



Determination 2009/115

Determination regarding a dispute about a house built by one shareholder of a jointly owned block of Maori land at 41 Rarapua Place, Te Puna, Tauranga



1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

The parties to the determination

- 1.2 The applicant, Ms P Werohia-Lloyd, is the building owner (“the applicant”), and the other party is the Western Bay of Plenty District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”). Both parties are acting through legal advisers.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

1.3 The site where the building has been constructed forms a part of a block of land, which is jointly owned by a number of shareholders (“the shareholders of the land”). The applicant is one of the shareholders of the land. I consider that the other shareholders of the land are entitled to be parties to the determination. This is because section 176(c)² of the Act states that a party, in relation to a determination, includes the owner. Owners of Maori freehold land are usually considered to own the fee simple estate in the land, and by virtue of section 176(c) of the Act, such owners can be parties to the determination.

1.4 I attempted to contact all the shareholders of the land. One shareholder, Mr R Leef, (“the shareholder”) requested to be considered as a party to the determination, and therefore, based on section 176(c), I have considered this shareholder as a party to the determination.

The matters

1.5 This determination arises from a dispute about a house built on a rural block of Maori land by the applicant, who is one shareholder of the jointly owned land. Based on the evidence, I take the view that the matters for determination³ are:

- whether the authority was correct to impose a condition of demolition or removal on the notice to fix of 25 May 2007 (“the second notice to fix”)
- whether the authority was correct in its decision to refuse to amend the building consent
- whether the authority was correct in its decision to refuse to issue a certificate of acceptance.

1.6 In order to determine the matters of the refusal of the authority to consider issuing a certificate of acceptance, and the refusal of the authority to consider amending the building consent, I need to consider whether the decision of the authority to grant the original building consent was correct.

1.7 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”) and other evidence in this matter.

1.8 I also note that contraventions of other enactments have not been taken into account, as I have no jurisdiction under those other enactments. In this determination, I have only considered building matters relating to the Act and its regulations.

1.9 I also note that the matters considered in this determination are subject to an injunction issued by the Tauranga District Court (refer to paragraphs 3.4 and 3.5). This determination must also be read subject to that injunction, and I understand it is likely the parties will have to return to Court to discuss the terms of the injunction before any action could be taken on the findings of this determination.

² In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

³ In terms of section 177(b) and 177(c)

2. The building

- 2.1 The building is constructed on a part of a rural block of Maori land at 41 Rarapua Place (“the site”). The Maori Land Court particulars specify the land to be Maori Freehold Land with a block name of Te Puna Parish of Lot 154A No 2 (“the land”).
- 2.2 The site is close to the sea and slopes slightly down from east to west. The building work is a single storey detached house with a steel and light timber frame and is of a relatively simple envelope shape. The 10° pitched roof is of light timber construction with steel tiles.
- 2.3 There is a large verandah on the north side of the house, and no eaves on the south side. The house is clad with a mix of vertical plywood sheets and horizontal colour steel corrugated iron, and has aluminium flashings fitted, although some flashings have been omitted. No down pipes have been fitted.

3. The background

- 3.1 On 31 March 2005, the applicant contracted a building company (“the builders”) to construct a two-storey dwelling to replace the family’s bach on the site. I do not know the regulatory status of that bach, but that fact is not material to my consideration of the current matter.
- 3.2 On 26 April 2005 a shareholder of the land submitted a complaint to the authority that there was unconsented building work being undertaken on the land. The authority visited the site and found that floor slabs had been constructed and the framing was being assembled. The authority notified the builders that they were to stop work and that no further work could take place until a building consent was obtained. The authority visited the site again on 5 May 2005, at which time the majority of the ground floor external walls were constructed. The authority issued a notice to fix (“the first notice to fix”) to the builders, requiring all building work to cease until a building consent, or the necessary consents, were obtained. The applicant was issued with the first notice to fix on 12 May 2005.
- 3.3 On 25 May 2005, the applicant lodged an application for a building consent and on 27 May 2005, the applicant lodged an application for a resource consent. The authority subsequently requested further information from the applicant for the resource consent application.
- 3.4 The authority visited the building site several times in June 2005 and found that work was continuing. The authority applied for an injunction under section 381 of the Act requiring work to stop. On 20 June 2005, shortly before the injunction was heard, the applicant paid the fees that were outstanding for the building consent, and the authority issued the building consent (consent number 73060). The authority attached a section 37 certificate to the PIM stating that building work could not proceed until a resource consent was obtained.
- 3.5 The injunction application was heard at Tauranga District Court. On 23 June 2005, the Court issued an injunction restraining the applicant and the builders ‘from carrying on any building work at all on [the land] until further order of this Court or until the proper consents are obtained’.

- 3.6 On 9 September 2005, a representative for the applicant (“the agent”) wrote to the authority requesting permission for the roof to be installed so that the untreated timber framing could be protected. The authority wrote to the applicant responding that further building work was not to be carried out until the resource consent was granted and noting that tarpaulins could be used to provide the necessary temporary protection.
- 3.7 In correspondence to the authority on 28 November 2005, the agent explained that an application for an occupation order had been lodged with the Maori Land Court and the information for resource consent would be available once that Court had issued a decision. The application for an occupation order was heard in July and October 2005, and on 15 May 2006 the Court issued a decision dismissing the application for an occupation order. Paragraph 32 of the decision stated:
- If it were not that a majority oppose the application the Court would have granted it... Owners need to ensure that they have followed a process to gain the other owner’s consent before they begin building – otherwise this can be the result.
- 3.8 Late 2006 and early 2007 investigations by the authority revealed the building work had been completed. A summary of the background to the application for determination submitted to the Department by the applicant states:
- During this time, the [authority] refused to let the [applicant] put a roof on the partially complete structure to protect it from the weather while the issues with the consents were unresolved. Members of the applicant’s whanau took their own steps to prevent the structure from deterioration. The top floor of the building, which had suffered weather damage, was taken off and the ground floor was closed in.
- 3.9 On 27 May 2007, the authority issued the second notice to fix to the applicant and the agent because the work was not carried out in accordance with the building consent and without a resource consent. The notice stated ‘To remedy the contravention or non-compliance you must ...either remove the building from the land where the building is located or demolish the building. ‘
- 3.10 The authority commenced a prosecution against the applicant in December 2007, alleging that the applicant failed to comply with the second notice to fix. The authority sought an order under section 381 of the Building Act that the building be demolished.
- 3.11 In April 2008, the applicant contracted an independent registered building inspector (“the consultant”) to report on the current state of the building, and a report was furnished on 8 May 2008.
- 3.12 Correspondence ensued between the legal advisers for the applicant and the authority in July and August 2008. The authority maintained that the unlawful building work undertaken by the applicant could not be legitimised. The applicant wanted to undertake remedial work, and sought building inspections relating to that work. The authority refused to carry out inspections and noted the applicant would be in breach of the court injunction if work was carried out.
- 3.13 The application for a determination was received by the Department on 10 November 2008.

The injunction and the determination

- 3.14 On 26 June 2009, a telephone conference was held between the legal advisers for the applicant and the authority, the Department, and the Tauranga District Court Judge, regarding the effect of the injunction on the determination. It was confirmed that the issue of a determination would not in itself breach the terms of the injunction, but that in any event, on the issue of a determination it was likely the parties would have to return to Court to discuss the terms of the injunction before any of them could act on the findings of the determination.

Correspondence with shareholders of the land

- 3.15 On 1 July 2009, the Department wrote to the shareholders of the land informing them of their entitlement to be considered parties to the determination, and inviting them to make submissions (refer paragraph 1.3).

4. The submissions

- 4.1 In a statement accompanying the application, the applicant's legal adviser explained that the authority refused to let the applicant put a roof on the partially completed structure to protect it from the weather and that members of the applicant's whanau took their own steps to prevent the structure from deterioration.
- 4.2 The statement also explained the applicant's view that the condition imposed on the second notice to fix was invalid. Furthermore, the applicant was trying 'to progress the dispute in a productive manner and to provide a basis for seeking the certificate of acceptance, or an amended building consent' by contracting the consultant to assess the building. The authority should not refuse to issue an amended consent or a certificate of acceptance.
- 4.3 The application also contained:
- the building consent and resource consent applications, the section 37 certificate, and the notices to fix
 - communications between the applicant and the authority, and the applicant's legal adviser and the authority's legal adviser.
- 4.4 In response to the application for determination, the Department sought clarification on the status of the applicant as an owner of the land and therefore as a party able to apply for a determination for the house under section 176. A register of the shareholders of the Maori Freehold land from the Maori Land Court was provided as evidence of ownership.
- 4.5 In response to the application, the authority made a submission dated 17 December 2008, which explained the background to the situation and its reasons for the actions that had been taken:
- There were 'blatant and persistent breaches of the [Act]'.
 - The involvement of the authority was initiated by other shareholders, who continue to express their opposition to the work.
 - There were a number of paths that the applicant could have taken in order to construct the dwelling lawfully, but these had been ignored.

4.6 The submission also contained:

- communications between the applicant and the authority, and the applicant's legal adviser and the authority's legal adviser
- a copy of an affidavit of a representative of the authority
- a copy of the report provided by the consultant
- the building consent and resource consent documentation.

The consultant's report

4.7 The applicant contracted a consultant to inspect the building and prepare a report on the condition of the building. The applicant forwarded a copy of the report, dated 8 May 2008, to the authority. The report stated:

- If the building is to remain the defects which are visible, both on the inside and exterior, need to be remedied by an experienced and qualified tradesperson.
- If the building is to remain, invasive/destructive investigation of the inside of the wall frames and the septic tank system at the very least is required. Some invasive examination of the footing and foundations and damp proof course may also be required.
- The exterior cladding and veranda needs replacing.

The draft determination

4.8 A draft determination was issued to the parties for their comments on 28 October 2009.

4.9 The applicant accepted the draft determination, without comment.

4.10 Following discussions between the shareholder and the authority, the shareholder elected not to make a submission about the draft determination.

4.11 The authority accepted the draft determination, however, sought clarification about a number of issues as follows:

- whether the determination required a new notice to fix to be issued, or whether the notice to fix of the 25 May 2007 could be modified
- that the terms of the new or modified notice to fix should be:
 - (a) [The applicant] is to arrange for a suitably qualified building expert to carry out further investigation as to:
 - (i) The extent of the decay; and
 - (ii) The full extent of repairs required to the building to ensure the building complies with the Building Code.
 - (b) [The applicant] is to ensure that all necessary remedial building work required by the building expert to ensure the building complies with the Building Code is carried out. [The applicant] is to arrange for all necessary [inspections by the authority] in relation to that remedial building work and is to apply for a code compliance certificate when the remedial building work has been completed.
 - (c) No remedial building work is to be carried out until [the applicant] has obtained a building consent for the building work. [The applicant's] building consent application will need to show how the building will be brought into compliance with the Building Code.

- (d) If [the applicant] is granted a building consent, no building work can proceed in reliance on that building consent until [the applicant] has obtained a resource consent.
 - (e) [The applicant] is to apply for a certificate of acceptance for those aspects of the building work that have been completed and in relation to which the building expert does not recommend remedial work.
- that a further option be provided on the notice to fix of 'remove the building from the site (after obtaining a building consent for that purpose)'.)

5. The expert's report

- 5.1 As discussed in paragraph 1.7, I engaged an independent expert to provide an assessment of the condition of the building. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 5 February 2009 and furnished a report that was completed on 11 February 2009.
- 5.2 The expert noted that the house was situated closer to the line of Mean High Water Springs than designated by the building consent.
- 5.3 The expert took invasive moisture readings at locations at the interior walls, and noted one elevated reading of 19% where the flashing was missing on the southeast corner of the house, near the ground.
- 5.4 The expert also took two timber samples, from a bottom plate and from a stud, and submitted the samples for laboratory testing. Both samples were found to be unsound, exhibiting various levels of decay. One sample, although containing elements of H1.2 preservative treatment, contained early established fungal decay and substantial structural damage, from which the expert inferred that serious decay to framing near the sample location is not unlikely. The other sample was likely to be treated to H3.1 and showed fungal decay. The expert considered that while this is unlikely to be structurally significant to the H3.1 treated timber, it had been exposed to significant moisture elevation, and the same conditions may have caused serious decay to less durable framing located near the sample.
- 5.5 In the report, the expert provided a summary of building elements that required further investigation or remedial work, noting that given the limited scope of the report the list is unlikely to be complete, and that further investigation would be required if remedial work was to be undertaken.
- 5.6 The expert summarised the cladding and structural deficiencies, stating 'in view of the deficiencies of the cladding and structure that were accessible to view, all claddings should be removed to allow framing, electrical and plumbing services to be inspected.' Due to the extent of deficiencies, the expert summarised some of the steps of remedial work and investigation that would be required if the house was to remain on the site, including:

Roof

- remove all roof cladding, underlay, and accessories
- upgrade framing including all joist hangers and tie downs for all roof members
- replace roof, and fixings
- fit ceiling insulation

Cladding

- remove cladding, ply panel sheets and corrugated colour steel including underlay
- remove all windows and doors and check compliance of installation
- check integrity of framing and compliance, replace as required, and treat remainder with an approved in situ treatment
- check all brace and tie down requirements
- replace cladding to manufacturer's specification and adjust ground clearances
- replaced all exposed metal fixings with stainless steel
- repaint the exterior of the house to manufacturer's specifications

Other

- replace bowed verandah posts
- check insulation
- check all services
- fit downpipes and stormwater drains
- check the installation of the horizontally installed hot water cylinder
- complete installation of baths, showers and vanities and adjust or refit bathroom vents.

The matter of the second notice to fix

6. Discussion

- 6.1 The provisions in the Act for notices to fix are broadly worded and empower an authority to issue a notice to fix if the authority 'considers on reasonable grounds a specified person is contravening or failing to comply with this Act or regulations.' The notice must require the person 'to remedy the contravention of, or comply with' the Act.
- 6.2 As the statutory requirements for a notice to fix do not prescribe the specific detail that must be included in the notice, an authority has a degree of discretion around what to include in the notice. Therefore, the authority must have reasonable grounds for issuing the notice, and must decide on the appropriate terms to be included in the notice. The authority is required to consider the matters listed in section 165 and the circumstances relating to the building work in deciding what the appropriate terms are for a notice to fix.
- 6.3 Building work may be required as one of the consequences of a notice to fix, and as the definition of building work in the Act includes demolition, I take the view that it may be considered as one of the requirements of a notice to fix.

Demolition of buildings

- 6.4 I have considered the other provisions of the Act for the purposes of identifying instances in which demolition of all or part of a building may be appropriate. I note that under section 127, work required or authorised under the dangerous, earthquake prone, and insanitary buildings provisions of the Act may include the demolition of all or part of a building.
- 6.5 Because the purpose of the dangerous, earthquake prone, and insanitary provisions of the Act is to protect the health and safety of building users, an authority must be satisfied the building is dangerous, and must take the appropriate course of action under section 124 to protect the health and safety of building users. It is clear from section 124 that while demolition of a dangerous building may sometimes be the necessary course of action, even for a dangerous building, demolition will not always be appropriate or reasonable.
- 6.6 Guidance issued by the Department about the dangerous and insanitary building provisions of the Act⁴ states:
- In most cases, [an authority's] views on the appropriate action to be taken in regard to dangerous or insanitary buildings will be based on the specific issues and dangers arising from the building in question and the requirements of the legislation. In the case of a derelict building, erecting a hoarding to prevent people from approaching or entering the building may be adequate, but, for example, if the building has a history of use by squatters who thereby place themselves at risk, this may not be sufficient. Serving notice on the owner to remove or reduce the danger, possibly through demolition, could be a more appropriate course of action.
- 6.7 In a 1995 case⁵ about whether it was reasonable for an authority to demolish a building, the Court noted that the owner had given evidence of being ready to repair the building. The Court further observed that had it been satisfied that the building was insanitary, it would not have considered the demolition to be reasonable without affording the owner an opportunity to undertake the remedial work that he had assured the Court he was about to do.
- 6.8 In regards to demolition of buildings that are not dangerous or insanitary, the following view was held in Determination 1999/6:
- (a) Demolition of private property which is neither dangerous nor insanitary is a drastic step which should only be taken for a compelling reason and in the public interest;
 - (b) The [Building Industry Authority] does not consider that there is any such compelling reason in this case; and
 - (c) Even if there appeared to be such a reason, it should generally be tested in Court, as would be the case with a notice issued under section 65 [of the Building Act 1991] in respect of a building deemed to be dangerous or insanitary under section 64 [of the Building Act 1991].

⁴ Dangerous and Insanitary Building Provisions of the Building Act 2004 (Policy Guidance for Territorial Authorities) – available on the Department's website www.dbh.govt.nz

⁵ (Malborough DC v Chaytor 16/3/95, Judge Walker, DC Blenheim M76/94 [1995] DCR 382)

6.9 The following view was held in Determination 2000/1:

The [Building Industry] Authority recognises that if building work that was done unlawfully is not demolished then the owner would appear to benefit from its unlawful actions. Nevertheless, if that building work, although done unlawfully, complies with the Building Code, then the Authority considers that it is unreasonable to require it to be demolished so that it can be constructed again. ...

[T]he Authority notes that the issuing of the notice to rectify has the following adverse consequences for the owner:

- (a) The notice will be mentioned in any land information memorandum issued in respect of the building.
- (b) Failing to comply with the notice is an offence, and some circumstances a continuing offence, under section [168].
- (c) Where there is a continuing offence, a prosecution may be commenced later than would otherwise be required by section [378].

6.10 I agree with these views, and in particular consider that under the Act, demolition of building work which is neither dangerous nor insanitary is a drastic step which should only be taken for compelling reasons.

The conditions of the second notice to fix

6.11 The second notice to fix (refer to paragraph 3.9) describes the particulars of the contraventions and non compliances as the building work having been carried out otherwise than in accordance with the building consent and without a necessary resource consent.

6.12 I do not accept that a notice to fix is the correct method to remedy a contravention of the Resource Management Act. While I acknowledge section 37 links the two Acts, contraventions of the Resource Management Act should be remedied through the tools provided in that Act.

6.13 There is sufficient evidence that allows me to accept that the building work contravenes the Act and therefore the authority had reasonable grounds to issue the second notice to fix. I note that at the time this notice to fix was issued the authority did not have information pertaining to the code compliance of the building work.

6.14 The second notice to fix requires the removal or demolition of the building. I accept that the building work in this case appears to be unlawful, in that it was not constructed in accordance with the building consent. However, I do not consider that the breaches of the Act at the time the second notice to fix was issued constitute compelling reasons for the requirement that the building be removed or demolished under the Building Act.

The matters of the refusal to amend the building consent and the refusal to issue a certificate of acceptance

7. Discussion

Application of the legislation

- 7.1 The applicant has sought ‘a determination that the [authority] should issue a certificate of acceptance or an amended building consent.’ It is clear in the Act that a certificate of acceptance cannot be issued for building work for which there is a building consent, other than in particular circumstances. Failure to construct a building in full accordance with a building consent is not a circumstance to which the certificate of acceptance provisions applies.
- 7.2 Section 49 of the Act requires that an authority ‘must grant a building consent if it is satisfied on reasonable grounds that the provisions of the [Building Code] would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.’ Section 45(5) states ‘An application for an amendment to a building consent must be made as if it were an application for a building consent’. I also note that section 94(1) of the Act requires that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent.
- 7.3 I am of the view that the applicant would be very unlikely to ever be able to obtain a code compliance certificate for the building work, because the building work was not undertaken in accordance with the requirements of the consent, and not constructed in accordance with the consented plans and specifications. There were no inspections undertaken in accordance with the proposed procedures for inspection, so the authority has not had the opportunity to inspect any elements of the building work. Furthermore, the variation between the building that was constructed and the proposal that was consented is significant. An application for an amendment to a building consent is required to be made as if it were an application for a building consent and considered by the authority with respect to its compliance with the Building Code.

The authority’s decision to issue the building consent

- 7.4 As discussed in paragraph 1.6, in order to consider the matters of the refusal of the authority to consider issuing a certificate of acceptance, and the refusal of the authority to consider amending the building consent, I need to consider whether the decision of the authority to issue the original building consent was correct.
- 7.5 The issuing of a building consent is a statutory decision authorising building work to be undertaken. In Determination 2009/15, I took the view that while the Chief Executive has the power to reverse the decision to issue a building consent, where the issuing of consent is a decision that has been relied upon, there would need to be compelling reasons to reverse that decision, especially when a period of time has elapsed.

7.6 Therefore I consider that in order to reverse the decision to issue a consent, I must be satisfied that:

- (a) the decision was not correct, in that the authority did not have reasonable grounds to be satisfied the provisions of the Building Code would be met; and
- (b) the decision of the authority was not relied upon; and
- (c) there are compelling reasons to reverse the decision.

I now address those particular issues in order:

(a) Reasonable grounds for the decision to issue the building consent

7.6.1 At the time the authority granted the building consent it knew that the foundations had been laid and that most of the external framing had been completed, with the exception of the roof framing, and that it had not undertaken any inspections of the unconsented building work. However, the authority does not appear to have checked the compliance of the unconsented building work against the plans and specifications before it granted the building consent. If it had, significant discrepancies would have become apparent, such as the different location of the building and the extent of compliance of the external framing.

7.6.2 The authority could not have been satisfied on reasonable grounds that the provisions of the building code would have been met if the building work were properly completed in accordance with the plans and specifications. For the authority to have had reasonable grounds for granting the consent it would have had to have considered whether the unconsented building work complied with the plans and specifications. This would have required evidence such as a careful site inspection, involved uncovering some of the building work, such as the foundations that had not been inspected, and probably also required supporting evidence from the builders or producer statements from other experts involved in the building work. Only once the authority had satisfied itself that the unconsented building work already completed complied with the plans and specifications could the authority have been in a position to have had reasonable grounds for granting the building consent.

(b) The reliance on the statutory decision

7.6.3 In this case, the applicant began building work without first obtaining a building consent, and continued building work while the application for the building consent was being processed by the authority. Furthermore, I note that the building work was not built in accordance with the consented plans and specifications, and was built closer to the Mean High Water Springs mark than specified in the consent.

7.6.4 The building consent was issued with a section 37 certificate referring to the project information memorandum which stated that building work could not proceed until a resource consent was obtained. While the Act and the Resource Management Act are linked through the section 37 provisions, and contraventions of the Resource Management Act must be remedied under that Act, it is clear that the section 37 provisions of the Act allowed the authority to prevent the building work proceeding until the required resource consent was obtained.

7.6.5 I also note the authority was successful in obtaining an injunction restraining the applicant and the builders ‘from carrying on any building work at all on [the land] until further order of [the Court] or until the proper consents are obtained’.

7.6.6 I consider that little regard has been shown for the regulatory systems governing building work, and for these reasons, while considerable building work has been undertaken, I do not consider that this building work has been undertaken in reliance on the statutory decision of the authority to issue the building consent.

(c) Compelling reasons to reverse the decision to issue the building consent

7.6.7 I consider that there are compelling reasons to reverse the decision of the authority to issue the building consent. As I have noted above, the variation between the building that was constructed and the proposal that was consented is significant and an application for an amendment to the building consent is unlikely to ever be successful.

7.6.8 I also note the applicant would be very unlikely to ever obtain a code compliance certificate for the building work because the building work was not constructed in accordance with the consented plans and specifications and no inspections were undertaken by the authority so the authority has not had the opportunity to inspect any elements of the building work. I am therefore of the view that the decision of the authority to issue the building consent should be reversed.

7.6.9 I acknowledge that there are other enactments that may govern the final outcome of what happens to the building in this case. Regardless of the other issues relating to the house, in terms of resolving the building matters, it is my view that reversing the decision of the authority to grant the building consent provides the most appropriate way to proceed.

The refusal to amend the building consent

7.7 My decision to reverse the decision of the authority to issue the building consent means that I do not need to consider the matter of the refusal of the authority to amend the building consent.

The refusal to issue a certificate of acceptance

7.8 The circumstances under which an authority may issue a certificate of acceptance are set out in section 96 of the Act. Section 96(1)(a)(ii) refers to situations where a building consent was required for the work but not obtained. While in this case I acknowledge that there was a building consent granted by the authority for the building work, I am of the view that the decision of the authority to issue the building consent should be reversed. This means it is now possible for me to consider whether a certificate of acceptance can be issued for the work that has been completed.

7.9 Certificates of acceptance can be issued when an authority ‘is satisfied, to the best of its knowledge and belief and on reasonable grounds, that as far as it can ascertain, the building work complies with the [Building Code].’

- 7.10 I note that the authority refused to issue a certificate of acceptance on the grounds that there was a building consent for the building work. While it is now possible to consider a certificate of acceptance, I consider that the decision of the authority not to issue one remains correct, as I do not believe there are reasonable grounds to conclude that the building work complies with the Building Code.
- 7.11 Based on the evidence provided to me by the consultant (refer to paragraph 4.7) and the expert (refer to paragraph 5), it is my view that the building work has clearly not been constructed to comply with the Building Code. I take the view that the significance of such a substantial amount of the building work being not code compliant means that issuing a certificate of acceptance would not be appropriate as the building work clearly does not comply with the Building Code.

8. What is to be done now

- 8.1 In this determination, I have only considered building matters relating to the Act and its regulations. Any contraventions of other enactments have not been taken into account, as I have no jurisdiction under those other enactments, although they may have an impact on the final outcome of what happens to this building. The following paragraphs (8.2 to 8.5) are intended only to provide a way forward in terms of remedying the contraventions of the Act and its regulations.
- 8.2 The authority should issue a modified notice to fix for the building. I am of the view that the requirements proposed by the authority to be included on the modified notice to fix, as discussed in paragraph 4.11 are reasonable.
- 8.3 If the building is to remain, the building work will need to be brought into compliance with the Building Code, and significant remedial work will be required to achieve this. Further investigation would be required, to be undertaken by a suitably qualified person, as to the extent of the decay of the timber framing and the full extent of repairs required.
- 8.4 If this is the case, the applicant would need to apply for a building consent for the building work. Any application for a building consent will need to show how the building will be brought into compliance with the Building Code.
- 8.5 If remediation work is to be undertaken by the applicant, the authority may also require the applicant to apply for a certificate of acceptance and provide evidence of Building Code compliance for those other parts of the existing building work that have already been completed. Much of the current construction may be able to be inspected if building elements are removed for further investigation and remediation.
- 8.6 I note that there are other enactments that govern the building work on this site. I note that the authority correctly exercised its powers under section 37 of the Act when the building consent was issued in June 2005. While I have no authority under these enactments, I note that the authority has powers under the Resource Management Act and may chose to exercise its powers under that Act. I note the Resource Management Act also contains tools that may be appropriate for remedying breaches of that Act.

9. The decision

9.1 In accordance with section 188 of the Act, I hereby confirm the decision of the authority to refuse to issue a certificate of acceptance.

9.2 I also determine that:

- the decision of the authority to grant the building consent should be reversed
- the notice to fix should be modified, taking into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 December 2009.

John Gardiner
Manager Determinations