

Determination 2005/98

Notice to rectify building work done without building consent

1 THE MATTER TO BE DETERMINED

- 1.1 This is a determination under section 17 of the Building Act 1991 (“the Act”), as amended by section 424 of the Building Act 2004, made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department.
- 1.2 The application for determination related to a dispute about a territorial authority’s decision to issue a notice to rectify and the contents of that notice.

2 THE PARTIES

- 2.1 The applicant is the owner. The only other party is the territorial authority concerned.

3 THE BUILDING WORK AND THE SEQUENCE OF EVENTS

3.1 The building work

- 3.1.1 The building work consisted of the erection, on the same site as an existing house, of two carports and the extension and alteration of a large existing garage to convert it into a single garage incorporating storage areas together with what was referred to as a “minor household unit” containing two bedrooms with kitchen and toilet facilities.
- 3.1.2 It is not clear whether some of the work on the garage had been done by a previous owner. Nevertheless, it is not disputed that no building consent was obtained from the territorial authority in respect of any of the work.
- 3.1.3 The territorial authority became aware of the work and on 20 June 2003 wrote to the owner saying that the work was “unauthorised and contrary to Council records”. The owner was told, “the only option open to you is to demolish the unauthorised works”.
- 3.1.4 On 20 July 2003, a consultant (“the architectural consultant”) acting for the owner wrote a letter to the territorial authority requesting a “retrospective building consent”, reporting on site investigations, attaching “as built” drawings of the building work concerned, and also referred to certain proposed remedial work.

- 3.1.5 I have not seen the territorial authority's reply, if any, to that request, but note that section 33(1) of the Act did not appear to permit applications for building consent in respect of work that had already been done.
- 3.1.6 However, at some stage the territorial authority appears to have sent the owner a form "Application to Register Unauthorised Building Works" together with a list of persons ("listed consultants") approved by the territorial authority to undertake the site investigations and reports required for such applications.

3.2 The application to register the unauthorised building work

- 3.2.1 Registration of unauthorised building work was a procedure instituted by the territorial authority for owners of buildings that had been constructed or altered without building consent or other required authorisation such as a resource consent under the Resource Management Act 1991. That registration procedure was not mentioned in the Act, but I understand that similar procedures were used by several territorial authorities to give unauthorised buildings some form of legitimacy.
- 3.2.2 An application for registration was required to be accompanied by a report from a listed consultant covering certain matters, including whether the unauthorised works required "remedial or upgrading work to ensure compliance". On the basis of that report the territorial authority would consider "registering" the building.
- 3.2.3 On 21 July 2003, the owner applied for registration of the unauthorised building work. I have not seen the application itself, but it appears to have been subsequently supported by a site inspection report by a listed consultant dated 29 August 2003 as well as by the architectural consultant's report mentioned in 3.1.4 above.
- 3.2.4 The listed consultant's report concluded that the work would comply with the building code "to the extent required by section 64 of [the Act]" if:
- (a) One of the carports was demolished;
 - (b) The other carport and the minor household unit were upgraded.
- 3.2.5 The listed consultant noted that a building consent would be required for the upgrading.
- 3.2.6 The architectural consultant's report said in effect that the unauthorised work was not dangerous or insanitary. The report also referred to the provision of the district plan under the Resource Management Act 1991. The report (see 3.1.4 above) did not identify various essential matters relating to both the existing building work and the proposed remedial work. For example, the sizes of various timber framing members were identified but not the species, grade, and preservative treatment (if any) of the timber concerned.
- 3.2.7 On 10 November 2003 the territorial authority refused the owner's application to register the work, saying that the carports must be demolished and the minor household unit returned to its former use as a garage "as a Resource Consent would be declined if it was applied for".

3.3 The notice to rectify

- 3.3.1 The owner neither demolished the unauthorised work nor applied for a building consent for upgrading. On 1 July 2004 the territorial authority issued a notice to rectify under section 42 of the Act.

- 3.3.2 The notice to rectify identified the particulars of contravention as being that no building consent had been obtained for the unauthorised building work.
- 3.3.3 The notice to rectify also stated that the following remedial action was required:
- “1 Within 28 days of the issue of this notice, apply for and obtain a building consent to demolish the two unauthorised carports and remove the addition to the existing garage, and removal of the unauthorised dwelling unit in the existing garage.
 - “2 Within 28 days of the issue of this notice complete all works defined in the building consent.
 - “3 Within 7 days of completion of the works obtain a Code Compliance Certificate.”

3.4 Subsequent events

- 3.4.1 After the notice to rectify was issued there were further meetings, inspections, and correspondence between the parties. On November 2004 the territorial authority, through its solicitors, sent the owner a list of specific “defects and failures”. The “defects” included undersized structural members and a lack of structural bracing, no proof of wall or ceiling insulation nor of a moisture barrier beneath the floor in the minor household unit. The “failures” included a failure to comply with the requirements of the Act in respect of obtaining a building consent, with the Plumbers Gasfitters and Drainlayers Act 1996 in respect of the persons authorised to do sanitary plumbing and with the Electricity Act 1992 in respect of persons authorised to do electrical work.
- 3.4.2 At some point the territorial authority commenced proceedings against the owner for failing to comply with the notice to rectify, but I have not been given any details of those proceedings.
- 3.4.3 The owner applied for this determination at the end of January 2005.
- 3.4.4 Hoping to clarify the matter of doubt or dispute that I was being asked to determine, I wrote to the owner (copy to the territorial authority) saying:
- “Whether the City Council acted unreasonably, and whether you must demolish the buildings concerned rather than bring them to compliance with the building code are questions of law that must be decided by the Courts if you cannot reach agreement with the [territorial authority].
- “Whether particular remedial work will bring the buildings to compliance with the building code is a question of building technology that can be determined by the chief executive, but only after you have prepared plans and specifications for the work and the [territorial authority] has decided that it will not achieve compliance with the building code to the required extent.
- “The plans that you sent to the Department with your application for determination are not specific as to the particular remedial work that you propose to do. To put it another way, if those plans were given to a building company for construction it would not know what it was being asked to do.”
- 3.4.5 The owner replied, through the architectural consultant, saying in effect that the reports by the listed consultant and the architectural consultant defined the upgrading work required.

4 THE LEGISLATION

4.1 The relevant provisions of the Act are:

(a) Section 17:

“(1) If any doubt or dispute arises in respect of—

“(b) The territorial authority's decision in relation to—

“(i) The issuing of or the refusal to issue, or the cancellation of, any building consent, notice to rectify, . . . or any amendment thereto; or

“(ii) Any condition attached to a building consent, notice to rectify . . . or any amendment to any such condition; or .

. . .

“any of the parties may apply to the chief executive for a determination in respect of the doubt or dispute.”

(b) Section 18:

“An application to the chief executive under section 17 of this Act shall be limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code . . .”

(c) Section 32(1):

“It shall not be lawful to carry out building work except in accordance with a consent to carry out building work (in this Act called a “building consent”), issued by the territorial authority, in accordance with this Act.”

Section 32(2) and the Third Schedule specify various exceptions to the requirement for building consent, none of which are applicable.

(d) Section 33(1):

“(1) An owner intending to carry out any building work shall, before the commencement of the work, apply to the territorial authority for a building consent in respect of the work.”

(e) Section 34(3):

“(3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.”

(f) Section 42:

“(1) The territorial authority may issue to the owner or to the person undertaking any building work a notice to rectify, in the prescribed form, requiring any building work not done in accordance with this Act or the building code to be rectified.

“(2) A notice under this section may also direct that all or any building work shall cease forthwith until the territorial authority is satisfied that the persons concerned are able and willing to resume operations in compliance with this Act and the regulations.

“(4) The provisions of subsection (3)(b) of this section shall not be read as relieving the owner of the requirements of section 33 of this Act to obtain a building consent for building work for which a notice to rectify has been issued under this section.”

5 THE SUBMISSIONS

5.1 The owner submitted correspondence with the territorial authority, the architectural consultant’s report, and the listed consultant’s report together with photographs of the building work concerned, and:

- (a) Expressed willingness to demolish one of the carports,
- (b) Said that the defects identified by the territorial authority in respect of the other carport were “very minor and can be upgraded”, and
- (c) Said that sanitary work in the minor household unit had already been upgraded but the name of the person who had originally installed the sanitary plumbing was unknown as that work had been done for the previous owner,
- (d) Said that other upgrading had been addressed in the listed consultant’s report.

5.2 The territorial authority, through its solicitors, provided photographs of the unauthorised building work and made a submission that included a narration of the sequence of events, listed the defects that the territorial authority’s inspector had identified, and concluded:

“ . . . Council considers that the unauthorised works are of such a sub-standard and defective nature that, notwithstanding the recommendations in the report by [the listed consultant], it is the Council’s opinion that these structures should be demolished.”

5.3 The owner responded to that submission, disputing various points in the territorial authority’s narration and asserting that the unauthorised works (other than the carport that the owner had agreed to demolish) could be upgraded and should not be demolished.

6 DISCUSSION

6.1 My jurisdiction

- 6.1.1 The relevant provisions of the Act as regards my jurisdiction in respect of notices to rectify (see 4 above) are:
- (a) Section 17(1)(b), which provides in effect that an application for determination may be made in respect of “any . . . notice to rectify”;
 - (b) Section 18, which provides that an application for determination shall be “limited to whether or not or to what extent particular building work . . . complies with . . . the building code”; and
 - (c) Section 42(1), which provides that the territorial authority may issue a notice to rectify “requiring any building work not done in accordance with this Act or the building code to be rectified”.
- 6.1.2 On the basis of section 18, I take the view that I have jurisdiction to determine whether building work or proposed building work complies with the building code. However, there is no dispute that the unauthorised building work does not comply with the building code, and (despite my request, see 3.4.4 above, and the owner’s contentions to the contrary, see 5.1.1(d) above) I have not been given specifications for proposed remedial work intended to bring it to compliance.
- 6.1.3 In Determinations 99/006 and 2000/1 the then Building Industry Authority took the view that despite section 17(1)(b) it did not have the jurisdiction to determine disputes about notices to rectify that turned on matters of law as distinct from matters of building technology. I agree, and take the view that I have jurisdiction in respect of notices to rectify only to the extent that the notice, or conditions of the notice, turn on compliance with the building code.
- 6.1.4 In this case, the notice to rectify was issued on the grounds that the building work was not done in accordance with the Act because no building consent had been obtained. In fact, that is not disputed, but even if it was I take the view that whether or not a building consent is required for any particular building work is a matter of law, which I do not have the jurisdiction to determine.
- 6.1.5 I also take the view that I have no jurisdiction in respect of the territorial authority’s decision in respect of the application for registration of unauthorised building work because that is a matter of territorial authority policy that is not mentioned in the Act.
- 6.1.6 However, the interpretation of the Act’s provisions as to my jurisdiction is a matter of law. I am not a Court and cannot issue binding interpretations of the Act. Accordingly, in case I am wrong about not having the jurisdiction to determine the matter, I record below the decisions I would come to if I did have the jurisdiction.

6.2 General

- 6.2.1 I take the owner’s overall contentions to be that:
- (a) The notice to rectify should be withdrawn or modified so as not to require demolition of all of the unauthorised building work, and
 - (b) That a building consent should be issued for rectification work on the basis of the reports by the listed consultant and the architectural consultant.

- 6.2.2 I take the territorial authority's overall contention to be that the notice to rectify is valid and should be confirmed. As the owner had not applied for a building consent for rectification work (as distinct from unsuccessfully applying for registration of the unauthorised works), the territorial authority did not need to comment on whether a building consent should be issued.
- 6.2.3 I note that some of the "defects" listed by the territorial authority, such as that roof trusses "are constructed by a non-registered truss manufacturer", do not amount to breaches of the building code. However, I consider that the territorial authority adequately identified failures to comply with the code.
- 6.2.4 From various references by both parties to the Resource Management Act there appears to be some question as to whether the building work concerned would comply with the territorial authority's district plan even if it complied with the building code.
- 6.2.5 I can offer no opinion on that point, but note that it might be relevant to the final decision as to whether all or any of the unauthorised work is to be demolished.
- 6.2.6 Similarly, I can offer no opinion as to the territorial authority's statements (see 3.4.1 above) to the effect that the owner failed to comply with the Plumbers Gasfitters and Drainlayers Act 1996 and the Electricity Act 1992 except to observe that in my view any such failure cannot be the subject of a notice to rectify under the Building Act.

6.3 Withdrawing the notice to rectify

- 6.3.1 As to withdrawing the notice to rectify, there is no dispute that the owner did some if not all of the work concerned without a building consent. Accordingly, the notice was issued on legitimate grounds and I can see no reason why I should reverse the territorial authority's decision to issue the notice.

6.4 Modifying the notice to rectify

- 6.4.1 As to modifying the notice to rectify, I note that there is no requirement in the Act or in Form 8 "Notice to Rectify Building Work" in the Building Regulations 1992 that the notice must specify what must be done to rectify the work concerned.
- 6.4.2 In reality, building work that does not comply with the building code (whether or not it was done without a building consent) can be rectified in only two ways:
- (a) By remedial work to bring it to compliance with the building code, or
 - (b) By being demolished.

In this case, the notice to rectify states that the unauthorised work must be demolished.

- 6.4.3 In Determination 2000/1, the then Building Industry Authority said that if it had the jurisdiction to do so it would have determined that it was unreasonable for a notice to rectify to require building work to be demolished solely because it was done without a building consent and in ignorance of whether or not it complied with the building code.
- 6.4.4 That is not the case with here, because it is accepted that the work does not comply with the building code. I note that the owner, despite the listed consultant's advice that building consent was required for remedial work, did not apply for such a consent during the period from 10 November 2003, when the territorial authority

refused the application for registration of the unauthorised works, and 1 July 2004, when the territorial authority issued the notice to rectify. Furthermore, details of proposed rectification work were not submitted in response to my own request, see 3.4.4 above. I therefore conclude that no useful purpose would be served by modifying the notice to rectify so as to give the owner the option of undertaking remedial work at this late stage.

- 6.4.5 In reaching that conclusion I was assisted by advice to the effect that, in the absence of immediate danger, the territorial authority itself cannot demolish that work without obtaining an order of Court to do so.

6.5 Granting a building consent for rectification work

- 6.5.1 Given the conclusion I have reached about the notice to rectify, the question of a building consent for remedial work does not arise. However, I note the following:

6.5.2 The owner has not applied to the territorial authority for a building consent for remedial work. That being so, there can be no doubt or dispute as to whether the territorial authority should have refused that non-existent application. If there is no doubt or dispute there is nothing for me to determine.

6.5.3 The architectural consultant, on behalf of the owner, said in effect that the territorial authority should not have refused the owner's application for registration of the unauthorised work. I take it as implied that the territorial authority should not merely have registered the work but should have issued a building consent for the necessary remedial work. In that respect, the architectural consultant said that "the details of the upgrading work are very well defined" in the reports from the listed consultant and the architectural consultant.

6.5.4 I disagree. The listed consultant's report was written in terms of section 64 of the Act, which specifies when a building is deemed to be dangerous. That might be important to the territorial authority in terms of issuing a notice under section 65 or registering unauthorised work, but it is not relevant to the granting of a building consent under section 34, which requires the territorial authority to be satisfied on reasonable grounds that the building work concerned will comply with the building code if properly constructed in accordance with the plans and specifications submitted with the application for consent.

6.5.5 I do not consider that the documents submitted in support of the application for registration amount to the plans and specifications that are required in support of an application for building consent. It is not enough, for example, that the listed consultant's report says that structural members must be upgraded "to comply with NZS 3604"¹. What is required is full details of those members so that the territorial authority can check that they do in fact comply with the building code.

7 DECISION

- 7.1 For the reasons set out in 6.1 above, I take the view that I have no jurisdiction to make a determination in respect of the notice to rectify.

¹ NZS 3604 is the New Zealand Standard for light timber framing and is cited in acceptable solution B1/AS1 issued by the Building Industry Authority under section 49 of the Act.

7.2 However, in case I am wrong about that as a matter of law, I record that if I do have the jurisdiction to do so then in accordance with section 20 of the Act I confirm the territorial authority's decision to issue the notice to rectify.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 27 June 2005.

John Gardiner
Determinations Manager