

Determination 2007/50

Issue of a notice to fix requiring removal of a conservatory at Unit 19, No 1 Ambrico Place, New Lynn, Auckland



1 The matter 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 applicant is the owner of a unit in the building Michael Gunson (“the applicant”), and the other party is the Waitakere City Council (“the territorial authority”).
- 1.2 The matter to be determined is whether certain building work, in connection with the installation of a glass conservatory over the entrance to a unit, required a building consent and, consequently, whether the territorial authority should have issued, as it did, a notice to fix regarding the conservatory.
- 1.3 The application for determination was received by the Department on 19 June 2006. On the 18 July 2006 the applicant advised the Department by phone that the conservatory had been demolished, but that he wished the determination to proceed. I assume that the demolition was in response to the notice to fix issued by the

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

territorial authority (see paragraph 3.2), but that has not been stated. In any event the removal of the conservatory might well be seen as negating the purpose of the determination and entitling me to refuse the application under sections 179 (1) and 179 (2) (a) of the Act on the grounds that the application was no longer genuine. However, in case I am wrong to interpret the Act that way, and because the matter may well be of general interest, I have decided not to refuse the application, but to proceed to determine the matter in accordance with the application.

- 1.4 I take the view that the matter for determination is the territorial authority's decision to issue a notice to fix, which turns on whether a building consent was required for the building work concerned.
- 1.5 In making my decision, I have not considered any other aspects of the Act or the Building Code. I have also not considered whether there were any "private-law" restrictions on the building work as a consequence of the ownership arrangements for the building.
- 1.6 In making my decision I have taken into account the submissions of the parties and the report of the independent expert ("the expert") I commissioned to measure the floor area of the conservatory (see paragraph 5.7).

2 The building

- 2.1 The building work consisted of a fully glazed aluminium frame, forming walls and a roof, to enclose an open deck to the entrance of an existing unit. The unit is part of a three-level eight-unit apartment building with the deck located at first floor level. The purpose of the work was to provide weather protection to an external door to the unit.
- 2.2 The area enclosed was declared by the applicant to be approximately 4.5 square metres. As discussed in paragraph 4.4, the territorial authority said the area was 6.76 square metres.
- 2.3 The deck had been provided with a metal balustrade to form a safety barrier. The safety barrier was demolished as part of the building work.

3 Sequence of events

- 3.1 According to the territorial authority a consent was issued for the erection of 8 residential units on the site on 15 September 1997, which included the open deck that was subsequently enclosed and is the subject of this determination. A code compliance certificate was subsequently issued on 26 February 1999 for the 8 units. At that time there was no conservatory on the open deck of the subject unit.
- 3.2 The territorial authority issued a notice to fix dated 8 May 2006, in respect of the conservatory erected on the open deck. The notice required the applicant to either apply for a building consent to remove the conservatory and reinstate the exterior patio doors, or to apply for a certificate of acceptance. I note that the notice to fix referred to "A 2.6 square meter glass, conservatory . . .". I conclude, since the territorial authority subsequently said in its submission dated 26 September that the floor area was 6.76 square metres, that the notice to fix was wrong to refer to a "2.6 square meter conservatory" as it should have described the floor area as "2.6 metres

squared” (ie 2.6 metres long and 2.6 metres wide) or as “6.76 square metres”. The applicant, in response to this notice, contended that the conservatory was erected under the provisions of paragraph (j) of Schedule 1 of the Act.

3.3 The conservatory was subsequently demolished by the applicant.

3.4 The applicant’s application for a determination was dated 12 June 2006.

4 Submissions

4.1 The applicant made a written submission setting out his view of the matter in dispute, stating that, as the enclosure was less than 5 square metres in area, it was covered by paragraph (j) of Schedule 1 of the Act. The applicant enclosed a copy of a notice to fix issued by the territorial authority and dated 8 May 2006. The notice to fix required that either the conservatory be removed or an application be made for a certificate of acceptance.

4.2 I note that the notice to fix, in describing the “particulars of contravention and non-compliance” did not specify any breach of the Building Code but alleged that the building work was in breach of section 40 of the Act.

4.3 The structure is described in the application as the “closing in of a veranda/patio with a floor area of 4.51 square metres by a glass conservatory.” The applicant also advised that “no structural work was touched”.

4.4 In a letter to the Department dated 26 September 2006, more than 3 months after the application for a determination was made, the territorial authority described the background to the dispute and also submitted:

A Notice to Fix was . . . in respect of a 6.76 square metre conservatory . . .

Council’s enforcement unit takes the view that [(j) of Schedule 1] only applies where there is an existing veranda, patio or the like, (in this case the deck), that has an existing roof over it and the ‘closing in’ is limited to the insertion of walls between the floor and the roof of the structure.

The owner has given the sub-section a more liberal interpretation and has taken the view that ‘closing in’ includes the roof structure as well.

4.5 The territorial authority also forwarded 2 photographs showing the enclosure.

4.6 A copy of a draft determination was forwarded to the parties for comment on 9 March 2007. Both parties accepted the draft.

5 Discussion

5.1 The question to be determined is whether the building work complies with the description included in paragraph (j) of Schedule 1 of the Act. Schedule 1 of the Act defines “Exempt Building Work” (ie building work for which a building consent is not required) and states:

A building consent is not required for the following building work:

(j) Building work in connection with the closing in of an existing veranda, patio or the like so as to provide an enclosed porch, conservatory, or the like with a floor area not exceeding 5 square metres:

- 5.2 Setting aside the question as to the actual floor area of the conservatory, in this case the building work consisted of the demolition of an existing balustrade and the erection of walls and a roof over an existing flat external surface immediately outside the entrance door to the owner's unit. I have been provided with no details of the nature of that external surface. The question is whether that floor came within the meaning of the words "existing veranda, patio or the like".
- 5.3 The *Concise Oxford Dictionary* includes the following definitions:
- veranda** . . . **1** a portico or external gallery, usu. with a roof, along the side of a house. **2** *Austral. & NZ* a roof over a pavement in front of a shop.
- patio** . . . **1** a paved usu. roofless area adjoining and belonging to a house. **2** an inner court . . .
- 5.4 I consider that the floor of the enclosed area described in this determination can properly be described as a "veranda or patio or the like".
- 5.5 The wording of paragraph (j) of the Schedule does not restrict the manner of "closing in", which may include enclosing the area under the roof of a veranda with walls, or enclosing a patio with walls and a roof.
- 5.6 Turning now to the matter of the actual floor area of the conservatory, there seems to be a dispute between the parties. The applicant said it was 4.51 square metres (see paragraph 4.3) while the territorial authority said it was 6.76 square metres (see paragraph 3.2).
- 5.7 To settle the matter of the actual floor area of the conservatory I commissioned an independent expert to visit the site and measure the area. The expert reported that the area measured was 4.88 square metres. That area is less than 5 square metres and leads me to conclude that the applicant was entitled to rely on Schedule 1 (j) of the Act as grounds for not applying for a building consent for the construction of the conservatory.
- 5.8 I note that all these plain English definitions refer to the word "house". I am doubtful if my analysis will be the same if, all other things being equal, the building work was, say, 7 stories up in an apartment building.
- 5.9 It is important that the parties should bear in mind that whether or not a consent is required, section 17 of the Act requires all building work to comply with the Building Code to the extent required by the Act.
- 5.10 I observe here that compliance with the Building Code when installing a conservatory to an existing building will be relatively easier to achieve in sheltered locations near the ground than in a highly exposed location on a multi-storey building. In the latter case higher wind speeds, for example, will impose greater structural loads on the frame and the glazing, and make the achievement of weathertightness more difficult. There may also be cases where the glazing must act as a safety barrier to provide safety from falling.
- 5.11 I have been advised by the owner (see paragraph 1.3) that the conservatory has been demolished.

6. The decision

- 6.1 In accordance with section 188 of the Act, I determine that the building work carried out in this case to construct the conservatory was building work that was exempt from the requirement for a building consent by virtue of paragraph (j) of Schedule 1 of the Act.
- 6.2 Further, I determine that the territorial authority was wrong to issue the notice to fix, unless there were matters of non-compliance with the Building Code that required remedying. I note that the notice to fix issued by the territorial authority and dated 8 May 2006 made no reference to breaches of the Code. As noted in paragraph 6.1, there was no breach of section 40 of the Act.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 14 May 2007.

John Gardiner
Manager Determinations