



Determination 2011/016

The refusal of a certificate of acceptance and the issue of notices to fix for a sleep-out and bedroom addition at 14 Kohekohe Street, New Lynn, Waitakere City

1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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.
- 1.2 The parties to this determination are:
- Mr H Chen and Ms W Feng, the owners of the property, acting through their agent (“the applicants”)
 - the Auckland Council (including in its previous capacity as Waitakere City Council) (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 I also consider that the owner of the neighbouring property at number 12 Kohekohe Street (“the neighbour”) is a party to the determination.
- 1.4 This determination arises from the authority’s decisions to issue two notices to fix and to refuse to issue a certificate of acceptance for an addition to the western side of the house and the conversion of a detached garage into a sleep-out. The decisions arose because authority was not satisfied that the building work complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992).

¹ The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² In this determination, unless otherwise stated, references to sections are to sections of the Building Act 2004 and references to clauses are to clauses of the Building Code.

1.5 The matters to be determined³ are therefore whether the authority was correct to issue the notices to fix and to refuse to issue a certificate of acceptance for the building work. In deciding this I must also consider whether the building work complies with the relevant clauses of the Building Code.

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

1.7 Matters outside this determination

1.7.1 I note that the fact that the applicant’s swimming pool is unfenced has been referred to both in correspondence from the authority to the applicant and in the expert’s report. The pool fencing is outside the matters that are to be determined and is not considered further in this determination; however, I sent a letter to the parties, noting that any action required in relation to pool fencing should not be delayed for the determination.

1.7.2 In making my decision I have sought to clarify the sequence of events in respect of the application of the Building Acts (1991 and 2004) and the Building Code in relation to the building work. Under section 177 of the Building Act I am only able to determine matters concerning compliance with the Building Code and in this instance the exercise of the authority’s powers respect of the notices to fix and the certificate of acceptance.

2. The building work

2.1 The building work is on a residential section in a suburban area. The property has an existing weatherboard-clad house on it, built in the late 1950s with a single garage in the basement. At the rear of the house is an in-ground swimming pool, which appears to have been installed in or after 1987.

2.2 This determination relates to the conversion of an existing detached garage to a sleep-out (“the sleep out”) located in the northern corner of the property, and a bedroom on the western side of the house (“the bedroom addition”).

The sleep-out

2.3 The sleep-out is a free-standing garage structure which is metal clad, with aluminium joinery and a corrugated iron roof. I have not received any information as to the foundations of the structure however photographs show that the interior has been lined.

The bedroom addition

2.4 The bedroom addition has a concrete slab foundation, fibre-cement sheet cladding, aluminium joinery and a corrugated iron roof. The external western wall of the addition has been built onto, and incorporates, the boundary fence between the applicants’ and the neighbouring property.

³ Under sections 177(1)(b), 177(2)(f) and 177(3)(b) of the Act.

- 2.5 The room is accessed through doors in the kitchen area, and also has external doors leading out onto the back yard adjacent to the pool. It is understood that the bedroom addition incorporates elements of an earlier spa pool enclosure (refer paragraph 5.6.4), which stood in the same location onsite.

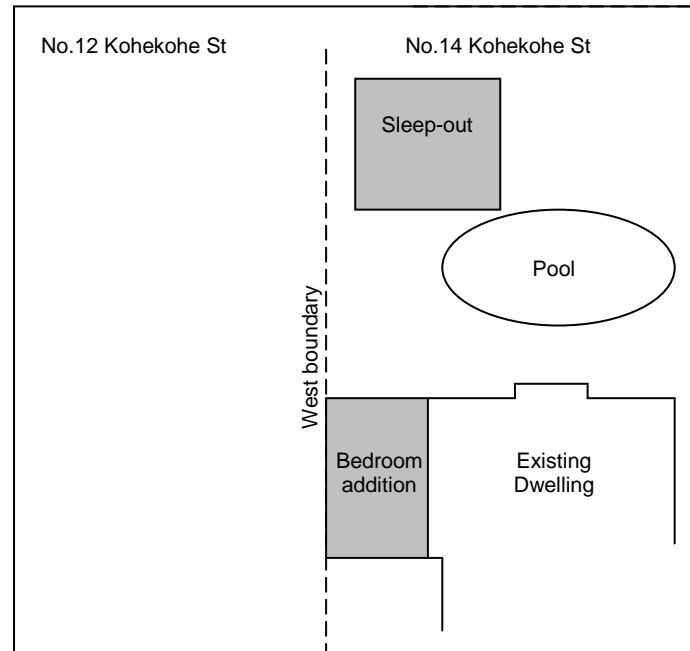


Figure 1: Site Plan (not to scale)

3. Background

- 3.1 The following building permits were issued by the then local authority for building work on this site:

- No. 57000985 – issued in 1957 for a dwelling
- No. 72015776 – issued in 1972 for a garage
- No. 87007358 – issued in 1987 for a swimming pool
- No. 88004655 – issued in 1988 for an addition to the dwelling

- 3.2 Though the authority does not hold plans or inspection records for the permitted work, it appears from the evidence provided that the building permits relate to; the construction of the original house (1957), the construction of the detached garage (1972), the installation of the in-ground swimming pool (1987), and the enclosing of the basement of the original house to form a garage (1988). All four permits were issued prior to the introduction of the Building Act 1991.

- 3.3 Although the exact date can not be ascertained, it is clear from the evidence provided to me that the spa pool enclosure was constructed on or before 2000 (refer paragraph 5.6.4).

- 3.4 In an internal memo dated 4 June 2003, generated in response to the request for a LIM by the applicants, the authority noted that it was ‘unable to find property bag, micro[film] ... no permit or plans’.

- 3.5 On 6 June 2003, the authority sent two letters to the then owner (“the previous owner”) noting that an unauthorised spa pool enclosure had been built on the property, that the swimming pool was unfenced, and requesting that these matters be rectified.
- 3.6 On 16 June 2003, the authority copied the LIM report to the applicants’ solicitor which noted that there were two outstanding notices on the property, concerning ‘Building Unauthorised Works’ and ‘Swimming Pool Fencing’ and including copies of the two letters dated 6 June 2003 addressed to the previous owner.
- 3.7 The authority also wrote to the previous owner on 16 and 19 June 2003 (copied to the applicants’ solicitor) with respect to the four building permits (refer paragraph 3.1). The authority’s letter dated 19 June 2003 was headed:
- Building Permit No’s 57000895 (Dwelling), 72015776 (garage), 87007358 (swimming pool) and 88004655 (addition to dwelling)
- The letter advised that:
- This letter is to advise that [the authority] hold insufficient record of inspections for the above Building Permits. We are therefore unable to final these Permits.
- However, an inspection carried out by [the authority] has established that the work appears to have been completed in a manner in keeping with the age of the construction and generally in accordance with the approved plan held by [the authority] under the above Building Permits.
- 3.8 I have not been provided with an exact date, but sometime later in 2003 the applicants bought the property from the previous owner.
- 3.9 It is unclear when the garage was converted to a sleep-out; however the applicants submit that it has been used as a sleep-out from the time of their purchasing the property.
- 3.10 It appears that the spa pool enclosure was fully enclosed and converted to a bedroom, with the associated building work undertaken, some time between 2005 and 2008 (refer paragraphs 5.3 and 5.6.4).
- 3.11 On 22 July 2008, the authority wrote to the applicants regarding a visit that it had made to the property. The letter stated that:
- No building permits or consents relate to work consistent with the conversion of the detached garage into a sleep-out nor with the additions to the dwelling which extend to the side boundary. Consequently the building work is deemed to be unauthorised.
- 3.12 On 1 December 2009, the authority wrote again to the applicants stating that as it had received no reply to its letter of 22 July 2008 it was now issuing a notice to fix. The notice to fix, also dated 1 December 2009, was attached and set out the ‘Particulars of Contravention or Non-compliance’ as:
- Conversion of attached vehicular garage into a sleep-out and an addition to the western side of the dwelling. This work was undertaken without building consent when consent was required under section 40 of the Building Act 2004.

- 3.13 I note that the particulars of contravention refers to an ‘attached’ garage. However, as the covering letter refers to the ‘conversion of the existing detached garage’ (and the applicants’ plans provided to the authority for a certificate of acceptance also label the detached building as a sleep-out), I conclude that the reference is an error and should read “Conversion of a detached vehicular garage”.
- 3.14 On 4 December 2009, the authority wrote to the applicants enclosing an application form for a certificate of acceptance and suggesting that they engage an independent building consultant to inspect the property and prepare a report, which could then form the basis of their application.
- 3.15 The applicants applied for a certificate of acceptance on 12 February 2010. Plans submitted with the application show the sleep-out, and the bedroom addition (labelled ‘bedroom 3’) attached to the west side of the dwelling and extending to the western boundary of the applicants’ property. It appears the applicants did not provide an inspection report with their application.
- 3.16 In response to the application, the authority inspected the property on 1 March 2010.
- 3.17 On 17 March 2010, the authority wrote to the applicants declining to issue a certificate of acceptance for the sleep-out and bedroom addition because the work ‘falls far short of’ the standards set by the Building Code ‘and in other areas compliance with the code could not be determined’. The letter stated that a report from a building consultant would be required before the application for a certificate of acceptance could be processed further. In particular, further information was required in respect of:
- adequacy of boundary fire-proofing
 - adequacy of thermal insulation
 - adequacy of free-board and damp-proofing, and protection from adverse weather
- 3.18 On 26 May 2010, the authority wrote again to the applicants to ask about progress on the ‘building assessment’. The letter set out the options that the applicants could pursue to rectify the unlawful building work, and enclosed a second notice to fix extending the deadline for achieving compliance to 14 July 2010. I note that the content of the second notice to fix is identical other than the date. The notice still referred to the ‘attached vehicular garage’ in error.
- 3.19 The applicants applied for a determination on 14 July 2010.

4. Submissions

- 4.1 In a submission attached to their application for a determination, the applicants made the following points.
- The attached (basement) garage is being used as a garage.
 - ‘The free standing structure [sleep-out] has never ... been used as a garage, rather as a sleep out. Currently it’s an empty room’.

- The [bedroom addition] ‘was likely permitted in 1988 [Permit No. 72015776] ... and the [sleep-out] in 1972 [Permit No. 88004655].
- ‘Authorization [of the sleep-out and bedroom addition] was reassured [reissued] and ... construction was OKed’ by the [authority letter dated 19 June 2003]’.
- ‘No change has been made to the [sleep-out] or dwelling’ since the property has been in the applicants’ possession.

4.2 The applicants provided copies of:

- correspondence from the authority
- the second notice to fix dated 26 May 2010.

4.3 There was some delay associated with the authority receiving a copy of the application for a determination from the applicants. However, the authority acknowledged receipt on 19 August 2010 and stated that it would make a submission after it had received the expert’s report. In a letter dated 17 December 2010 the authority stated that it did not wish to comment on the expert’s report.

4.4 The applicants made a submission on the expert’s report (refer paragraph 5.6.8) on 29 November 2010. The submission included the following specific responses to points made in the report:

- The expert cannot be absolutely sure which works the four building permits related to.
- The conversion of the spa pool structure to the bedroom addition was not undertaken by the applicants.
- The ‘[sleep out] was officially permitted and unlikely designed as a garage’ as it had a timber floor. It has been used for storage, a sleep-out and study, rather than as a bedroom.
- The authority had failed to keep adequate records for the property and failed to carry out a proper site inspection before the applicants purchased the property.
- The authority’s letter dated 19 June 2003 (refer paragraph 3.7) was ‘vague and misleading’ as it advised that an inspection had been completed but it did not mention any unauthorised work. The applicants advised that the property had been purchased on the basis of this letter.

4.5 With the submission the applicants provided an undated photo showing the north side of the bedroom addition, and two photos dated April 2004 which show the detached garage. I note that the photos of the garage show curtains in the window which indicate the garage had been used as a sleep-out by that date.

4.6 The draft determination was sent to the parties for comment on 20 January 2011. The authority accepted the draft without comment. In a submission to the Department received on 16 February 2011 the applicants accepted the draft subject to the following comment:

- The decision in paragraph 8.2 was accepted.

- The applicants did not accept the basis on which the expert had come to the conclusion that the building permit for the addition was for the basement garage and not the bedroom addition.
- The applicants reiterated the reliance that had been placed on the advice of the authority, following its inspection of the property, that there were no outstanding matters of concern.

4.7 The neighbour responded to the draft determination in a submission received on 1 March 2011. The neighbour raised concerns that the swimming pool was insanitary and that in their opinion the sleep-out did not comply with the Building Code in regards to B1 Structure. The neighbour also noted their concerns regarding the poor construction of the bedroom addition in relation to fire rating and a lack of effective drainage.

5. The expert's report

5.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the Building Officials Institute of New Zealand. The expert was engaged to clarify the chronology of events, gather documentation and view the as-built building work.

5.2 The expert met with the authority on 6 August 2010. The purpose of this meeting was to establish the sequence of events leading to the application for a determination and to inspect the authority's records. At the meeting, the authority provided copies of:

- the LIM report
- correspondence relating to the building work
- correspondence relating to the fencing of the applicants' swimming pool
- photographs from the authority's files
- aerial photographs obtained from Land Information New Zealand.

5.3 The authority also provided a timeline, sourced from its records, of events relating to the building work. In this timeline, the authority confirmed that the 'original paper records' for the applicants' property could not be located. It also stated that an officer of the authority, who had been involved with the 2003 requisition relating to the spa pool enclosure, had confirmed that:

this is the same structure that is now the subject of REQ 2009-459 [relating to the bedroom addition]. The spa pool appears to have been dismantled some time ago and the structure further developed (and known to be occupied) as a bedroom.

5.4 The authority also stated that:

[The bedroom addition] and [sleep-out] conversion was inspected as one of the two works submitted for COA. As far as could be ascertained the stand-alone garage to sleep-out conversion appeared to be satisfactory but the [bedroom addition] was not deemed to be (and fell far short) of an acceptable standard and the COA was declined.

The [applicants were] requested to obtain an independent report to verify among other things compliance with fire rating requirements in support of the COA application and this has not been submitted.

5.5 The expert visited the applicants' property on 24 August 2010 to inspect the building work and provided a report to the Department on 28 August 2010.

5.6 The expert's findings

5.6.1 In his report, the expert set out a timeline of events based on the documents he had reviewed, his discussions with officers from the authority and his site visit.

5.6.2 With respect to the four building permits, the expert made the following assumptions:

- No. 57000985, issued in 1957 for the original dwelling
- No. 72015776, issued in 1972 for the detached metal-clad garage
- No. 87007358, issued in 1987 for the in-ground swimming pool
- No. 88004655, issued in 1988 for an addition to the dwelling. The expert was unable to ascertain what this permit was for but concluded it was to enclose the basement at the front of the dwelling to create a single garage.

I accept the expert's conclusions regarding the building work that the permits relate to.

5.6.3 The expert was unable to ascertain when the detached garage was converted to a sleep-out and this may have been done before the applicants purchased the property. However, the expert did not accept that the sleep-out had never been used as a garage, as 'the conversion was most likely undertaken some time after construction'.

5.6.4 The authority's letter of 6 June 2003 states that an unauthorised spa pool enclosure was discovered on the property in 2003. Aerial photos from 2000 and 2005, obtained by the expert, show the translucent roof of this enclosure. The 2008 aerial photo shows the corrugated steel roof of the bedroom addition. The expert has concluded that 'the unauthorized conversion of the unconsented spa pool structure was undertaken ... between 2005 and 2008'.

5.6.5 The expert did not accept that permit No. 88004655, issued in 1988 for an addition to a dwelling, could have been for the bedroom addition, saying:

The structure clearly does not comply with the current Building Code and, in our view, could not have complied with any earlier legislation. In particular the exterior lining to the west wall is fixed to the outside of the fence and would be constructed on the neighbour's side of the boundary. There is also no evidence of any fire rating. The exterior wall lining appears to be much less than the 22 years old it would be if constructed in 1988.

5.6.6 The expert then went on to state that the bedroom addition was 'poorly constructed', including the following specific faults:

- two of the three exterior walls are clad with unpainted 4.5mm fibre-cement sheet

- the cladding of the west wall is over the neighbour's boundary
- the north wall is comprised mainly of a full-height aluminium window, with the balance of unpainted timber
- the corrugated steel roof cladding is accepting water run-off from the house's concrete tile roof, with the run-off directed across the corrugations rather than along them
- the finished floor is at the same height as the exterior ground level
- there is evidence of water ingress through the roof
- there is no evidence of fire rating to the addition within 1m of the boundary.

The expert considered the faults could not be adequately fixed without the addition being rebuilt.

5.6.7 With respect to the sleepout the expert said:

The detached garage conversion to a sleep-out/habitable space appears to have been undertaken to a higher standard than the [bedroom] addition. It is possible the sleep-out could be brought into compliance with the New Zealand Building Code.

5.6.8 The expert's report was referred to the parties for comment on 8 September 2010. The applicants' response to the report is detailed in paragraph 4.4.

6. Discussion

6.1 Generally

6.1.1 The applicants have sought a determination about whether the authority was correct to issue the notices to fix with respect to the building work. The second notice to fix was issued after the applicants had applied for, and the authority had declined, a certificate of acceptance for the building work.

6.1.2 The following considers the code compliance and the application of the legislation to the sleepout and the bedroom addition, and the decisions of the authority with respect to the notices to fix, and the certificates of acceptance.

6.2 The sleep-out

6.2.1 With respect to the sleep-out, the applicant's state that it was 'unlikely [to have been] designed as a garage'. I do not accept this, but rather concur with the expert's assessment that it was originally built and used as garage (in or after 1972), and it was converted to a sleep-out at some later date. In addition to the expert's assessment I note that there is a paved concrete surface from the street frontage, along the side of the house to the garage structure that is likely to have provided drive-on access. The adjacent fence and the location of the ranchslider are also indicative of its former use as a garage.

6.2.2 The applicants have submitted photos that indicate that the garage may have been in use as a sleep-out in 2004; the authority first mentions its use as a sleep-out in 2008.

The expert was unable to determine when the garage was altered to become a sleep-out.

- 6.2.3 I have seen no evidence that clearly indicates when the conversion occurred; therefore I am unable to determine what legislation applied when this work was done and whether the work pre-dated the former Act. However, the sleep-out appears to have been used as such for at least seven years since 2004.
- 6.2.4 Had the work to convert the garage to a sleep-out been consented, the work would not have been required to comply fully with the current requirements of the Building Code, but to the level required by either section 46 of the former Act or section 112 of the current Act (as discussed in Determination 2008/098). As noted in Determination 2008/098 while the provisions of the current Act are not worded precisely the same as the corresponding provisions of the former Act, they have essentially the same requirements and would, therefore, be subject to the same interpretation.
- 6.2.5 If the work to convert the garage to a sleep-out was consented as an alteration under the current Act, section 112 would apply which would require the sleep-out to be upgraded as near as is reasonably practicable in respect of means of escape from fire and access and facilities for people with disabilities (the latter requirement would not apply in this case) while all other Building Code provisions are to comply to the same extent as before the alteration.
- 6.2.6 It is also noted that if section 46 of the former Act or section 112 of the current Act was applied, the sleep-out as-built is likely to comply as near as is reasonable practicable with the requirements of the Building Code with the possible exception of means of escape from fire: in this instance meaning the provision of smoke detectors under F7/AS1 which took effect in April 2003.
- 6.2.7 An authority officer has advised the expert that the sleep-out 'appeared to be satisfactory' and the expert found no specific shortcomings with the sleep-out. However, it was noted that no smoke detectors were installed. Due to the uncertainty regarding when the conversion took place it is unclear whether this was a requirement of the Building Code at the time this work took place. However I strongly suggest that smoke detectors are installed in the sleep-out to meet the requirements of F7/AS1.
- 6.2.8 On balance, given the length of time the building has been in use as a sleep-out and the uncertainty around when the conversion from the garage occurred, I am prepared to accept that unless the building is unsafe or unsanitary under section 124 of the current Act, in this instance the authority should take no further regulatory action. Therefore the sleep-out should not be included in the notice to fix.

6.3 The bedroom addition

- 6.3.1 The applicants state that the bedroom addition was completed before they purchased the property in 2003 and have supplied an undated photo of the addition, which they submit was taken shortly after they moved in.
- 6.3.2 Authority officers have confirmed that the bedroom addition is the same structure as the spa pool enclosure (albeit with additional work done to it) that was inspected in

2003, referred to in the requisition letter dated 6 June 2003, and included in the LIM as an outstanding requisition for 'Building Unauthorised Works' on 16 June 2003. The authority has also provided aerial photographs of the applicants' property, which show a translucent roof in the position of the addition in both 2000 and 2005. Authority officers state that this was the roof of the unauthorised spa pool enclosure. The 2008 photo shows that this roof has changed to corrugated steel that currently forms roof of the bedroom addition.

- 6.3.3 It is clear is that, in June 2003, shortly before the applicants purchased the property there was an unauthorised spa pool enclosure in the position of the bedroom addition. As a result, I am satisfied that the building work for the addition happened sometime after June 2003, well after the Building Act 1991 came into force, and as such the work required a building consent which was not applied for or obtained. The photos suggest that the bedroom addition was built sometime between 2005 and 2008.
- 6.3.4 I accept the expert's advice, and the authority's position, that the bedroom addition does not comply the requirements of the Building Code in several respects. Of particular concern is the encroachment of the building work over the boundary, and the lack of fire rating and damp-proofing, and the potential impact that these deficiencies could have on the health and safety of the occupants and neighbours.
- 6.3.5 I conclude that, as the building work took place sometime between 2003 and 2008 and required a building consent which was not obtained, and the building work is not compliant with the Building Code, the authority was correct to issue a notice to fix.

6.4 The notices to fix

- 6.4.1 The authority has issued two notices to fix for the sleep-out and bedroom addition on the grounds that 'This work was undertaken without building consent when consent was required under section 40 of the Building Act 2004'. The second notice to fix was issued after the applicants had applied for and been declined, a certificate of acceptance.
- 6.4.2 The applicants have stated that they have not carried out any of the building work and that it was all completed by the previous owner before they purchased the property. Regardless of whether this is correct, it does not affect the authority's decisions to issue the notices to fix to the current owner. An authority can issue a notice to fix to a 'specified person', which includes the current owner of the building, even if the building work had been carried out by a previous owner.
- 6.4.3 In determining whether or not the authority was correct to issue the notices to fix, it is important to establish when the building work was carried out. The application of the relevant legislation is then as follows:
- If the building work was carried out before the former Act came into force in 1992, the authority is unable to act on the work unless it is considered dangerous or insanitary (as discussed in Determination 2008/098). Notices to fix cannot be issued for work undertaken before the enactment of the Building Act 1991. This has been established in previous determinations (refer Determinations 2007/114 and 2008/5) and I continue to hold this view.

- If the conversion of the garage to a sleep-out was undertaken under the former Act it would have been considered a change of use, and a building consent would have been required for the alterations (section 46 of the former Act then applying). The conversion of a garage to a habitable space, as a change of use under the former Act, was considered in Determination 2003/10.
- If the conversion of the garage to a sleep-out was undertaken under the current Act it would not be considered a change of use for the reasons set out in Determinations 2009/021 and 2010/107. However, a building consent would have been required for the alterations (section 112 of the current Act then applying), and a notice to fix would be appropriate to issue for new building work that was not compliant with the Building Code.
- I note that the requirement of the former Act, with respect to alterations and changes of use, do not differ substantially in their effect from the corresponding requirements of the current Act.

6.4.4 The applicants have submitted that the bedroom addition and the sleep-out were covered by building permits issued prior to the Building Act 1991; the bedroom addition by the 1988 permit for 'an addition', and the sleep-out by the 1972 permit for a garage. In the absence of plans or the property files it is not possible to be certain what building work the permits relate to. However, I consider the evidence gathered and the conclusions drawn by the expert (refer paragraphs 5.6.2 to 5.6.5) are sufficient for me to form the view that none of the building permits issued relate to the work covered by the notices to fix. In particular, I accept that it is highly probable that the 1988 permit was for an alteration other than the bedroom addition.

6.4.5 In conclusion, I consider that the authority was correct to issue the notices to fix in respect of the bedroom addition as discussed in paragraph 6.3.5 but not in respect of the sleepout, as discussed in paragraph 6.2.8. The notices to fix should be modified accordingly.

6.5 The certificate of acceptance

6.5.1 The authority declined the applicant's application for a certificate of acceptance in respect of the sleepout and the bedroom addition. Section 96 of the Act sets out the circumstances in which a territorial authority may issue a certificate acceptance. The relevant subsection is 96(1)(a) which states that:

- (1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—
- (a) if—
- (i) the work was done by the owner or any predecessor in title of the owner; and
 - (ii) a building consent was required for the work but not obtained

6.5.2 I note that, under section 96(1)(a)(ii), a territorial authority can only issue a certificate of acceptance for building work for which a building consent was required. This effectively means that only building work carried out after 1 July 1992 (when the building consent provisions in the Building Act 1991 came into force) is eligible for a certificate of acceptance under this subsection.

6.5.3 With respect to the bedroom addition, I have already found that this work was carried out sometime after 2003 and that it required a building consent. The certificate of acceptance is the appropriate regulatory mechanism for regularising this work because it was undertaken without a building consent.

6.5.4 Section 96(2) of the Act states that:

A territorial authority may issue a certificate of acceptance only if it is 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.

In deciding whether or not the authority was correct to refuse to issue the certificate of acceptance for the bedroom addition, the question therefore becomes whether or not the building work complies with the Building Code.

6.5.5 As I have found that the building work to the bedroom addition does not comply with the Building Code in many respects (refer paragraph 6.3.4) it follows that the authority was correct to refuse to issue the certificate of acceptance in respect of the bedroom addition. However, for the reasons given in paragraph 6.2.7, I do not consider it appropriate or necessary to require a certificate of acceptance in respect of the sleep-out.

6.6 The use of notices to fix and certificates of acceptance generally

6.6.1 In general terms a notice to fix is issued in respect of breaches of the Building Act and its regulations. Certificates of acceptance can be issued in respect of completed work for which a building consent was required but not sought: a certificate of acceptance can be seen as a means of regularising unconsented building work.

6.6.2 As discussed in Determination 2009/113, a certificate of acceptance can be issued in respect of those Building Code clauses that an authority is satisfied comply with the Code, but exclude those clauses for which it is not satisfied. The fact that compliance may not be able to be determined in respect of certain Building Code clauses does not, of itself, mean that the work concerned is non-compliant. A notice to fix can only be issued in respect of work that the authority knows to be non-compliant.

6.6.3 Building work undertaken to an existing building without consent may also affect the extent to which the existing building complies with the provisions of the Building Code. In the case where the building work is an alteration to an existing building, the territorial authority may wish to consider whether the building's existing performance has been adversely affected, and may wish to note this on the certificate of acceptance. Where the new work is an alteration to an existing building, as in this case, due allowance must be made of the provisions of section 112(1)(b) as described in paragraph 6.2.5.

6.6.4 A territorial authority should always keep in mind the possible application of the minimum performance requirements of the Act relating to dangerous, earthquake prone, and insanitary buildings. It is also important that a territorial authority keep in mind the possible application of the dangerous and insanitary building provisions of the Act to any building work that has been undertaken, but for which it has concluded that there are not reasonable grounds to ascertain compliance with the Building Code.

7. What is to be done?

- 7.1 The authority should now reissue the notice to fix but in respect of the bedroom addition only. It is then up to the owners to decide how best to meet the notice's requirements, by either rectifying the matters of non-compliance, or by removing and replacing the structure.
- 7.2 I consider the authority should satisfy itself that the sleep-out, including the supply of electrical power, is not dangerous or insanitary as defined in the current Act.
- 7.3 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

8. Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work to the bedroom addition does not comply with the Building Code, and accordingly I confirm the authority's decision to refuse to issue a certificate of acceptance in respect of that work.
- 8.2 I also determine that the notices to fix, dated 1 December 2009 and 26 May 2010, are to be modified to remove reference to the sleep-out.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 March 2011.

John Gardiner
Manager Determinations