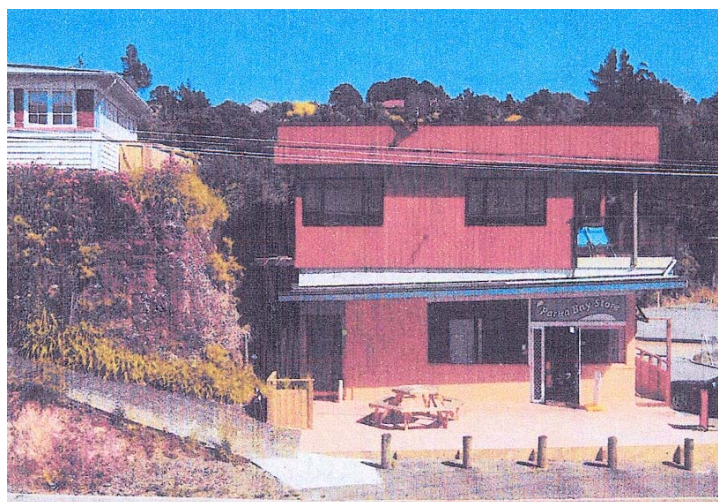


Determination 2008/38

Determination regarding the decisions of the territorial authority regarding an extension to a restaurant at 1035 to 1037 Whangarei Heads Road, Whangarei



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 applicants are the adjoining owners, Mr and Mrs Owles, (“the applicants”) acting through a building consultant (“the applicants’ consultant”) and the other parties are Mr and Mrs van Iersel the building owners (“the owners”), acting through legal counsel, and the Whangarei District Council (“the territorial authority”).
- 1.2 For the purposes of this determination, I accept that the applicants are owners of “other property” as defined under the Building Act 2004.

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

1.3 This determination arises from the decision of the territorial authority to issue a consent, a code compliance certificate and a certificate of acceptance in relation to a 2-3 year old extension to an existing building (“the restaurant”).

1.4 I consider that the matters to be determined are as follows:

A. Whether the restaurant as constructed complies with the following clauses of the Building Code² (First Schedule, Building Regulations 1992):

- B1 “Structure”
- C3 “Outbreak of Fire”
- C4 “Structural Stability During Fire
- E1 “Surface Water”
- E3 “Internal Moisture”
- G4 “Ventilation”
- G11 “Gas as an Energy Source”.

B Whether the territorial authority was in error in issuing a certificate of acceptance for work that was carried out in addition to the building work that was approved under a building consent.

In this instance, I have only considered those Building Code clauses that were in force at the time that the relevant building consents were issued. I note the some of the clauses and their titles have been amended by regulation since the issue of these consents.

1.5 Further to paragraph 1.4, I note that the applicants’ submission also raises questions relating to the following Code Clauses:

- B2 “Durability”
- ‘Fire Safety’ Clauses C1 and C2
- D1 “Access Routes”
- E2 “External Moisture”
- E3 “Internal Moisture”
- F4 “Safety from Falling”
- F6 “Lighting for Emergency”
- ‘Services and Facilities’ Clauses G1 to G3, G5, G9, G10, G12, and G13

However, as the applicants are adjoining owners, there is no provision in these clauses in terms of the Building Code that existed as at September 2004, unlike those described in paragraph 1.4, affording them protection from non-compliance with the Building Code. Accordingly, I am unable to consider them in this determination.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

- 1.6 In addition, the applicants have raised issues that relate to the Resource Management Act 1991 and the liquor licensing legislation. As my authority is restricted to matters raised under the Act and the Building Act 1991 (“the former Act”) I am also unable to comment on or determine these other concerns.
- 1.7 In making my decision, I have considered the submissions of the parties, the report of the independent expert (“the expert”) commissioned by the Department to advise on this dispute, and the other evidence in this matter.
- 1.8 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.

2. The building work

- 2.1 The completed building work which is the subject of this determination consists of a ground floor café and associated kitchen and an upper floor living area with an adjoining outside deck supported on timber posts.
- 2.2 The adjoining building, which is owned by the applicants, is situated above a bank adjacent to the restaurant. The ridge of the restaurant roof is approximately in line with the mid-height of the adjoining building and the adjacent walls of each building are several metres apart.

3. Sequence of events

- 3.1 The territorial authority issued a building consent (No 61284) on 7 January 2003 for “Additions to Store and 1st Floor Accommodation”. The territorial authority carried out a series of inspections and following a Final Inspection on 20 October 2003 noted on a Field Advice Notice (“FAN”) “all work completed and complies with NZ Building Code”.
- 3.2 On 22 October 2003, the territorial authority issued a code compliance certificate in regard to Consent No 61284.
- 3.3 On 17 July 2006, the territorial authority issued a notice to fix, which stated that the building had to be connected to the territorial authority’s sewer line by 20 January 2007.
- 3.4 The owners employed a firm of architects and engineers to prepare a “Fire Safety Compliance Report” for a proposed addition to the previously amended building. The report, which was dated 27 September 2004, and which was forwarded to the territorial authority, set out the various safety features that were required to be installed in the proposed additions and noted that property protection would be achieved at the various boundaries.
- 3.5 The territorial authority issued a second building consent (No 76880) dated 30 September 2004 for “Second Storey Accommodation over Shop”. (I note at this point that both the consents for the restaurant were issued under the former Act.) The territorial authority carried out a series of inspections and following a Pre-line

Inspection on 29 June 2006, noted on a FAN that the “existing café is as per plans” but that some work was required regarding signage and exit doors.

- 3.6 On 2 November 2007 a code compliance certificate was issued for work associated with Consent No 76880.
- 3.7 A set of three “As Built” plans was received by the territorial authority on 29 August 2006, which related to the completed building.
- 3.8 The applicants’ consultant provided an “Assessment of Code Compliance Issues” report that was dated 13 December 2006. This report set out the background to the matters in dispute and described the documentation that had been issued regarding the building work. The report addressed issues relating to the resource consent and raised concerns as to the code compliance of some of the building work. In the opinion of the consultant, a building consent should not have been issued for this work.
- 3.9 The applicants’ legal counsel wrote to the territorial authority on 22 February 2007 describing a meeting that had taken place with officers of the territorial authority and attached a file note dated 21 February 2007 regarding the development of the property in question. Counsel concluded that the development was in breach of the District Plan and the Resource Management Act 1991.
- 3.10 A series of letters, which discussed the matters raised on behalf of the applicants, passed between the applicants’ consultant and the territorial authority between 8 March 2007 and 15 June 2007.
- 3.11 Following a request from the owners on 26 January 2007, the territorial authority inspected the premises to determine whether a certificate of acceptance could be issued for the re-located kitchen and associated drainage work that had been carried out but did not form part of Consent No 76880. Following a Final Inspection on 12 September 2007, the territorial authority noted on a FAN that “all items for COA have been addressed”. On 20 September 2007, the territorial authority issued a certificate of acceptance (No 98022) for the relevant work.
- 3.12 The Department received an application for a determination on 8 August 2007.

4. The submissions

- 4.1 The applicants wrote to the Department on 25 June 2007, setting out their concerns regarding the restaurant. These included the fumes from the extract vent, the issuing of a certificate of acceptance, the access way, and the capabilities of the sewerage holding tank.
- 4.2 In a covering letter dated 31 July 2007, the applicants’ consultant set out the history and background to the dispute and mainly raised matters concerning resource consent and liquor licensing issues. The consultant stated that there were grave concerns relating to many clauses of the Building Code and in particular those

relating to the outbreak of fire. The cooking extract vent also elevated the fire risk and was the source of “obnoxious odours”.

4.3 In a second letter to the Department dated 23 October 2007, the applicants’ consultant stated that the applicants were more concerned about the risk of outbreak of fire than the odours from the extract vent. The consultant queried whether the original fire report would cover the current commercial operations carried out in the building and also whether it was appropriate for the territorial authority to issue a certificate of acceptance.

4.4 The applicants forwarded copies of:

- the “as-built” drawings
- the consent and inspection documentation
- the code compliance certificate dated 22 October 2003
- the certificate of acceptance dated 20 September 2007
- the applicants’ consultant’s report dated 13 December 2006
- the correspondence between the applicants and the territorial authority.

4.5 The owners wrote to the Department on 19 September 2007, giving some background to the disputed matters. The owners were of the opinion that the adjoining property may not meet the territorial authority’s requirements and noted that there were nuisances emanating from the applicants’ adjoining tavern that affected both the applicants’ and the owners’ properties.

4.6 The territorial authority wrote to the Department on 26 September 2007 and restricted its response to items relating to the Building Act. The territorial authority had not enforced the notice to fix as it was currently working with the community to try to install a pumping station on its rising main. The current vent discharge point was considered to be appropriate and the territorial authority had approved the fire report that had been prepared on behalf of the owners. A compliance schedule and a compliance statement would be issued on completion of the works.

4.7 Copies of the all documentation were forwarded to the respective parties.

5. The draft determination and the hearing

5.1 The draft determination was forwarded to the parties for comment on 27 November 2007.

5.2 At the request of one of the parties a hearing was held in Whangarei on 8 April 2008. The hearing was chaired by me. I was accompanied by a referee, appointed under section 187 of the Act, and officials from the Department. In attendance were the applicants and their building consultant, the owners and their legal counsel, and representatives of the territorial authority. The party’s verbal submissions provided me with information that corroborated or enlarged on the written submissions.

- 5.3 Following the hearing the attendees visited the site to observe the buildings that are involved in the matters to be determined.
- 5.4 The determination takes account of matters raised at the hearing.
- 5.5 In a letter dated 10 April 2008 the applicants' consultant expressed concern about various matters including the length of time that the restaurant had been in operation, the enclosure of the carport, and the alignment of the deck adjoining the upper floor. Where the views expressed in the letter related to the matters to be determined I have taken account of them in the final determination.

6. The expert's report

- 6.1 As mentioned in paragraph 1.7, I engaged an independent expert ("the expert"), who is a consulting engineer specialising in building services and a member of the Institution of Professional Engineers New Zealand, to provide an assessment of the kitchen extract system and whether it complies with Clause G4.
- 6.2 The expert inspected the extract system on 8 November 2007 and furnished a report to the Department that was dated 20 November 2007. The report described the physical layout of the system and analysed its layout and design. The analysis was undertaken in the context of Clause C4 and in comparison with the requirements of the Acceptable Solution G4/AS1. In summary; the expert noted that the kitchen exhaust system did not comply with G4/AS1 in the following respects:

"E7.2 - filters inclined at greater than 30 degrees to the vertical

E7.4.1 - top is flat, and would not comply if condensation formed on it at times of normal peak use.

E7.5 – the overhang beside the deep fryer is less than the minimum requirement of 150mm.

3.7.3(a) – discharge is not vertical.

3.7.3(b) – discharge is not at least 3m above the roof of the dwelling above the restaurant.

3.7.3(c) – discharge appears to be less than 6m from the boundary, and we assume that it is without approval."

7. Discussion

7.1 Evaluation framework

- 7.1.1 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solution³, in this case G4/AS1, which will

³ An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way, but not the only way, of complying with the Building Code. The Acceptable Solutions are available from The Department's Website at www.dbh.govt.nz.

assist in determining whether building elements are code compliant. However, in making this comparison, the following general observations are valid:

- Some Acceptable Solutions are written conservatively to cover the worst case, so that they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code.
- Usually, when there is non-compliance with one provision of an Acceptable Solution, it will be necessary to add one or more other provisions to compensate for that in order to comply with the Building Code.

7.2 Clause B1 “Structure”

7.2.1 As described in clause 2.2, the adjacent building is predominantly situated at a level that is above the roof of the restaurant. Clause B.1.1(c) has the objective of protecting other property from physical damage caused by structural failure [of an adjoining property]. Based on the respective positions of each building, I cannot accept that even a major structural failure of the restaurant could impact on the safety of the adjoining building. Accordingly, even if there are concerns as to the structural integrity of the building, taking into account both the wording of Clause B1 and the positioning of the two buildings, these concerns are not relevant in the context of this determination.

7.3 Clause C3 “Spread of Fire”

7.3.1 Clause C3.1(c) has the objective of protecting adjacent household and other residential units and other property from the effects of fire. I have examined the “Fire Safety Compliance Report” described in paragraph 3.4, and undertaken my own research within the Department. I consequently conclude that:

- it is appropriate to consider that the steep bank will protect the adjacent property from fire radiant heat
- the building is approximately 4 metres from the boundary rather than 3 metres
- the report considers the store and café to be separate fire cells. As the store was the original structure of block construction it seems reasonable to use this approach
- using the tables in C/AS1 the purpose groups are CS and CR, the Fire Hazard categories are 2 and 1 and the occupancy rates of the lower floor are less than 100
- with regard to External Fire Spread adequate protection is achieved for the store and café. The first floor would require 37% of the elevation requiring fire protection if it was 3 metres from the boundary or 20% if it was 4 metres away. In effect that means the south west elevation should be lined with a fire-resistant lining board
- with respect to this lining, on the territorial authority’s inspection record of 3 May 2005 is a note that draws attention to the requirements for lining the upstairs southwest wall to be confirmed with the person who wrote the fire report. Subsequently, on the inspection record of 10 August 2005, the ok is

given to line the remainder of the top storey. I consider it is reasonable to arrive at the view that the wall is appropriately lined.

- 7.3.2 Accordingly I conclude that the fire report was properly carried out and correctly based on the relevant tables set out in C3/AS1. I find that the conclusions reached in the report are appropriate when applied to the restaurant. Accordingly I determine that the applicants' property is not at risk from the spread of fire.

7.4 Clause C4 “Structural Stability during Fire”

- 7.4.1 Clause C4.1(b) has the objective of protecting household units and other property from damage due to structural instability caused by fire. However, for the reasons outlined in paragraph 7.2.1, I cannot accept that the object of this clause is relevant in the context of this determination.

7.5 Clause E1 “Surface Water”

- 7.5.1 Again, for the reasons outlined in paragraph 7.2.1, I cannot accept that the object of Clause E1.1(a), which requires the safeguarding of other property from damage caused by surface water, is relevant in the context of this determination.

7.6 Clause G4 “Ventilation”

- 7.6.1 The performance requirement of clause G4.3.4 requires that contaminated air shall be disposed of in a way which avoids creating a nuisance or hazard to people and other property. I consider the expert's report establishes that the current performance of the existing kitchen exhaust system is such that it does not comply with clause G4.

7.7 Clause G 11 “Gas as an Energy Source”

- 7.7.1 The objective of clause G11.1(b) is to safeguard people and other property from the risk of fire or explosion [caused by gas from an energy source]. As I have not received any evidence that the gas supply as installed poses any threat to the adjoining (other) property I am prepared to accept that it does not.

7.8 The Certificate of Acceptance

- 7.8.1 The applicants have raised the concern that it was not appropriate for the territorial authority to issue a certificate of acceptance for work that was carried out in addition to that authorised under Consent 76880. Section 96(1)(a)(ii) of the Act allows a territorial authority, on an application from a building owner, and subject to conditions set out in section 96(2), to issue a certificate of acceptance for work already done if a building consent was required for the work but was not obtained. In the current situation a building consent should have been obtained for the additional work related to the re-location of the kitchen and associated drainage work, but was not obtained. I am, therefore, of the opinion that it was appropriate for the territorial authority to issue of a certificate of acceptance in terms of section 96, if, as section 96(2) requires, it was satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the Building Code.

8. What is to be done now?

- 8.1 The territorial authority has not issued a notice to fix. A notice to fix should be issued that requires the owners to bring the kitchen extract system into compliance with the Building Code as described in paragraph 6.2, without specifying the features that are required to be incorporated. It is not for the notice to fix to stipulate directly how the defects are to be remedied and the system brought to compliance with the Building Code. That is a matter for the owner to propose and for the territorial authority to accept or reject.
- 8.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 8.1. Initially, the territorial authority should issue the notice to fix. The owners should then produce a response to this in the form of a technically robust proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination. In this respect, I note that in his report, the Department's expert has provided a possible response to the points of non-compliance. While this has not been considered in the determining of the matters at issue, it may be of assistance to the parties in this matter.

9. The Decision

- 9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the restaurant complies with Clauses C3 and G11 of the Building Code
 - the restaurant does not comply with Clause G4 of the Building Code and accordingly, I reverse the territorial authority's decision to issue a code compliance certificate in respect of Consent No 76880
 - the "protection of other property" provisions in Clauses B1, C4, and E1 are not relevant in the context of this determination
 - the territorial authority was justified in issuing a certificate of acceptance and accordingly, I confirm its decision to do so.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 May 2008.

John Gardiner
Manager Determinations