (or, in respect of the District Council’s subsequent inspection and certification functions), I consider that the risks are mitigated sufficiently to say confidently that no higher risk will follow the issue of the Guidance Document than existed before Cyclone Gabrielle caused the damage to which it relates. In short, I am of opinion that the District Council is not exposed to additional legal risk if the Guidance Document were issued.

#### **The “reliance question”**

The second question concerns assurances given by the Regional Council about current and future flood protection measures.

Relevantly, s 71(1) and (2) provides:

#### **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.

...

(Emphasis added)

The reliance question is important because, if reliance were permissible, the Council would be entitled to conclude, from what the Regional Council has provided, that the natural hazard has been addressed in a manner that will meet both elements of s 71(2).

By way of example, in a letter dated 18 July 2023, the Chief Executive of the Regional Council wrote:

As we return Category 2C land to Category 1 signalling that those lands now have the 1% AEP that existed prior to Cyclone Gabrielle we are encouraging Hawke's Bay communities to move forward with their lives and plans.

This has stimulated building and development and in order not to unnecessarily impede that development and the rebuild we propose to provide interim advice as to the flood hazard levels and allow other legislation such as the Building Act and Local Government Act to not unnecessarily impede recovery matters.

*Accordingly, while we currently await information from NIWA on the return period of rainfall and flood flows, we suggest that we signal that as with flood protection levels to 1% AEP pre-cyclone we likewise use flood levels for building and floor heights as they were pre-cyclone. We anticipate that in due course these levels may be reviewed and changed to take account of the cyclone however any building consented at the existing levels should not be required to be altered.*

(Emphasis added)

The District Council's obligation is to be satisfied that "adequate provision" of the type to which s 71(2) refers has been made in respect of a natural hazard to which a building consent application relates. It must form its own judgment on that. The District Council is entitled to rely on evidence of the type contained in the Regional Council's letter but, if it were aware of updated information or something that put it on further inquiry, it would not be appropriate to base a view about "adequate provision" solely on the basis of what the Regional Council has previously stated.

In my opinion, while in each case the Council must consider all relevant evidence before reaching a conclusion that "adequate provision" has been made, statements of the Regional Council of the type to which you have referred me, constitute compelling evidence to support a conclusion

that "adequate provision" has been made, in the absence of evidence to the contrary or the need to make further inquiry.

**The "consultation question"**

The third question involves consultation. No decision is being made in the Guidance Document. Rather, members of the public are being informed of the way in which the building consent provisions are likely to be approached in respect of affected land in the various categories declared by the Regional Council. In my view, there is no need for public consultation in respect of the Guidance Document. This is something that the Council may issue as part of its usual functions under the relevant legislation.

**Conclusion**

I have answered the three questions you have posed above. Please let me know if any clarification is required.

I take this opportunity of thanking you for your instructions and enclose herewith a bill of costs. You will recall that I am meeting Ms Lindsay's costs myself, so her time and attendances are incorporated within the fee I have charged, rather than being added as a disbursement.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Paul Heath', with a stylized flourish at the end.

Paul Heath

PS: Lauren Lindsay and I made one amendment to the draft Guidance Document. Lauren has just sent that to you. That is the version to which this opinion is directed.