



## Determination 2014/061

# Regarding the authority's exercise of power in refusing to issue certificates of acceptance for the installation and relocation of kitchen stoves, laundry and bathroom facilities at 325A and 325B, Mt Albert Road, Mt Roskill, Auckland.

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations 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:
- the owner of the house, Madhava Corporation Limited (“the applicant”), acting through a lawyer (“the applicant’s lawyer”)
  - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the authority’s decision to refuse an application for two certificates of acceptance for the inclusion of additional kitchen stoves and the installation and relocation of laundry and toilet facilities in the ground and first floors of dwellings at 325A (“flat 1”) and 325B (“flat 2”) at Mt Albert Road (together referred to as “the dwellings”).
- 1.4 The matter to be determined<sup>2</sup> is therefore whether the authority was correct to refuse to issue certificates of acceptance for the installation of two kitchen stoves, and the installation and relocation of laundry and bathroom facilities for the dwellings.
- 1.5 I note the original certificates of acceptance provided with the determination application only made reference to the kitchen stoves and no reference to the laundry facilities. After the Ministry received the property file for the dwellings from the authority, two amended certificates of acceptance were found to be lodged with the authority (refer paragraph 2.1) with additional statements regarding building work associated with a laundry and toilet to each dwelling. In an email dated 3 October 2014 the applicant’s lawyer confirms the building work in the amended certificates of acceptance is the building work applied for and will be referenced for the purposes of this determination.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

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

<sup>2</sup> Under sections 177(1)(b) and section 177(3)(b) of the Act.

- 1.7 I note that any matters relating to resource consent under the Resource Management Act 1991 (“the RMA”) are outside the jurisdiction of this determination.

## 2. The background

- 2.1 On 6 December 2013 the applicant applied for two certificates of acceptance for the dwellings. The certificates of acceptance, as lodged with the authority, stated:

Description of the building work: Installation of stove on ground floor, relocation of laundry to toilet/bathroom [for flat 1] and installation of stove on first floor, laundry in bathroom [for flat 2]...

Reasons why a certificate of acceptance is required: I was under the impression that building consent is not required to install a stove

- 2.2 The applications were both accompanied by two identical Producer Statements for construction (“PS3”) regarding plumbing, noting the following:

Description of the building work: Domestic Plumbing

Both certificates refer to ‘Building Consent No. BLD 20063014201’, with the plumber having completed work in accordance with the consent, and that the pipework has been tested:

By pressurising the pipe work to 1500kPa for a period of no less than 15 minutes (NZBC G12/AS1 7.5.1 (AS3500.4.11.3 for 30 mins, AS3500.5, 2.23.1 for 30 mins) for both hot and cold water and checking to see that there are no leaks

I do not have any further information as to what building work the certificates relate to. The author has made no reference to the building consent referred to.

- 2.3 The certificates of acceptance included as built drawings for the dwellings.

- For flat 1, the location of a laundry tub, kitchen sink and a ‘laundry 40mm exhaust’ are handwritten onto the plan and appear to be additions to the original drawings.
- For flat 2, the location of a laundry tub, wash basin and ‘laundry 40mm exhaust’ are handwritten onto the plan. It appears two showers, two basins and two toilets have been redrawn in different positions.

I note the hand drawn additions to the plans are not clearly able to be deciphered.

- 2.4 Two identical certificates of verification for electrical services are provided for the dwellings dated 30 January 2014 stating:

COV covers installation of existing stove. It is electrical safe and is in accordance with Reg 73

- 2.5 The applicant provided amended ground and first floor plans for the dwellings, showing two separate gas heating units and two separate electrical meters are provided for each of the flats. The alterations noted in paragraph 2.3 have been incorporated into the plans; two stove areas are evident in the dwellings. The applicant has not provided a clear description of what building work was carried out, particularly in relation to the laundry/bathroom alterations to accompany the plans.

- 2.6 In a letter dated 16 June 2014 the authority declined the applicant’s certificate of acceptance for flat 2 (however, I take this decline letter to apply for both dwellings). The letter specifies:

Your application has been declined, as it does not meet the minimum requirements of the New Zealand Building Code, reasons for declining your application:

- No inspections have been undertaken by [the authority]

- Used, or intended to be used, only or mainly for residential purposes, and occupied, or to be occupied, exclusively as the home or residence of not more than one household
- 2.7 On 19 June 2014 the applicant emailed the authority regarding the decline of the certificate of acceptance asking for clarification on:
- the exact description of the building work which does not meet the Building Code and was not inspected by the authority
  - the exact variation and standard required under the Building Code
- 2.8 On 24 June 2014 the authority responded noting that a certificate of acceptance can be issued only if the authority is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, in so far as it could ascertain, the building work complies with the Building Code. The authority states that as inspections of the work have not been carried out, the authority cannot be satisfied that the building work complies with the Building Code.
- 2.9 On 27 June 2014 the applicant emailed the authority stating
- ...the COA application was specifically made for the additional stove and laundry exhaust. Both were never inspected by [authority] inspectors even during normal course of inspections. I have submitted electrical inspectors and plumbers certificate with my application...
- I have not seen any further information relating to laundry exhaust building work.
- 2.10 On 30 June 2014 the authority emailed the applicant noting it did not carry out any inspections of the building work whilst it was being carried out, and reiterated earlier advice (refer paragraph 2.8).
- 2.11 The Ministry received an application for determination on 16 July 2014.
- 2.12 On 29 July 2014 the Ministry sought clarification from the applicant on the matter to be determined, noting that the determination application is in respect of the authority's refusal to issue a certificate of acceptance to install two stoves but this does not appear to be reflected in the material submitted with the application, for example:
- Authority forms verifying a water pipe test
  - Marked-up plans showing kitchen and toilet alterations
  - An email from the authority referring to a fire report, and reference to the dwellings being used for more than one household
  - An email from the applicant referring to a certificate of acceptance application for additional stove and laundry exhaust.
- 2.13 On 31 July 2014 the applicant's lawyer responded that the certificate of acceptance was only sought for the installation of the stoves in the dwellings.
- 2.14 On 3 September 2014 the Ministry asked the authority to clarify why the certificates of acceptance for the stoves has been declined. The email noted the building work associated with installing electric stoves is usually limited to the provision of an electrical supply which in this case is covered by an energy works certificate. It was unclear why the certificate of acceptance have been refused, or if it was necessary in the first place.
- 2.15 On 9 September 2014 the authority responded that 'the installation of just the stoves did not require a building consent, and [the authority] is therefore of the view that a certificate of acceptance does not fall to be issued just for the stoves'.

- 2.16 On 15 September 2014 the Ministry sought clarification from the applicant on the matter to be determined as the authority had noted consent was not required for the installation of two electric stoves (refer paragraph 2.15).
- 2.17 The applicant's lawyer responded on 18 September 2014 saying that:
- The authority has advised that a building consent is not required for the additional stoves and consequently a certificate of acceptance is not required; the authority should have provided this advice to the applicant upon receiving the certificate of acceptance applications. The authority handled the matter incorrectly.
  - The applicant requests the determination record that the authority incorrectly processed the certificate of acceptance application; and should reimburse the applicant the certificate of acceptance application fees, the determination application fee, and legal costs involved.
- 2.18 As noted in paragraph 1.5, on 22 September the Ministry sought the property file from the authority. On receipt of the file the Ministry sought clarification from the applicant's lawyer regarding the certificates of acceptance being different to those provided with the determination file. The applicant's lawyer responded saying that the application details were amended at a pre-lodgement meeting between the applicant and the authority.

### **3. The initial submissions**

- 3.1 The applicant's lawyer provided a written submission, dated 11 July 2014, which contended that:
- The applicant seeks a determination in respect of the refusal of the authority to issue a certificate of acceptance for building work done without consent, being the inclusion of an additional kitchen stove in the ground floor of each dwelling.
  - The reason the certificate of acceptance application was declined was that the building work did not meet the minimum requirements of the Building Code and in subsequent email correspondence that the authority had not inspected the building work and could not be satisfied the building work complies with the Building Code.
  - The dwellings are occupied and used as single household units. The applicant rents the dwellings as a single tenancy and management plan which conforms to the definition of 'household unit' under section 7 of the Act.
  - The authority has not specified what aspects of the Building Code have been breached by the inclusion of the additional kitchen stoves.
  - The applicant seeks cancellation of the authority's decision and issue of a certificate of acceptance for the building work.
- 3.2 The documentation supplied with the application included:
- Certificate of acceptance documentation for the dwellings (the later amended certificate of acceptance documentation was obtained by the Ministry)
  - The declining letter from the authority for Flat 2
  - A certificate of title under the Land Transfer Act 1952

- An undated digital survey plan showing the location of the dwellings
- Various email correspondence between the applicant and the authority dated 19 June 2014 – 30 June 2014

3.3 The authority provided a written submission dated 18 August 2014. The authority submitted:

- The building work installing kitchen and laundry facilities required building consent. The authority does not believe the work is compliant; this position is based on the information supplied by the applicant and the inspection carried out by the authority.
- If the certificates of acceptance were granted issued it ‘would facilitate use of the property for the provision of additional household units in breach of the current resource consent conditions’.
- The authority was ‘considering ... whether it should refuse to issue the certificates of acceptance prior to the properties obtaining appropriate resource consents ...’. The authority sought the Ministry’s view on the matter.

#### **4. The draft determination and further submissions**

4.1 On 10 October 2014 I issued a draft determination to the parties. The draft determination concluded the authority was correct to refuse to issue the certificate of acceptance due to unclear information provided by the applicant and little evidence the building work complied with the building code. The draft determination also concluded the authority provided insufficient reasons for the refusal under section 99A. I reserved the issue of a costs application until the current determination is issued as a final.

4.2 On 23 October 2014, the authority accepted the draft determination noting that the authority would wish to be heard on any application for costs by the Applicant under section 190 of the Act.

4.3 On 23 October 2014 the applicant’s lawyer provided a written submission that the draft determination was not accepted. In summary the applicant’s lawyer stated:

- The applicant contends that he did not undertake building work to relocate the laundry and install showers, toilets and washbasins in the laundry areas. The as-built plans provided with the application for certificates of acceptance accurately confirm what had been approved following discussion with the authority’s officers prior to lodging the applications.
- The original building plans showed a toilet block at a slightly wrong location, noticed during inspections. The mistake was corrected in the as-built plan and the drawings provided with the application. It was understood this did not involve any building work that required a certificate of acceptance.
- The applicant contends the information submitted to the authority was neither unclear nor insufficient although concedes the applications were not clearly worded. The application needs to be considered with the as-built plans and the pre-lodgement meeting and discussion with the authority’s officers.
- The laundry facilities in the dwellings did not involve any building work and therefore do not require a certificate of acceptance.

- The determination should make a direction with regard to reimbursement of the application fee and legal costs.
- 4.4 I note here that if the applicant wishes to continue with a costs application under section 190 of the Act it is considered after the issue of this determination.
- 4.5 On 30 October 2014 I sought clarification from both parties relating to correspondence from the authority indicating building consent applications had been applied for.
- 4.6 On 5 November 2014 the applicant's lawyer responded stating that only one building consent was issued for the dwellings, and one code compliance certificate. The applicant maintains the current use of the dwellings is not in breach of Rule 7.7.2.1 of the District Plan as single residential units.
- 4.6 On 17 November 2014 the authority responded confirming a single building consent was issued for the dwellings, and the certificates of acceptance were sought to facilitate the reconfiguring of the building into multiple unauthorised residential units. The authority is resolving this matter under the appropriate enforcement provisions of the RMA. The authority accept that enforcement provisions under the Act and RMA are separately exercised 'it is uneasy that the law may be brought into disrepute by the exercise of [the authority's] regulatory powers under the Act in such a way as may appear to the public to contradict/undermine enforcement action under the RMA'.

## **5. Discussion**

### **5.1 The certificates of acceptance**

- 5.1.1 Under section 96 of the Act, the authority may issue a certificate of acceptance for building work already done if the work was done by the owner and a building consent was required for the work but not obtained. The 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.
- 5.1.2 In the current case it has been accepted by the authority in subsequent correspondence that for the installation of two electrical stoves, a building consent is not required and therefore a certificate of acceptance is not required. In my view this is correct, the installation of two electrical stoves do not require a building consent.
- 5.1.3 However the certificates of acceptance also refer to the relocation of a laundry, and the 'laundry in bathroom'. The accompanying plans show relocation and installation of showers, toilets and washbasins in the laundry areas of the dwellings. From the plans provided it appears that building consent was required for the laundry and bathroom alterations, and therefore a certificate of acceptance was required as building consent was not applied for.
- 5.1.4 The applicant has requested that the determination determine whether the authority correctly processed the certificate of acceptance application correctly. In my view there are two aspects of this request that require analysis:
- the information and evidence provided to the authority with the certificate of acceptance applications; and
  - the authority's reasons for refusing the certificate of acceptance applications.

- 5.1.5 In respect of the first issue, having reviewed the documentation provided for the certificate of acceptance applications for the dwellings, there is a significant amount of ambiguity in that the information provided is unclear and insufficient. There is no detail, other than an amended building plan, as to the extent of the laundry work carried out, and no detailed evidence as to how the building work complies with the Building Code.
- 5.1.6 In my view the applicant has failed under section 97 of the Act to provide the available information to enable the authority to make an assessment on reasonable grounds as to whether the building work complies with the Building Code. I remind the authority that it has the ability under section 98(2) to request further information in relation to a certificate of acceptance.
- 5.1.7 The second issue relates to the authority's refusal of the certificate of acceptance applications. The authority has stated 'the refusal is due to the statutory threshold for issuing the stove/kitchen and laundry facilities not being met on the basis of the information provided and the inspection carried out by [the authority]'. However, the initial refusal letter dated 16 June 2014 (refer paragraph 2.6) provides the reasons for refusal being that no inspections were undertaken by the authority, and the dwellings were being used for more than one household unit.
- 5.1.8 In my view, the authority has failed under section 99A to provide adequate reasons for the refusal of the certificate of acceptance application. Determination 2011/101<sup>3</sup> stated:
- 6.1.7 When refusing to issue a certificate of acceptance an authority should provide adequate reasons for a refusal to the owner. The reasons should provide the owner with evidence of why the authority considers the work does not comply with the Building Code. It is important that, should an owner be declined a certificate of acceptance, they be given reasons for this decision. An owner can either act on those reasons, or apply for a determination if the reasons are disputed.
- 6.1.8 Where an authority has not provided adequate reasons for refusal to the owner that authority has not correctly exercised its powers in respect of the requirements of the Act.
- 5.1.9 The authority has not specified why the building work did not comply with the Building Code, the reference to household units appear to be outside of the scope of the application (although as noted in paragraph 5.1.5 the application lacked sufficient information which has created considerable confusion in this respect). The other reason provided for refusal is that inspections were not carried out by the authority. It is normally the case with certificates of acceptance that they are in respect of work that is covered and is unable to be inspected. Sections 99(2) and 99(3) of the Act specifically provides for this situation in stating:
- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected
- (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

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<sup>3</sup> Determination 2011/101 The refusal to issue a certificate of acceptance for 8-year-old cladding repairs carried out without a building consent to a semi-detached townhouse (*Department of Building and Housing*) 1 December 2011

## **5.2 The regulatory options open to the authority**

- 5.2.1 The authority is considering whether it should refuse to issue the certificates of acceptance until the properties have the appropriate approval under the RMA. It also considers that the granting of any certificates of acceptance will facilitate the use of the additional household units, in breach of the applicable resource consent conditions. In my view this is incorrect. A certificate of acceptance should be used to regularise work that falls under the Building Act and should not be used to regulate matters under the RMA. In my view the authority must separate enforcement procedures under the Building Act and the RMA and should not use the regulatory options in one Act to remedy the contraventions in another Act.
- 5.2.2 The authority has not explored the option of a notice to fix. In this instance the authority has refused the certificate of acceptance and remains concerned that building work undertaken does not comply with the Building Code. A notice to fix can be issued where the owner has undertaken building work without building consent under section 40 of the Act. In my view this would be an appropriate mechanism in this case to regulate unconsented building work.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct to refuse the issuing of certificates of acceptance; however, I consider the authority provided insufficient reasons for the refusal under section 99A of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 December 2014.

John Gardiner  
**Manager Determinations and Assurance**



## Appendix A

### A.1 The relevant sections of the Act

#### **96 Territorial authority may issue certificate of acceptance in certain circumstances**

(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; or

...

(2) 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

...

#### **97 How to apply for certificate of acceptance**

An application for a certificate of acceptance must—

..

- (b) if available, be accompanied by plans and specifications that are—
  - (i) required by regulations made under section 402; or
  - (ii) if the regulations do not so require, required by the territorial authority; and
- (c) contain or be accompanied by any other information that the territorial authority reasonably requires; and

#### **98 Processing application for certificate of acceptance**

...

(2) A territorial authority may, within the period specified in subsection (1), require further reasonable information in respect of the application, and, if it does so, the period is suspended until it receives the information.

#### **99A Refusal of application for certificate of acceptance**

If a territorial authority refuses to grant an application for a certificate of acceptance, the territorial authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

#### **99 Issue of certificate of acceptance**

- (1) A certificate of acceptance must—
  - (a) be issued in the prescribed form; and
  - (b) have attached to it,—
    - (i) if a compliance schedule is required as a result of the building work, the compliance schedule for the building; or

(ii) if an amendment to an existing compliance schedule is required as a result of the building work, the amended compliance schedule for the building.

(2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.

(3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.