



Determination 2014/050

The issue of a notice to fix requiring removal of a conservatory to the upper level of a house at 13 Westenra Terrace, Cashmere, Christchurch



**Figure 1: View of conservatory over the recessed deck
(seen from the South West)**

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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - Mr M and Mrs K Fitzgibbon, the owners and applicants acting through Ultimate Design and Renovation Limited as their agent (“the agent”). The agents were initially represented by legal advisers (“the agent’s legal advisers”).
 - The Christchurch City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to issue a notice to fix in relation to a conservatory under construction; the agent maintains that the building work was exempt building work under Schedule 1 of the Act and therefore no building consent was required. For the purposes of this determination I will describe the building work as a ‘conservatory’.

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

- 1.4 The matter to be determined² is whether the authority was correct in issuing a notice to fix regarding the building work for the conservatory, which turns on whether a building consent was required for the conservatory.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The background

- 2.1 The building work consists of a glass and aluminium-framed conservatory to the upper storey of the existing house that is located over an exposed and recessed deck (refer Figure 1). The conservatory is to provide weather protection to the outdoor area formed by the deck.
- 2.2 The conservatory is fully located over living space below. The conservatory is approximately 14m² in area and comprises of a pitched roof to match the existing roofline, and the conservatory's outer perimeter finishes over the outer edge of the deck balustrade. The roof to the house is corrugated steel. The deck has a solid balustrade and a membrane floor.
- 2.3 From the photographic evidence provided it appears the aluminium framework is in place and the structure has been partly glazed (refer Figures 1 and 2).



Figure 2: Street view of the house

- 2.4 On 16 January 2014 a neighbour complained to the authority regarding the building work for the conservatory. The authority visited the premises to carry out a site inspection on the same day.
- 2.5 On 17 January 2014 the authority issued a letter including a notice to fix to the owner. The authority stated the building work, described by the agent's legal advisers as a 'glass windbreak', had been erected on the second storey of the dwelling, and therefore was not exempt under Schedule 1 of the Act. The notice to fix stated:

...you must either remove the constructed extension and return the building to its original condition or apply for and uplift a Building Consent for the work to be completed and a Certificate of Acceptance for the work already completed.

² Under sections 177(1)(b) and 177(2)(f).

- 2.6 On 17 January 2014 the authority and the agent's legal advisers engaged in email correspondence, the legal advisers sought further information regarding the issuing of the notice to fix.
- 2.7 On 28 January 2014 the agent's legal advisers made a written submission to the authority: this is discussed below at paragraph 3.1.1
- 2.8 On 4 February 2014 emails were exchanged between the agent's legal advisers and the authority, the authority restated their position and advised the legal advisers to apply for a determination.
- 2.9 An application for determination was received by the Ministry on 14 February 2014.

3. The submissions, the draft determinations, and the hearing

3.1 The initial submissions

3.1.1 The agent's legal advisers made a written submission setting out their view that the conservatory does classify as an exemption under Schedule 1 of the Act and the notice to fix has been unlawfully issued. Their key points are summarised below:

- As to whether the work is in connection to a porch or veranda, neither term is defined in the Act. Under the Standards New Zealand Glossary of Building terms³ ("the glossary") the definitions for porch and veranda are as follows:
 - Porch* - projecting or recessed covered space at the entrance to a building or structure
 - Veranda* - a roofed space extending from a building
- The conservatory falls within the definition of a veranda, the fact that the conservatory contains a large amount of glazing and has a relatively small opening is not relevant.
- The ground floor is the floor near the actual ground level where the main entrance is located. In this case the level above the garage is the ground floor, with the top storey where the building work is occurring being described as the first storey. The glossary also contains the following definition:
 - Floor, ground* – the floor of a building near ground level where the main entrance is normally located.
- The legal advisers engaged a property inspection company who concluded that the dwelling is described as a two level premises with a basement garage, a ground floor where the main entrance is located and a first floor where the work is being carried out.
- The authority's building plans on the property file refer to the floor where the conservatory is being built as the first floor.

3.1.2 The agent's legal advisers included the following documents with their application:

- the notice to fix issued by the authority
- google street view photos of the existing house
- plan for the proposed conservatory
- correspondence between the parties between 17 January 2014 and 4 February 2014

³ Standards New Zealand Glossary of Building Terms published by Standards New Zealand June 1998

- letter from a property inspecting company
- extracts from the glossary

3.1.3 The authority provided written correspondence in emails dated 17 January and 4 February 2014. The reasons why the notice to fix was issued for the conservatory are summarised below:

- The amount of glazing indicates that the structure is more a conservatory rather than a porch or veranda. The structure also lacks the classic opening that is associated with porches; the opening more resembles a window and is limited to a small portion of the gable side.
- The authority quoted from draft guidance from the Ministry, at the time this had not yet been published but has subsequently been released to the public (“the guidance document”)⁴. I note the statement below was not subject to change in the interim. The guidance document states:

...porches and verandas are usually made from permanent materials and often extend over raised decks or patios. Porches are roofed structures which project from the face of a building. They may have sides but they are open at the front. Porches are generally used to protect a building entrance and to provide shelter. A veranda is typically a long porch and can extend along the full length, or even around more than one side of a building.
- The authority stated that the building has a total of three levels, and the work is being undertaken above two other levels of the house with the garage at the bottom, therefore an interpretation that this work is at first storey level is not accurate. If the conservatory was further along the building this may be true but at the current location it is not on the ground or first storey level. Building work at higher levels has greater complexity of design for loadings and weathertightness. The fact that other sections of the house are only two levels does not reduce the risk at this part of the building.

3.2 The first draft determination and submissions received

3.2.1 The first draft determination was issued to the parties on 24 March 2014.

3.2.2 On 16 April 2014 the authority accepted the draft determination with minor clarification, in summary:

- The statement in the draft determination regarding ‘what happens next’ could be interpreted incorrectly and should be amended so that work yet to be completed could be considered by the authority under exemption Schedule 1(2) of the Act (not after work has been completed).
- The authority expects an application for a certificate of acceptance to be made for the completed work, and would consider an application for exemption from building consent for any work still to be completed.

3.2.3 On 4 April 2014 the agent’s legal advisers sought an extension of time to respond to the draft determination. On 3 June 2014 the legal advisers stated the agents did not accept the draft determination and requested a hearing to be held. On 18, 19 and 25 June 2014 the agent provided written submissions and supporting documents, in summary:

⁴ Ministry of Business, Innovation and Employment “Building work that does not require a building consent” dated March 2014.

- The structure is a porch less than 20 square meters. The structure had to sit on top of the verandah balustrade, and the structure was compliant with respect to the weight it was required to support.
- The drawings from the building consent clearly show the garage under the ground floor was excavated. Under the 'city plan rules' it states that 'ground level on hill sites is the level prior to excavation'. This supported the argument that the 'porch' is on the first floor.
- The legal advisers provided a document entitled 'City Plan: Summary of Rules for Residential Units in Living H Zone' produced by the authority. The document highlights the definition of ground level being 'taken as the level of the ground existing when works associated with any prior subdivision of the land were completed but before filling or excavation for new buildings on the land has commenced'.

3.3 The hearing

- 3.3.1 I held a hearing in Christchurch on 5 August 2014. The hearing was attended by an officer of the Ministry, two people representing the agent, and an officer of the authority. The opportunity was taken to visit the site.
- 3.3.2 In summary the agent stated the building was built as a single level dwelling, the excavation for the garage was done at a later date. The structure is best described as a porch; it protects the doorway from wind and rain and follows the existing roof line. The size of the opening is governed by the structure. There is no definition of a 'conservatory' in the New Zealand Standards, only the definition of a porch.
- 3.3.3 The authority argued the conservatory is on the third storey from street view, and there is a greater wind exposure than if the conservatory was on ground level.
- 3.3.4 Following the hearing on 5 August 2014 the agent emailed the Ministry stating under NZS3604, Section 1, 'Scope and interpretation' cleared ground level is defined as '[t]he ground level after completion of site excavation and removal of harmful material, but before excavation for foundations'. The agent contended this supported the 'local body rule' referred to in paragraph 3.2.3, 3rd bullet point.

3.4 The second draft determination

- 3.4.1 The determination was amended to take account of the submissions received and issued as a second draft for comment on 25 August 2014.
- 3.4.2 The authority responded to the second draft determination on 9 September 2014. The authority accepted the reasoning that the conservatory did not fit under the definition of either a porch or veranda for the purposes of Schedule 1. However, the authority did not accept that the building was only two storeys high (refer paragraph 4.2.5). The authority referred to Determination 1997/003⁵ which included relevant discussion in this respect. The authority contended that Schedule 1 exemptions were for 'low risk' work that was constrained to work at ground or first floor level.
- 3.4.3 The agent did not respond to the second determination despite being reminded to do so.

⁵ Determination 1997/003: Access for people with disabilities in the alteration of an office building with a carparking area beneath it

4. Discussion

4.1 Is the conservatory a porch or veranda for the purposes of Schedule 1?

4.1.1 Section 17 of the Act states that all building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work. Section 41 sets out those cases in which consent is not required and includes ‘any building work described in Schedule 1’.

4.1.2 Schedule 1 to the Act ‘Exempt Building Work’ lists work for which a building consent is not required. Schedule 1, paragraph 17 states:

17 Building work in connection with a porch or a veranda that—

- (a) is on or attached to an existing building; and
- (b) is on the ground or first-storey level of the building; and
- (c) does not exceed 20 square metres in floor area; and
- (d) does not overhang any area accessible by the public, including private areas with limited public access, for example, restaurants and bars.

4.1.3 The Ministry has previously published a guidance document⁶ (now superseded) entitled “A guide to Building work that does not require a building consent” which stated:

...the primary purpose of Schedule 1 is to exempt building work that is minor and low risk in nature and where the benefits of requiring a building consent do not exceed associated compliance costs. Work exempt under Schedule 1 is generally building work that will not significantly affect public safety or the structural integrity or fire safety components of the building.

4.1.4 The first question that needs to be considered is whether the conservatory can be defined as a porch or veranda to fit within paragraph 17 of Schedule 1.

4.1.5 The Act does not provide a definition for a porch, veranda or conservatory. The definition provided by the agent from the glossary for a ‘veranda’ being a roofed space extending from a building, is a very broad definition and could encompass a variety of interpretations. In my view, if the conservatory had no enclosed end space it could more easily be described as a veranda.

4.1.6 I accept the definitions for ‘porch’ and ‘veranda’ provided by the agent in paragraph 3.1.1 have been included in the recently released guidance document. I note that the new guidance document does not provide a definition for a conservatory. The guidance document clearly states that a porch may have sides but are open at the front. Although the conservatory has a window opening it is not open at the front.

4.1.7 A comparison with paragraph 15 of Schedule 1 should be made to help to ascertain the statutory context.

15 Closing in existing veranda or patio

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

4.1.8 The conservatory in question has a floor area of 14 square metres so does not fall within this exception. However it does show that Parliament has already turned its mind to the question of a conservatory and enclosing an existing porch.

⁶ Ministry of Business, Innovation and Employment “A guide to building work that does not require a building consent” dated December 2010, superseded.

- 4.1.9 I acknowledge that the conservatory has aspects of being a porch, veranda or conservatory but does not easily fit into a definition of one term, particularly because it is enclosed. In my view I consider the best description is a conservatory and therefore I do not believe the conservatory as designed fits under the definition of a porch or veranda for the purposes of Schedule 1.
- 4.1.10 I consider it reasonable to consider the agent's view that the conservatory was exempt under Schedule 1 was genuinely held and not a deliberate attempt to evade or contravene the Act. The conservatory is the type of structure that could have suited a Schedule 1(2) exemption being minor, low risk and posing no risk to public safety. The conservatory is inherently stable in construction and aims to reduce the weathertightness risks potentially associated with the existing deck. If the conservatory had been under 5 square meters it would have suited an exemption under paragraph 15. I intend to draw this determination to the attention of the policy makers for any future review of the Schedule 1 exemptions.

4.2 Is the conservatory exempt building work under Schedule 1?

- 4.2.1 Although I have concluded that the conservatory does not fit the definition of a porch or veranda and therefore would not fall within the scope of paragraph 17, Schedule 1; I will provide my view on whether the conservatory fits the four requirements under paragraph 17; namely whether it is located on the ground or first storey level of the building. As noted by the agents, there is no dispute over the requirements in paragraph 17(a), (c) and (d).
- 4.2.2 The intention behind placing this statutory limit on paragraph 17 is to reduce the risk of issues like higher wind speeds, greater structural loads, and weathertightness issues if the building work was to be carried out on higher levels. These concerns are mentioned by the authority in its email of 4 February 2014.
- 4.2.3 The authority has also referred to Determination 1997/003 to support its position that where the conservatory is located the building is three storeys high. The building in Determination 1997/003 had a regular foot print with each level having the same area: the Determination found the building was three storeys high with respect to structure, and two storeys high with respect to access for people with disabilities.
- 4.2.4 In this instance the basement garage was added after the two storey building was constructed, and the garage is approximately 20% of the building's ground floor footprint. There has been no change in the terrain or wind loadings on the building. The conservatory follows the existing roof line; the topographical location of the conservatory is the same as the north end of the house. Given the limited size of the conservatory it will have little significant load to the existing structure, and its construction will, if anything, will reduce the weathertightness risk associated with the existing enclosed deck that it covers.
- 4.2.5 In terms of Schedule 1 the building can be described as a two-storey dwelling, and consequently the conservatory has been located on the first storey level of that building.
- 4.2.6 Therefore, I consider that if paragraph 17 had applied to the conservatory, in my view it has been constructed on the first storey of the building.

5. What happens next?

- 5.1 As mentioned in paragraph 4.1.3 the primary purpose of Schedule 1 exemptions are to allow building work that is minor and low risk not to be subject to the costs and requirements of the building consent process. There is no indication that the building work does not comply with the building code. The work would appear to significantly reduce the weathertightness risk associated with the existing deck. The triangulated aluminium frame to the conservatory is inherently stable.
- 5.2 The conservatory would have been an ideal candidate for an exemption under Schedule 1(2) of the Act although it does not fit into paragraphs 15 or 17 of Schedule 1. Schedule 1(2) gives the authority the discretion to exempt any building work from requiring a building consent. In my view the remainder work on the conservatory that has not yet been completed is still a candidate for this exemption.

6. The decision

- 6.1 In accordance with section 188 of the Act, I determine that the building work partially carried out to construct a conservatory was building work that was not exempt from the requirement for a building consent under paragraph 17 of Schedule 1 of the Act.
- 6.2 However, I consider the notice to fix is not appropriate in this case and hereby reverse the notice to fix. The agent shall apply for a certificate of acceptance for the work undertaken without a building consent, and apply to the authority for an exemption under Schedule 1(2) for the work not yet completed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 October 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A: The Legislation

A.1 The relevant legislation

Schedule 1 Building work for which building consent is not required

17 Porches and verandas

Building work in connection with a porch or a veranda that—

- (a) is on or attached to an existing building; and
- (b) is on the ground or first-storey level of the building; and
- (c) does not exceed 20 square metres in floor area; and
- (d) does not overhang any area accessible by the public, including private areas with limited public access, for example, restaurants and bars.

15 Closing in existing veranda or patio

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

2 Territorial and regional authority discretionary exemptions

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

- (a) the completed building work is likely to comply with the building code; or
- (b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.

...

A.2 NZ Standards Glossary of Building Terms

Porch projecting or recessed covered space at the entrance to a building or structure

Veranda a roofed space extending from a building

Floor, ground the floor of a building near ground level where the main entrance is normally located

...