



Determination 2011/053

The authority's refusal to accept a building consent application for the fit out of the ground floor of a new building at 72 Webb Street, Wellington

1. The matters 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.
- 1.2 The parties to the determination are:
- Vey Group Limited, the building owner ("the applicant")
 - the Wellington City Council carrying out its duties and functions as a territorial authority and a building consent authority ("the authority").
- 1.3 The application for determination arises from a dispute about the authority's decision to refuse to accept an application for a building consent from the applicant. The application for the building consent was to fit out new wet areas (bathrooms, kitchens and laundry) to the ground floor of a building. The building work being undertaken to the ground floor was part of a fit out to the ground floor to create apartments. The applicant considers that some of the proposed building work that was to be carried out is exempt from the need for a building consent under Schedule 1 of the Act and therefore was not required to be included.
- 1.4 I therefore consider the matter to be determined² is whether the authority correctly exercised its powers in refusing to accept the application for a building consent.
- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

¹ The Building Act, 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 terms of section 177(1)(b) and 177(2)(a) of the Act. 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 background

- 2.1 Building consents were issued by the authority for the construction of a four storey building as follows:
- Building consent SR 173252 issued on 19 February 2008 for Stage 1 of the project described as ‘Stage 1: commercial/residential – excavation, demolition, repiling, retaining walls and slab only’.
 - Building consent SR 178711 issued on 8 September 2008 for Stage 2 of the project, described as ‘4 storey building – basement with stairs, parking area; ground floor – 2 commercial areas, residential lockup apartment entry. 1st floor – 6 apartments, bedrooms, bathrooms and ensuites; 2nd floor kitchen, living/study areas’.
- 2.2 A number of amendments were subsequently made to the building consents. A code compliance certificate has not been issued in respect of Stage 2 of the project (building consent SR 178711).
- 2.3 The ground floor was to consist of an apartment and a children’s day care centre (“crèche”). The fit out of the crèche was not included in Stage 2 of the project. The consented plans show the majority of the ground floor as an open space, and the plan is annotated with a note that states ‘Proposed [crèche] separate consent for ground floor internal fit out’.
- 2.4 The building work that is the subject of this determination relates to the fit out of the ground floor. The original uses for the building were for residential apartments on the top two levels, and a proposed crèche and one apartment on the ground floor. The fit out of the crèche was not included as part of the original building consents or the amendments to the consents.
- 2.5 The applicant built internal timber framed walls on the ground floor. Some of these walls were originally constructed in relation to the proposed crèche and additional walls were later built to adapt the proposed crèche into two apartments.
- 2.6 On 23 April 2010 the authority received an application for a building consent which described the building work as ‘fit out of new wet areas (bathrooms, kitchens and laundry)’. A plan provided with the application shows the layout for two self-contained apartments, and includes details of the plumbing.
- 2.7 On 30 April 2010 the authority wrote to the applicant stating that it was returning the building consent application as it was not complete. The authority listed the additional information that it required as follows:
- A fire report for the building, including the ground floor with a new lay out.
 - A floor lay out of intended floor spaces and partition construction detail.
 - Elevations showing window joinery and openings.
 - Details of the shower system.
 - The electrical layout.
- The authority also stated that it was not in a position to grant a further building consent for the building in question until the matters set out in a notice to fix issued by the authority on 30 April 2010 (relating to the construction of the exterior envelope under Stage 2) were addressed.

2.8 On 4 May 2010 the applicant wrote to the authority stating that it had been advised that the work in question did not require a building consent as the work was exempt under Schedule 1. The applicant also noted that neither the fire alarm system nor the means of escape had been altered, and stated that in accordance with Schedule 1

- the floor layout was exempt
- windows were also exempt as they were existing and remained in place
- information about the showers was not required to be shown as they were exempt
- the electrical layout was exempt.

The applicant also questioned the content of the 30 April 2011 notice to fix in terms of sections 164 and 165 of the Act.

2.9 On 6 May 2010 the authority received the re-submitted building consent application. On 10 May the authority replied to the applicant, returning the consent application noting that

- the notice to fix dated 30 April 2010 was still outstanding
- the description of work did not identify the change of use from a crèche to habitable units
- insufficient information had been provided to allow the authority to determine whether the building work will trigger a change of use or was an alteration to an existing building.

2.10 The authority wrote again to the applicant on 11 May 2010 noting that

- Schedule 1 did not apply to new plumbing sanitary fixtures, new apartment and inter-tenancy walls, and new exterior joinery
- as all the proposed work was new, was not maintenance, repair or replacement of services, it was not exempt
- the proposed scope of the ground floor building work was a change of use from the original intended use as a crèche, which required a fire assessment of the building covering the means of escape from fire and relevant fire ratings
- completed plans were required that showed the how compliance was to be achieved in respect of all the building elements
- the electrical layout did not feature under Schedule 1.

2.11 An application for a determination was received by the Department on 22 July 2010.

3. The submissions

3.1 In a letter to the Department, the applicant explained the background to the dispute. The application included copies of the following:

- Plans and specifications for the building work and building consent documentation.
- Inspection records and a copy of a notice to fix.
- Correspondence between the applicant and the authority.

- 3.2 The applicant made subsequent submissions on 16 September 2010 and 10 December 2010. The applicant is of the view that:
- change of use is designed to be used on old buildings, and as the building is new, the ‘change of use is semantics’
 - internal walls built for the purpose of the crèche were built under paragraph (ag) of Schedule 1. Schedule 1 allows internal building work to occur without a building consent
 - both the crèche and apartments require sleeping areas, bathroom facilities, laundry services, and individual rooms. The existing access routes and the fire alarm system (including call points and heat and smoke detectors) have been maintained and the fire regulations only require a connection to the main fire alarm warning system
 - no exterior, inter-tenancy, or load bearing walls had been altered
 - there was nothing preventing a building consent application being considered by the authority just because a notice to fix had been issued for a previous consent.
- 3.3 The authority provided a submission from its legal advisors dated 29 November 2010, which set out the background to the dispute, a timeline of events, and the authority’s position regarding the application for determination. Regarding the refusal to accept a new building consent application, the authority was of the view that it acted correctly in returning the application to the applicant and that:
- the consent application was incomplete, and further information was required, and therefore it was returned
 - the building work is not exempt under Schedule 1
 - the Regulations provide that a change of use of part of a building is deemed to be a change of use to a building to which section 115 applies. The definition of change of use in the Regulations is to address situations where the code compliance requirements of a new use are more onerous than those of an old use
 - the authority has a ‘broad discretion’ under section 115(a) by virtue of the clause ‘as nearly as reasonably practicable’.
- 3.4 The authority submitted that the notice to fix required the applicant to provide information for the authority to assess the applicant’s amendments to building consent SR 178711. The authority submitted that the applicant had:
- repeatedly ignored directions from the [authority] to provide further information to enable the [authority] to determine building consent and building code compliance ... The notice was issued when other methods to obtain information and determine compliance had been exhausted.
- 3.5 On 20 December 2010, copies of a first draft determination were forwarded to the parties for their comments. Both parties made submissions to the first draft (see below) and on 29 March 2011 copies of a second draft determination were forwarded to the parties for their comments.
- 3.6 The applicant did not accept the draft determinations and in submissions dated 26 December 2010 and 11 April 2011, raised the following points:

- The determination should consider the authority's decision to refuse to accept a building consent application, and 'can a notice to fix be used to refuse an application'.
- As household units originally existed in the building, in terms of section 115(a), no change of use has occurred. The original use of the top levels of the building was always residential. As the original consent application referred only to a 'proposed' crèche and to 'internal' work, there was no actual change of use.
- The requirement for a building consent was never questioned, but the use by the authority of section 50 to reject the application and the way that was addressed was questioned. Section 44 does not apply to exempted works.
- Section 48 provides three options in processing an application for a building consent - S48(1)(a) Grant the application, S48(1)(b) Refuse the application, S48[(2)] Suspend the application and ask for further information.
- Clauses D1.3.3 and G1.3.4 did not apply to housing and the construction of the dividing wall between the two apartments will not alter the safe paths. Only a battery operated smoke alarm is required, and the existing hard-wired alarm system, 'which is well above code-requirements', has been retained. The structural components of the building have not been altered and the dividing wall has a 2-hour fire rating.
- The determination must provide a clear view of what work is exempt.
- The determination is about the letter dated 30 April 2010, whereby section 48(2) was invoked by the authority. '[The authority] then must comply with [section] 50 of the Building Act and the letter dated 30 April 2010 met this obligation.' The determination needs to be limited to section 50 of the Act. The authority does not state the applicant failed to meet section 45 of the Act.

3.7 The authority accepted the draft determinations and in submissions dated 17 January 2011 and from its legal advisors dated 17 January 2011, and 11 April 2011 made the following points:

- Section 115(a) applied in the context of a change of use as 'the change involves the incorporation in the building of 1 or more household units where household units did not exist before'.
- The authority never accepted a building consent application from the applicant for building work to be undertaken on the ground floor of the building. The applicant filed an application which was returned to the applicant because it was deficient in a number of respects, including that it did not contain sufficient information.
- The draft determination had not dealt with the implications of building work being carried out by the applicant without a building consent having been obtained.
- The matter for determination should reflect that the authority did not refuse to grant the building consent, but refused to accept the application.

3.8 I have carefully considered the submissions from the parties and I have amended the determination as I consider appropriate.

4. Discussion

4.1 Applications for building consents

4.1.1 In order to consider the authority's decision to refuse to accept the application for the building consent, I need to take into account:

- the requirements for building consent applications in terms of section 45 of the Act
- the authority's policy about accepting building consent applications
- the Department's guidance about building consent applications, and the information required to support an application.

4.1.2 In terms of the basic information required to support an application for a building consent, section 45 of the Act states:

- 45 How to apply for a building consent
- (1) An application for a building consent must—
- (a) be in the prescribed form; and
 - (b) be accompanied by plans and specification that are –
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and
 - (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and
- ...

4.1.3 The authority provides applicants with a list of the information that is required to be provided with the building consent application. The authority's policy is to undertake an initial assessment of the content of building consent applications, and not accept applications for processing that do not have the basic plans and specifications required for the proposed building work (as specified by section 45 of the Act).

4.1.4 The authority refused to accept the applicant's application for a building consent for the ground floor fit out. The authority returned the building consent application as it was of the view that the application was incomplete and did not contain sufficient information to undertake an assessment under section 49 of the Act. Therefore it could not accept the application for the building consent.

4.1.5 An authority is entitled to refuse to accept a building consent application on the basis that to process an application for a building consent in accordance with section 48 of the Act, the application must comply with section 45. Adequate documentation must be provided for an authority to apply the statutory test for the granting of a building consent. Section 49 states that an authority 'must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application'.

4.1.6 The Act provides for an authority to set reasonable requirements for the documentation that accompanies applications for building consents. An authority is entitled to set minimum requirements to ensure that the proposed building work is clearly documented and to require designers to clearly demonstrate and document how Building Code compliance is to be achieved. The authority has a 'Guide to completing applications for building consents' that sets out the documentation that is required, the documentation that is sometimes required (depending on the type of

application) and the types of plans and drawings that are required to support an application.

- 4.1.7 The Department has also issued guidance that describes the minimum documentation that should be supplied with an application to demonstrate compliance with relevant clauses of the Building Code – ‘Guide to applying for a building consent (residential buildings)’ (second addition October 2010). Although I note this guide is about residential buildings, the guidance is useful in this case as it discusses minimum requirements for documentation.

4.2 The refusal to accept the building consent application

- 4.2.1 In order to consider the authority’s decision to refuse to accept the building consent application, I have considered the following categories of information for which the authority required information be provided (in terms of section 45(1)(b)(ii) and 45(1)(c)).

- 4.2.2 In its letters dated 30 April 2010, 10 May 2010, and 11 May 2010, the authority was of the view that the information provided in the building consent application was inadequate and raised the following issues as reasons for refusing to accept the application (refer to paragraphs 2.7, 2.9, and 2.10):

- the lack of information about the shower systems
- the lack of information about the floor layout and partition construction
- the lack of information about the fire safety provisions
- the lack of information about the electrical layout
- the lack of information about the window joinery and openings.

- 4.2.3 The authority also raised issues relating to the application of the section 115 change of use provisions of the Act and an outstanding notice to fix (note that the matter of the issue of the notices to fix is considered in Determination 2011/054).

- 4.2.4 In considering these reasons, I have taken regard of the following questions:

- Was any of the work exempt?
- Was sufficient information provided?
- Was the further information requested by the authority reasonable?

The shower systems

- 4.2.5 Paragraph (ad) of Schedule 1 refers to ‘the alteration’ to existing sanitary plumbing in a dwelling:

- (ad) the alteration to existing sanitary plumbing (as defined in section 3 of the Plumbers, Gasfitters, and Drainlayers Act 1976) in a dwelling (for example, replacing a bath with a shower or moving a toilet) carried out in accordance with the Plumbers, Gasfitters, and Drainlayers Act 2006 and that is not repair or replacement to which paragraph (a)(iv) (other than subparagraph (A) or (B)) applies:

- 4.2.6 It is my view that the fit out of a particular area in the shell of new building is part of the construction of that building and cannot be treated as an alteration to an existing building. As described in paragraphs 2.1 to 2.6, the various building consents were for stages of construction, not for alterations.

- 4.2.7 In respect of the showers (sanitary plumbing), I therefore do not consider that the installation of the showers are exempt from the requirement to obtain a building consent, and the applicant is required to demonstrate Building Code compliance through the plans and specifications provided.
- 4.2.8 I have considered the documentation provided and do not consider there is sufficient information to demonstrate compliance with Clauses B2, E3, G1 and G13. Therefore, I consider that the authority was correct to require this information be provided.
- 4.2.9 In respect of the typical requirements for new wet areas including bathrooms, kitchens, and laundry, the primary Building Code clauses that are relevant are E3, G1, G2, G3, G4, G8, G12, and G13. Despite the fact that the scope of work was not clearly defined, the plans and specifications provided to support a building consent application are required to show the extent of building work to be carried out, and show how Building Code compliance is to be achieved. Other than the ground floor plan, no plans or details have been provided.

The floor layout and partition construction

- 4.2.10 The applicant has stated that several walls had been built under paragraph (ag) of Schedule 1 and other walls have now been built under paragraph (ca). Both paragraph (ag) and (ca) specify that the paragraphs are applicable to ‘an alteration’ (paragraph (ag)) and to ‘any existing building’ (paragraph (ca)):
- ag) the alteration to the interior of any non-residential building (for example, a shop, office, library, factory, warehouse, church, or school), if the alteration does not—
 - (i) reduce compliance with the provisions of the building code that relate to means of escape from fire, protection of other property, sanitary facilities, structural stability, fire-rating performance, and access and facilities for persons with disabilities; or
 - (ii) modify or affect any specified system:
 - (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:
- 4.2.11 I do not consider that the construction of the internal walls, as shown on the plans provided with the application for determination, are exempt from the requirement to obtain a building consent (as discussed in paragraph 4.2.6).
- 4.2.12 I note that the authority’s ‘Guide to completing applications for building consents’ (refer to paragraph 4.1.3) requires a floor plan for any internal work including temporary buildings. This floor plan is required to:
- show all levels (new or altered), all designated spaces, all removals, sanitary fixtures, smoke detectors, egress routes to safe places need to be shown for ‘commercial and complex residential’ applications.
- It is my view that this is a reasonable requirement.
- 4.2.13 I note that some of the walls may be outside the scope of the work that the applicant intended to be covered by the building consent. However, if building work is or isn’t included in an application for building consent, it should be clearly marked on the plans as such and clearly described in the scope of the building consent application.

The plan provided in this situation does not clearly define the building work; therefore I consider that the authority was correct to require further information about the floor layout.

The fire safety provisions

- 4.2.14 I note that some areas of the apartments may be outside the scope of the work that the applicant intended to be covered by the building consent. However, if building work is or isn't included in an application for building consent, it should be clearly marked on the plans, and the scope of the application for building consent clearly described.
- 4.2.15 I note that the nature of the fit out, for example the construction of the internal walls, has an impact on compliance with fire safety provisions, including means of escape from fire, and therefore the fire report needs to be updated to reflect these changes. It is my view that there was not sufficient information provided to demonstrate compliance with the fire safety provisions of the Building Code.
- 4.2.16 Compliance with Clauses C2 and C3 needs to be demonstrated, as the fire safety design to meet the performance requirements of these clauses is dependent on use features such as the number of occupants, the fire hazard, and the use of the building (ie. requirements for household units). The fire safety report provided with building consent SR 17811 states 'The proposed building is to consist of four levels that include a carpark at basement level, a crèche on the ground floor and six two level apartments on levels 1 and 2', which differs to the use provided in the fit out building consent.

The electrical layout

- 4.2.17 Under section 43 of the Act, a building consent is not generally required for energy work; however there are certain situations where a building consent is required. Section 43(2)(a) requires a building consent for energy work relating to a specified system that will be covered by a compliance schedule. Given the fire safety features in the building (hard-wired smoke detectors and a manual call point alarm system), I consider that the test for requiring a building consent is met.
- 4.2.18 No plan of the electrical layout was provided; therefore I consider there was insufficient information provided to meet the requirements of section 43(2).
- 4.2.19 Taking account of paragraph 4.2.17, and as the plans and specifications did not clearly define the scope of the work, I consider that the authority was correct to require this information be provided.

The window joinery and openings

- 4.2.20 The windows and joinery appear to be a part of the construction of the external envelope, under building consent SR 178711, rather than the building consent for the fit out. I note however, that under Schedule 1, the windows are not exempt from the requirement to obtain a building consent as contended by the applicant.
- 4.2.21 The authority requested elevations of window joinery and openings. I do not believe this is relevant to an internal fit out. This is information that would appear to be relevant to work done under building consent SR 178711.

The issues relating to the application of section 115 and the outstanding notice to fix

- 4.2.22 As described in paragraph 4.2.3, the authority also raised issues relating to the application of the section 115 change of use provisions and an outstanding notice to fix.
- 4.2.23 In respect of the application of section 115, I note:
- The fit out of the ground floor area in the shell of this new building is part of the construction of the building, and cannot be treated as an alteration to an existing building. In this case, the stages of construction are aligned closely together in terms of their timing and the area of the building has not had an interim use. I also note that the consented plans for Stage 2 of the construction note that the fit out of the ground floor is proposed to be done under a separate consent.
 - The two building consents and the application for building consent in question were all for stages of the construction of the new building, not for alterations to an existing building or a change of use. This is in accordance with the view taken in previous determinations; see for example Determinations 2003/1, 2004/5, and 2008/83.
 - I therefore consider that the authority was incorrect to request information pertaining to a 'change of use'.
- 4.2.24 In respect of the outstanding notice to fix, I note:
- There may be circumstances where the existence of a notice to fix for a building could be relevant to a decision to grant a further building consent for that building. For example, if a notice to fix related to work on an earlier stage of building work, then compliance of the proposed work is affected by the compliance (or otherwise) of the already consented work. In such circumstances, the notice to fix would be a very relevant ground for refusing to grant a building consent.
 - In this case, the authority has stated it cannot accept and grant any further building consent until the matters raised in the notice to fix are resolved.
 - I am of the opinion that the authority was not justified in its intention to not accept a further building consent application for the building until the matters in the notice to fix had been resolved. Under section 45 of the Act, an application for a building consent must be in the prescribed form, be accompanied by plans and specifications required by the authority, and be accompanied by any other information reasonably required by the authority. I am of the opinion that acceptance of the consent application must be based on these criteria.
 - I also note that the notice to fix relates to compliance with Clauses B2 and E2 of the external envelope because the authority was not invited to carry out the required inspection. I note that there will be situations where a notice to fix may affect the compliance of building work proposed in a building consent, however, I am of the view that the outstanding notice to fix should not have an effect on the statutory test for the granting of a building consent in this case.

4.3 Conclusion

- 4.3.1 I note that the applicant is entitled to limit the scope of the building work to be included in that building consent. However, in respect of the plan and specifications provided, I observe that if building work is or isn't included in an application for building consent, it should be clearly marked on the plans as such, and the scope clearly described in the building consent application. The plan provided does not clearly define the building work.
- 4.3.2 The authority should have ensured that the information requested was relevant to the scope of the work. However, as the scope of the work was not clear, this was not possible. I consider that it was reasonable for the authority to require information to be provided pertaining to the floor layout and fire safety features, as well as details of the shower system and the electrical layout.
- 4.3.3 Taking account of paragraph 4.2.9 and my finding in paragraph 4.2, While the section 45 test is not about Building Code compliance, I conclude that the building consent application was not sufficient to meet the requirements of section 45 because:
- there was insufficient detail provided to be capable of demonstrating Building Code compliance
 - the scope of work was not clearly defined.
- 4.3.4 It is also clear that the authority did not have sufficient information to enable it to decide whether to grant the consent. I note that in most cases an application that is rejected under section 45 of the Act would not be able to be granted.

5. What is to be done now

5.1 The application for the building consent

- 5.1.1 The applicant will need to reapply for a building consent. The application should include plans and details that adequately describe the proposed work and that it is capable of demonstrating the Building Code compliance of the proposed work. I note it is not sufficient to simply state that items comply.
- 5.1.2 In its response to the first draft determination, the authority observed that the draft determination did not consider the implications of the building work carried out by the applicant without building consent. In this respect, I note that the authority could:
- exercise its powers to issue a notice to fix under section 164, for building work carried out without a building consent, that requires the applicant to make an application for a certificate of acceptance for the work undertaken without consent
 - exercise its powers to issue an infringement notice under section 372
 - exercise its powers to prosecute under section 375.
- 5.1.3 I observe that if the applicant limits the application for the building consent to the wet areas, a further building consent will still be required to be obtained by the applicant for the building work needed to fit out the remaining areas. If the scope of the work is clarified, some of the information requested by the authority, such as the request for a fire design and floor layout, would be required to support the further building consent.

5.2 Building consent SR 178711

- 5.2.1 The change from the crèche to the apartments will require the applicant to apply to amend building consent SR 178711. With the proposed modification to the ground floor space from a crèche to apartments, the applicant will need to provide plans and specifications that demonstrate that the building work done under SR 178711 will comply with the Building Code in the modified use. I note that the applicant is required to demonstrate, by way of plans and specifications, that the building work complies with the Building Code, and it is not sufficient to simply state that items comply.
- 5.2.2 I note that the construction will exceed the requirements of the Building Code in some respects e.g. Clause D1 Access Routes. However, there are also aspects of the Building Code that have more onerous requirements, such as the requirements for Internal Moisture (Clause E3.3.1) and Insulation (Clause H1.3.2). Compliance with these clauses will need to be demonstrated.
- 5.2.3 Compliance with Clauses C2 and C3 will also need to be considered, as the fire safety design to meet the performance requirements of these clauses is dependent on use features such as the number of occupants, the fire hazard, and the use of the building (i.e. requirements for household units). The fire safety report provided with building consent SR 17811 states ‘The proposed building is to consist of four levels that include a carpark at basement level, a crèche on the ground floor and six two level apartments on levels 1 and 2.’ Compliance with these clauses in the identified areas will need to be demonstrated.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers in refusing to accept the application for a building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 3 June 2011.

John Gardiner
Manager Determinations