



## Determination 2010/107

# Whether a building consent was required for the conversion of a part garage to an office at 55 Ferry Parade, Herald Island, Waitakere

## 1. The matter for determination

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 are:

- the applicant, Mr R Hadfield, who is the owner of the house (“the applicant”)
- the Waitakere City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

1.2 The application arises from a dispute between the parties as to whether a building consent was required for the work to create an office in part of an internal garage. I am therefore of the view that the matter for determination<sup>2</sup> is whether the authority correctly issued the building consent in respect of this work.

1.3 In making my decision I have not considered any other aspects of the Act or of the Building Code.

## 2. The building work

2.1 The building work consisted of an alteration to an existing two storey house to convert part of the attached garage into an office. The garage is founded on a full concrete pad base and is constructed of concrete block walls. The alteration involved the construction of a non load-bearing partition wall (“the partition wall”) across the existing garage to divide part of the garage into an office.

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243

<sup>2</sup> In terms of section 177(b)(i) of the Act (prior to 7 July 2010)

- 2.2 The partition wall is constructed of a simple framing of studs and dwangs. It is fastened to the existing walls and bolted to the floor at the bottom plate. The wall is lined and insulated, lining was added to the existing walls and floor in the office, and the existing window in the office area had a new sill and jamb installed.
- 2.3 The door to the office area was also an existing feature located in an existing wall.

### 3. The background

- 3.1 Based on the information provided in the application, it appears the applicant approached the authority in late 2007 about the proposed building work. The authority advised the applicant that a building consent was required for the creation of the office in the garage, because this would constitute a change of use from a non-habitable space to a habitable space.
- 3.2 The applicant subsequently submitted an application for a building consent; however the authority refused to accept the application on the grounds that the information submitted was insufficient to assess the proposal and the plans were not prepared in accordance with NZS/AS 1100<sup>3</sup>. The applicant did not resubmit the application for a building consent until November 2008. The November 2008 application included professionally drawn plans and a specification for the building work. The application was refused by the authority because a required cross sectional plan was missing from the application. The applicant resubmitted the application, including the cross sectional plan and a building consent was issued in December 2008.
- 3.3 The final inspection was carried out in March 2009, and a code compliance certificate was issued on 17 March 2009. The authority sent the applicant a questionnaire requesting feedback about the service that the authority had provided.
- 3.4 On 30 March 2009, the applicant responded, noting ‘The costs to date therefore for the \$500 partition wall even before I had purchased any materials ... total \$2902.’
- 3.5 The authority responded to the applicant’s 30 March 2009 letter on 14 May 2009 explaining their position in respect of the building consent process and inspection process. In response, the applicant wrote to the authority in a letter dated 26 May 2009, stating:
- ... the construction of a 3 metre non-load bearing wall was unlikely to be carried out otherwise than in accordance with the Building Code and even if it was defective then it would not endanger people or any building or property. ... your officer did not use any discretion and instead funnelled me into the full building consent process which was expensive, unnecessary and plagued with mistakes.
- 3.6 In response, the authority wrote to the applicant on 25 June 2009, explaining that the issue was:
- ... whether the [authority] was correct to ask for a building consent for the proposed building work. As may be expected, the [authority] takes the view that it was, because it considers that the [Building Code] requirements associated with building work involving the conversion of part of a garage into a habitable room are otherwise unlikely to be met. ... disputes concerning exemptions under paragraph (k) of

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<sup>3</sup> New Zealand and Australian Standard NZS/AS 1100:1992 Technical Drawing

Schedule 1 of the [Act] may be resolved by means of a determination pursuant to section 177(c)(iia) of the Act.

- 3.7 There was correspondence between the applicant, the authority and the Department. On 30 July 2009, the applicant wrote a further letter to the authority and in response to that letter, the authority, in a letter dated 18 August 2009, stated:

It is important to be clear here that it is the building owner, not the [authority], who is responsible for determining whether or not their proposed building work is exempt from the requirement of obtaining a building consent. It is one of the points made in paragraph 5.1(a) of Determination 2003/10, referred to in your letter.

The position is confirmed in the introductory passage on page 1 of the 'Building work that does not require a building consent' guidance issued by the Department ... in November 2008. It therefore inexorably follows, that it is for the building owner to obtain whatever advice and information they require, and that they are entirely responsible for the consequences of their decision.

It is the [authority's] position that it was not appropriate to do this [(regard a building consent as unnecessary pursuant to paragraph (k) of Schedule 1 of the Act)] because of the technical and/or safety aspects associated with a change of use of part of the garage into a habitable room ...

- 3.8 The application for a determination was received by the Department on 15 February 2010.

## **4. The submissions**

- 4.1 The applicant provided a copy of some of the plans for the building work and the correspondence mentioned in paragraph 3.
- 4.2 The authority acknowledged the application on 18 February 2010; however it did not make a submission in response to the application.

### **4.3 The first draft determination**

- 4.3.1 The first draft determination was issued to the parties for comment on 15 March 2010. The parties made submissions in response to the draft determination and in response to the submissions of the other party.

- 4.3.2 The applicant made the following comments:

[the authority] held itself out as an [appropriate] organisation to obtain information to provide advice as to whether a building consent was required or not...

[the authority] admits that counter staff would have told me that even if I made a formal application for consideration for exemption under [paragraph (k)] this was unlikely to have been granted.

- 4.3.3 The authority made submissions with the following comments:

... no request of the [authority] to consider the matter under paragraph (k) has ever been made...

...it is not denied that counter staff would have taken the view in November 2007 that the building work required a building consent, but it is denied that the applicant requested the [authority] to consider the matter under paragraph (k).

The applicant confirms that he never proceeded to make an application to the [authority] for consideration of his building project under paragraph (k) of Schedule 1...  
...a casual conversation with a counter assistant [does not amount] to a refusal by the [authority] to exempt under paragraph (k).

In an affidavit provided to the Department on 30 April 2010, an officer of the authority stated:

Counter staff do not have the authority to make decisions on matters of this kind. ...  
The application would then be put before a senior building control officer for consideration.

4.3.4 In response to these comments, I note that the first draft determination considered whether the building work should have been exempt under paragraph (k) of Schedule 1 of the Act based on the explanation of the authority in a letter to the applicant (refer to paragraph 3.7).

#### **4.4 The second draft determination**

4.4.1 I amended the determination to take the parties comments into account. The second draft determination considered whether the authority correctly exercised its powers under section 115 of the Act, because it considered the work constituted a change of use and that the Building Code requirements associated with the change of use were unlikely to be met. The second draft determination was issued to the parties for comment on 12 May 2010.

4.4.2 The authority responded to the second draft determination in a submission to the Department dated 31 August 2010. The authority submitted, in summary, that:

- The authority ‘was never requested by the Applicant to consider an exemption under paragraph (k) of Schedule I of the [Act].’
- The authority was concerned that the Department had issued the second draft determination on a matter that the applicant had not sought (being section 115).
- The authority ‘has never considered the change of use provisions of section 115 of the Building Act 2004 to be relevant to the building work’ and it was therefore concerned that the determination was deciding on a matter that the authority had not exercised its powers in respect of.

4.4.3 The applicant responded to the second draft determination in an email to the Department also dated 31 August 2010. The applicant submitted, in summary, that:

- The applicant ‘did request the council to consider an exemption under paragraph (k) of Schedule 1 of the Building Act.’ The ‘request was verbally made to a council employee [at a public counter]’.
- The council employee applied ‘the then [authority] policy ... that if a change [of] use was involved then no such exemption under paragraph (k) would be approved and a building consent was therefore required’.
- The applicant said he saw little point in making a written application for a paragraph (k) exemption ‘for something that would be refused anyway?’

- ‘If Section 115 should have been applied by the [authority] then that too should be part of [the] determination.’

4.4.4 In an email to the Department dated 13 September 2010, the authority submitted that some of the disputed matters were ‘outside the remit of the Determination procedure’.

## **4.5 The third draft determination**

4.5.1 Taking account of the comments on both the first and second draft determinations I further amended the determination to consider whether the authority was correct to issue the building consent. The third draft determination was issued to the parties for comment on 7 October 2010.

4.5.2 The applicant responded to the third draft determination in a submission dated 9 October 2010. The applicant wished to have the determination note that the garage was internal to the house and to have the determination confirm ‘whether a building consent was required or not’. The applicant ‘wish[ed] to retain some value ... and keep the consent and code of compliance certificate on [his] property file for ... future possible owners of the property.’

4.5.3 The authority responded to the third draft determination in a submission dated 22 October 2010. The authority did not accept the third draft determination. The authority restated its previous position that a building owner was responsible for obtaining a building consent and determining whether building work was exempt. The authority questioned the draft determination’s view that the legal obligation to assess such matters fell to the authority, and challenged the legal basis on which that view was reached. The authority said that:

At the time an application for a building consent is made the [authority] is reasonably entitled to conclude that the building owner has decided either (i) that the building work requires a building consent, or (ii) that although exempt the building owner prefers to have the building work consented and a code compliance certificate issued.

The authority concluded by submitting that the Department ‘[does] not understand Schedule 1 of the Act.’

4.5.4 I have taken account of the submissions made and amended the determination as I consider appropriate.

## **5. Discussion**

### **5.1 My response to the authority’s position**

5.1.1 The authority has used two references (refer paragraph 3.7) to support its position that it is an owner who is responsible for deciding whether building work is exempt from the need for a building consent; being Determination 2003/10 and a Departmental guidance document<sup>4</sup>.

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<sup>4</sup> Building work that does not require a building consent – A guide to Schedule 1 of the Building Act 2004 (November 2008)

- 5.1.2 Determination 2003/10 took the view that the predecessor to the Department (“the BIA”<sup>5</sup>) had no power under the Building Act 1991 to determine whether a building consent was required or not. The authority sought to apply that view to this situation and argued that the authority also could not decide whether a building consent was required.
- 5.1.3 The relevant limit on determinations under the Building Act 1991 that prevented the BIA considering whether a building consent was required was not carried over to the current Act. For this reason I consider Determination 2003/10 is not relevant to the current situation.
- 5.1.4 The authority considers that the Departmental guidance document supported its position that an owner is ‘responsible for determining whether or not their proposed building work is exempt from the requirement of obtaining a building consent’.
- 5.1.5 In my view the statement is an explanation of an owner’s obligation to check whether work is exempt before carrying out work without a building consent. It is not a statement of an authority’s obligations when processing a building consent. The guidance document goes on to make it clear that the advice applies to owners deciding to carry out exempt work themselves:
- Therefore, it is important to get good advice before deciding that the building work is covered by the exemptions set out in Schedule 1. If building work is unlawfully undertaken for which a building consent is required (ie it is not exempt under Schedule 1) then this is an offence under section 40 of the Building Act.
- The “important notes” section on page 2 of the guidance document also states that:
- If you are unsure what requirements may apply to your project, the Department recommends that you seek advice from your local council.
- 5.1.6 The authority further submitted that it was under no legal obligation to consider the application of Schedule 1 when considering a building consent application and that the authority's legal obligations were set out in sections 48 and 49 of the Act. The authority submitted that where the authority received a building consent application for exempt building work the authority was entitled to assume the owner had decided to obtain a building consent even though the building work may be exempt.
- 5.1.7 Before the authority may grant a building consent it must have the power to do so. A building consent can only be issued for “building work” which “means work for, or in connection with, the construction, alteration, demolition, or removal of a building” (section 7). A “building” is defined in section 8 and various matters are excluded from that definition in section 9. The authority must be mindful of these provisions when considering an application for a building consent to ensure it has the power to issue a building consent.
- 5.1.8 Similarly, section 41 sets out those circumstances where a building consent is not required and the circumstances include matters such as energy work, Crown building work, urgent building work and building work carried out by an authority under the Act. It is not for the authority to ignore such provisions when considering a building consent application and assume an applicant has some valid reason for applying for a

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<sup>5</sup> Building Industry Authority

building consent. This is particularly so where an applicant may not be a building professional and may have little experience in building matters.

- 5.1.9 In this situation (as happened here) it is only appropriate that the applicant sought the authority's advice as to whether a building consent was required. The authority cannot now disavow itself of the incorrect advice it gave to the applicant that a building consent was required by saying it was the applicant's decision to apply for the building consent.

## 5.2 The change of use provisions under the Act

- 5.2.1 The Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005 classify 'Uses related to sleeping activities' for a 'Sleeping Single Home' (SH) as:

| Use                       | Spaces or dwellings   | Examples  |
|---------------------------|---|---|
| SH (Sleeping Single Home) | detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements | dwellings or houses separated from each other by distance |

- 5.2.2 It is clear from the provisions of the Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005 that changing part of a garage to an office does not constitute a change of use under the Act. The building use was classified as SH before the building work was done and remained SH after the building work was completed.
- 5.2.3 I therefore consider that changing the use of part of a garage to an office does not constitute a change of use under the provisions of the Act, as is contended by the authority, and therefore section 115 does not apply in this instance.
- 5.2.4 While the change of use provisions do not apply, I note that section 115 does not, of itself, trigger the need for building work to be undertaken. I also note that if building work is required, the change of use provisions do not require a building consent to be obtained. Building work that may arise from a change of use may be exempt from the need for a building consent under Schedule 1 of the Act.
- 5.2.5 When considering the building consent application in this instance the authority should have considered the application of Schedule 1 and advised the applicant that the proposed work could be exempt. The applicant could then have decided whether to proceed with the application or withdraw it. In my view if an authority considers building work exempt it is incumbent on the authority to advise an owner accordingly.

## 5.3 The provisions of Schedule 1

- 5.3.1 The following Paragraph (ca) of Schedule 1 came into force on 16 October 2008.

(ca) the construction, alteration, or removal of an internal wall (including the construction, alteration, or removal of an internal doorway) in any existing building if—

- (i) compliance with the provisions of the building code relating to structural stability is not reduced; and
- (ii) the means of escape from fire provided within the building are not detrimentally affected; and
- (iii) the wall is not made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar:

5.3.2 The authority considered the building consent application in November 2008 and issued the building consent on 22 December 2008. However, in my view Paragraph (ca) of Schedule 1 clearly provides a complete exemption for the consented work.

5.3.3 In addition Paragraph (k) of Schedule 1 that was in force at the time the consent was issued says:

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

- (k) any other building work in respect of which the territorial authority ... consider that a building consent is not necessary for the purposes of this Act because that building work–
  - (i) is unlikely to be carried out otherwise than in accordance with the building code; or
  - (ii) if carried out otherwise than in accordance with the building code, is unlikely to endanger people of any building, whether on the same land or on other property.

5.3.4 Given the nature of the building work I consider it unlikely to be carried out otherwise in accordance with the Building Code in accordance with Paragraph (k)(i).

5.3.5 Furthermore, given the application of the requirements of the Building Code to the building work, it is my view that even if the work was carried out other than in accordance with the Building Code, the building work would not endanger people of any building, on the same land or other property in accordance with Paragraph (k)(ii).

5.3.6 As with my comments above in paragraph 5.2.5 it is incumbent on the authority when considering a building consent application such as the one here to consider the application of Schedule 1 and advise the applicant if it considers that the proposed work is exempt. It is not appropriate for the authority to defend the issue of the building consent in this instance by saying that it was the applicant's responsibility to decide whether the work was exempt. That is particularly so because it appears the applicant specifically sought the authority's advice whether the work was exempt and was advised that a building consent was required.

## 5.4 Conclusion

5.4.1 The building work did not constitute a change of use, and even if it had, the work would have fallen within the exemption for the need for a building consent under either paragraphs (ca) or (k) of Schedule 1. The authority failed to properly consider whether either exemption applied and to advise the applicant accordingly.

5.4.2 If the authority had properly turned its mind to the question of whether the proposed building work was exempt, it would have advised the applicant of the correct situation regarding the application of Schedule 1, and sought a response from the



applicant whether the applicant wished the authority to continue with the processing of the building consent application. It is clear from the submissions of the applicant that he would have withdrawn his application and proceeded with the proposed building work as exempt building work under Schedule 1. However, the applicant has submitted that he wishes the building consent to remain in place (refer paragraph 4.5.2). I have therefore not withdrawn the building consent.

## **6. Decision**

- 6.1 In accordance with section 188 of the Act, I hereby confirm the decision of the authority to issue the building consent but determine that a building consent was not required as the work was exempt building work under Schedule 1 of the Act.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 November 2010.

John Gardiner  
**Manager Determinations**