



Determination 2015/064

Regarding the authority's exercise of its powers of decision in refusing to grant building consent for an addition to an existing building that had undergone a change of use without first obtaining approval at 4203A Far North Road, Pukenui

Summary

This determination discusses considerations in granting building consent for an addition to an existing building where a change of use has occurred without approval and where building work had been carried out without consent when consent was required.

1. The matter 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:

- the owners of the property, D Hewitt & L Best, who applied for the determination (“the applicants”)
- Far North District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the authority's exercise of its powers of decision in refusing to grant a building consent for an addition to an existing building. The existing building had been consented as a garage/storage but unconsented work had been carried out and the building was being used as a dwelling.

1.4 The applicants sought a determination under a number of matters for consideration including very specific questions:

- whether the decision of the authority to refuse to grant the building consent on the grounds provided was ‘wrongful’
- whether the authority was ‘negligent’ in failing to provide requested property information
- given that the authority did not provide the requested property information, whether it was then ‘wrong or careless’ to include a compliance date on the notice to fix that was issued.

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

- 1.5 I am bound by the jurisdiction under section 177 of the Act to the matters I can determine. Therefore I consider the matter to be determined² is whether the authority correctly exercised its powers of decision in refusing to issue a building consent for the addition described in the building consent application No. BC-2015-158/0.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. Background

2.1 The determination refers to three consent applications as follows:

- BC-2010-1048/0 - “the existing building”
- BC-2015-158/0 - “the original addition”
- BC-2015-647/0 - “the revised addition”

2.2 The existing building

- 2.2.1 The original application for building consent for the existing building was made on 8 March 2010; the application described the intended use of the building as ‘Domestic Garaging / Storage Shed’. The building consent for the work was issued on 19 April 2010. It is unclear whether inspections were carried out during construction and I have not seen a code compliance certificate issued against that consent; the applicants have stated that ‘a completion certificate was issued by [the authority] in 2010’.
- 2.2.2 At the time the existing building was consented there was no dwelling on the property.
- 2.2.3 While the existing building was consented for use as garaging and storage, unconsented building work has been carried out and the building is now used as a three bedroom house constructed over two levels.
- 2.2.4 On 23 January 2013, the authority wrote to the applicants in a ‘field advice notice’ to state that an inspection of the property on 23 November 2012 had revealed that the building had undergone a non-notified³ change of use to a dwelling, and ancillary buildings had been constructed without consent. The authority set out three remedies, namely removing building work, applying for a certificate of acceptance and giving notification of the change of use, and discussing options with the authority.

2.3 The original addition

- 2.3.1 The applicants applied for a building consent for the original addition on 8 August 2014. The consent application described the building work as ‘Extension to Existing Dwelling’.
- 2.3.2 The original addition is located to the southwest of the existing building, and consists of three levels in part: a basement garage and two levels above. Ground level includes a lounge, sewing room, and recreation room: level 2 contains a small sitting area. Two infill timber decks are located to northwest and southeast where the buildings are offset. The overall plan dimension (including the decks) was approximately 9x9m.

² Under sections 177(1)(b) and 177(2)(a) of the Act.

³ Section 114 of the Act requires an owner give written notice to the authority of a proposed change of use.

- 2.3.3 It appears that sometime around August 2014 and in relation to the consent application, the authority raised concerns regarding the granting of the building consent for the addition in relation to the change of use of the existing building. In an email to the authority on 22 August 2014, the architectural designer acting on behalf of the applicants stated that he had spoken with an officer of the authority prior to commencing work on the project, and that:
- [the officer] advised me that the issue with the existing dwelling will have no effect on the proposed extension & that it was a totally separate issue hence would not hold up the proposed works ... [now] there is a change of heart & now the existing issue is holding up the works, you informed me that [the officer of the authority] didn't realise that the extension was as big as what it is, this is a small extension of 47m² & the size of a project shouldn't determine whether (sic) or not you allow it to proceed ... I ask that you please reconsider this RFI item as being waved (sic) until the proposed extension is constructed & then a CCC & a COA can & will be applied for simultaneously.
- 2.3.4 On 26 August 2014 the authority wrote to the architectural designer: the officer of the authority noted that 'my letter did not state that the COU and COA had to be granted prior to approval of this building consent – only that they be applied for.'
- 2.3.5 On 2 September 2014 the authority again wrote to the applicants, noting that no response had been made in regards the field advice notice. The authority enclosed a notice to fix (BC-2015-231/0) which referred to the application for building consent for the addition and stated the contravention of the Act as 'the building had non-consented works done and undergone a change of use from a shed to a residential dwelling.' The authority required the applicants prepare plans to identify the building work done 'outside of the original consent' and for the additional building, apply for a certificate of acceptance, and complete a change of use application form.
- 2.3.6 On 5 September 2014 the authority requested further information from the applicants, seeking to clarify a change of use noted on a producer statement design for the on-site effluent disposal and the location of the new septic tank, the number of bedrooms in the existing building, the exact scope of work, and whether the addition would form a separate residential unit.
- 2.3.7 The consent application was amended on 9 September 2014, describing the work as 'Proposed extension to existing unconsented dwelling & new effluent field'.

2.4 The refusal

- 2.4.1 On 12 September 2014 the authority wrote to the applicants with a further request for information, including a total of 23 items to be addressed. Many of the items relate to detailing of the proposed addition, and I have listed only some items relevant to this determination below (my emphasis in bold):
1. Amend project description to reflect unconsented dwelling, size and extent of alteration. ...
 16. Provide detail of existing cladding to new cladding junction (Existing cladding to trimline? Cavity to direct fix?) ...
 23. Section 112 and 115 of the Building Act applies to this building (as new building work is attached to a consented existing shed), and until the requirements of section 115 are addressed (refer [notice to fix] 2015 – 231) **Building Consent will not be granted** (Section 49 (1)) as we cannot be reasonably satisfied that the entire building in its actual use will comply with the building code (section 17)
- ...
- 2.4.2 On 29 October 2014, the authority wrote to the applicants with a further request for information listing five items to be addressed. Item 5 repeated Item 23 of the previous request for information. In addition the authority stated

... we cannot indefinitely store applications which are not being actively progressed. Unless we either hear from you or all the relevant information is received within 10 working days of the date of this letter, processing will stop and the application will be refused.

- 2.4.3 On 16 November 2014 the applicants emailed the authority requesting a copy of all of the documents on the property file held by the authority. In regards to the proposed addition, the applicants set out their view formed on the advice of their architectural designer that
- ...whilst it would be attached in small part to [the existing] building that would need a change of use application it would be viewed as two different applications neither of which would be dependent upon the other.
- 2.4.4 The applicants went on to advise the authority that due to the issues with the authority refusing to grant consent for the original addition, the applicants would not be proceeding as per the original application, but would be making changes to the design and amending the application accordingly. The applicants advised they also proposed to proceed with the necessary documentation to record the change of use of the existing building and apply for a certificate of acceptance.
- 2.4.5 On 17 November 2014 the authority wrote to the applicants regarding the request for documents held by the authority. The authority reiterated it had concerns regarding the regularising of the building work carried out without consent and the change of use. The authority went on to note that the applicants had applied for a change of use for the existing building and a building consent for the original addition, but that both were 'suspended' and that no application for a certificate of acceptance had been made.
- 2.4.6 The authority stated that from its perspective 'there is a very clear connection between all of these building aspects'. The authority set out what it saw as the way forward; being the applicants providing new information to support the application for the revised addition, and that 'the Change of Use and Certificate of Acceptance will be treated as connected and can be addressed in sequence after the Building consent is issued.'
- 2.4.7 Further correspondence between the parties confirmed the applicants' understanding of the steps laid out by the authority to progress the consent.
- 2.4.8 On 7 January 2015 the authority wrote to the applicants regarding the previous requests for information, repeating the content of the letter of 29 October 2014 but without listing the items required.

2.5 The revised addition

- 2.5.1 On 8 January 2015 the applicants provided the authority with the documentation for the revised addition.
- 2.5.2 The revised addition (approximately 5x4m) comprises a single room on one level located where the south-eastern deck was to be situated for the original addition.
- 2.5.3 By email on 16 January 2015 the authority advised the applicants that (my emphasis in bold):
1. One 'unconsented dwelling' is correct, its status as a 'dwelling' cannot be met until the [certificate of acceptance] and [change of use] are acted on as per the Notice to Fix issued. **The current application for the [revised addition] must be cancelled before any progress can be made with this one**, we cannot have both in at the same time. A letter confirming its cancellation will be required [for the original addition].

- 2.5.4 On 19 January 2015 the applicants emailed the authority, referring to the authority's correspondence and stating
- Please accept this correspondence as [per] your instruction TO CANCEL [the original addition]. The above matter was to be cancelled last November by [the architectural designer] ...
- 2.5.5 On 20 January 2015 the authority wrote to the applicants saying the building consent application for the original addition had been cancelled.
- 2.5.6 The parties met on 23 March 2015 regarding the processing of the building consent applications and the authority's refusal to grant consent.
- 2.5.7 The applicants then sought advice from the Ministry. An officer of the Ministry responded on 24 March 2015 setting out his view on the provisions under section 112 and the status of the existing building in relation to the building consent application for the revised addition.
- 2.5.8 The applicants emailed the authority on 25 March 2015, stating that they did not accept the reasons for the authority suspending the building consent application for the revised addition on the grounds provided by the authority, and requesting the authority grant and issue the consent. The applicants attached the advice that had been provided by the officer of the Ministry.
- 2.5.9 On 1 April 2015 the authority wrote to the applicants regarding the proposal 'to extend property subject to a notice to fix'. The authority acknowledged the Ministry's advice and set out the background to events. The authority also referred to its Policy (no. 3119) for 'dangerous, insanitary and earthquake prone buildings', and that the authority considered the provisions of that policy in regards alterations to an existing building and a change of use were relevant to the consent application.
- 2.5.10 The authority concluded that in its interpretation of the Act
- ... the application for the addition cannot be assessed while the notice to fix that (sic) is still outstanding. The Notice to Fix determines that the compliance with the code of the existing building is defective and [the authority] therefore requires it to be remedied to allow the use of the building to changed (sic) from an uninhabited shed to a inhabited dwelling. The impact of the addition on the existing buildings compliance which is something that [the authority] has to assess when issuing a building consent pursuant to section 112 can only be determined once the Notice to Fix has been complied with.
- The authority advised it would process the application for the revised addition and the application would be issued or refused in line with the authority's normal procedures.
- 2.5.11 On 2 April 2015 the authority emailed the applicants regarding the requirements of the notice to fix. In concluding the email the authority referred to advice received from the Ministry that:
- [The Ministry's] view was to process your application for the [addition] and to prosecute you for your breaches.
- 2.5.12 By email on 7 April 2015 the officer of the Ministry noted the authority appeared to have misinterpreted the advice provided, and that if the authority considered it was appropriate then it is able to issue infringement notices and/or prosecute. The officer went on to state:
- There is no apparent reason why the processing of the application for [addition] prevents [the authority] from applying the provisions of the Act in relation to the unconsented work that [the authority] became aware of in 2013. The processing of

the consent for the [addition] and the enforcement action in relation to the illegal building work should be dealt with as separate processes as provided for in the Act.

2.5.13 On 9 April 2015 the applicants again wrote to the authority to reiterate that in the applicants' view the authority was wrong in suspending the building consent application for the revised addition, and requested the consent be issued.

2.6 The determination application

2.6.1 An application was received by the Ministry on 25 May 2015.

2.6.2 On 12 June 2015 I sought confirmation from the parties regarding the status and requesting copies of the various consents referred to in the application. I also clarified that although the applicants had raised a number of issues regarding how the authority had carried out its functions, the determination could not consider all of the issues raised and it was the exercise of the authority's powers of decision in refusing to issue the consent for the original addition that could be addressed.

2.6.3 I requested the authority provide confirmation of the reasons for refusing to grant the consent, and on what basis the authority considered an application for a certificate of acceptance was required before a building consent for the original addition could be granted.

2.6.4 On 16 July 2015 the applicants confirmed they would proceed with the determination on the basis of the matters outlined in paragraph 1.5.

2.6.5 The authority responded on 20 July 2015, setting out some of the background to the dispute and providing copies of:

- relevant correspondence between the parties
- building consent BC2010-1048/0 (the existing building)
- building consent BC2015-647/0 (the revised addition)
- the notice to fix, BC2015-231/0
- the field advice notice, BC2013-712
- building consent application 2015-158/0 (the original addition)

2.6.6 The authority advised that it had issued a building consent for the revised addition, but that the notice to fix had not been complied with and the authority 'has not been provided with a Certificate of Acceptance for the change of use from a "Shed" to a "Dwelling".'

3. The submissions

3.1 The applicants

3.1.1 In a covering letter to the application for determination, the applicants set out the matters to be considered in the applicants view (refer paragraph 1.4). The applicants provided copies of the following:

- Photographs of the existing building.
- Various items of correspondence between the parties, and the Ministry.
- The authority's Consultation Document for the proposed Long Term Plan 2015-25

- Application for building consent BC2015-158/0 (the original addition) along with supporting documentation.
- 3.1.2 The applicants provided further comment in an email on 20 July 2015, noting that the determination application was in respect of the building consent application for the original addition and not the revised addition. The applicants noted that the authority required the revised addition be considered under a new consent application, but during the processing also required that the application for the original addition be withdrawn before the authority would complete the processing of the new application. This was followed by a further email on 21 July 2015, stating that the applicants believed they had ‘no option but to comply with the [authority’s] directive’ to withdraw the consent application for the original addition.
- 3.1.3 On 22 July 2015 the applicants provided additional correspondence related to the matter from the architectural designer to the authority, and on 1 September 2015 provided a copy of the plans supporting the building consent application for the revised addition.
- 3.2 The authority**
- 3.2.1 By letter dated 20 July 2015, the authority set out some of the background to the dispute, noting that the applicants had been issued with building consent for the revised addition. The authority provided copies of the following:
- Building Consent BC2010-1048/0 dated 19 April 2010 (the existing building)
 - Building Consent application BC2015-158/0 (the original addition)
 - Building Consent BC2015-647/0 dated 5 May 2015 (the revised addition)
 - Correspondence between the parties.
 - The Notice to Fix BC 2015-213/0 dated 2 September 2014
- 3.2.2 The authority provided a copy of the email dated 19 January 2015 from the applicants (refer paragraph 2.5.4) with the instruction to the authority to cancel the consent.
- 3.3 A draft determination was set to the parties for comment on 29 September 2015.
- 3.4 The applicants acknowledged receipt of the draft on 29 September 2015 and noted that they would provide the authority with the documentation necessary to apply for a certificate of acceptance ‘for the entire building’. I note here that the certificate of acceptance can only be completed in respect of building work that was carried out without consent, and that any consented work would be subject to a code compliance certificate.
- 3.5 By email on 13 October 2015 the authority accepted the draft without further comment.
- 3.6 The applicants responded on 12 October 2015, accepting the draft subject to minor amendments.
- 3.7 I have amended the draft as I consider appropriate.

4. Discussion

4.1 The legislative framework

4.1.1 Section 49 of the Act provides:

- (1) A building consent 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.

4.1.2 In regards to the building consent application for the original addition, the assessment required under section 49 is in respect of the building work associated with the construction of the addition itself; included in this would be the construction of the junctions between the existing and new building elements, and similar.

4.1.3 In this case the building work constituted an alteration to an existing building, and the requirements of section 112 of the Act apply when an existing building is altered. Section 112(1) states:

A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

- (b) the building will,—
 - (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or
 - (ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

4.1.4 Accordingly, in regards to the consent application for the addition, the authority needed to be satisfied that the building (that is the existing building as a whole) will continue to comply if it complied before the alterations, or comply to at least the extent it did prior to the alterations. The assessment under section 112 would consider for example; any lessening of the structural stability of the existing structure, the ongoing compliance of drainage services, ventilation of spaces the addition is adjoining, etc.

4.1.5 Such an assessment is not done on the basis that the existing building must be compliant; it is only to remain compliant after the alteration to the same extent as before the alteration was made.

4.1.6 The authority's refusal to grant building consent for the addition was based on the grounds that the existing building had undergone a change of use without approval first being sought, and that there was building work completed for which no consent had been sought (refer paragraph 2.4).

4.1.7 While the authority may be correct to pursue those matters as breaches of sections 114 and 40, it was not correct to refuse to grant the building consent on this basis. However, for the authority to be able to make an assessment under section 112(1)(b) about the compliance of the building as a whole after the alteration, the authority needs to know the effect of the extension on the existing building.

4.1.8 The existing building is such irrespective of its regulatory status. The regularisation of the unconsented work and the assessment for the change of use to the existing building is a separate regulatory process to the granting of the consent for an addition to the building.

4.2 General comment

4.2.1 I provide the following as general comment only to assist the parties:

- There is no dispute that there has been a change of use of the existing building to a dwelling; sections 114 and 115 are the relevant provisions in respect of the change of use. The unapproved change of use does not restrict the applicants from carrying out alterations subject to the provisions of section 112.
- A certificate of acceptance is the appropriate regulatory mechanism to address building work that has been carried out without consent first being obtained when consent was required.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in refusing to issue building consent No. BC-2015-158/0 on the grounds provided by the authority.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 October 2015.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 Relevant sections of the Building Act 2004

49 Grant of building consent

(1) A building consent 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.

(2) However, a building consent authority is not required to grant a building consent until it receives—

- (a) any charge or fee fixed by it in relation to the consent; and
- (b) any levy payable under section 53.

112 Alterations to existing buildings

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—

(a) the building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

- (i) means of escape from fire; and
- (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) the building will,—

- (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or
- (ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

(2) ...