



## Determination 2017/062

# Regarding the grant of a building consent with a section 37 certificate for a house at 431 Ormiston Road, Flat Bush, Auckland



### Summary

This determination considered the authority's decision to grant a building consent with a section 37 certificate that omitted one (of three) items of noncompliance with the District Plan. The determination also considers whether the authority could place a section 37 "tag" on the building work after the building consent had been issued.

### 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 owners of the building, S-Z Xue, and M Chen ("the owners")
  - the licensed building practitioner concerned with the relevant building work, P Ing ("the applicant")
  - 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 identification of an additional infringement of the District Plan after the building consent was issued. The building consent was issued with a section 37 certificate, and the certificate was "cancelled" when the original infringements of the District Plan were resolved. However, a further non-compliance with the District Plan was identified after construction had started, and the authority informed the owners that resource consent would be required.

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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.building.govt.nz](http://www.building.govt.nz) or by contacting the Ministry on 0800 242 243.

1.4 The matter to be determined<sup>2</sup> is the authority's exercise of its powers of decision in issuing a building consent with a section 37 certificate because that certificate omitted one aspect of the building's infringement of the District Plan. In deciding this matter, I must consider:

- whether the authority was correct to issue the building consent with a section 37 certificate that failed to identify that the proposed siting of the building work would require a resource consent.

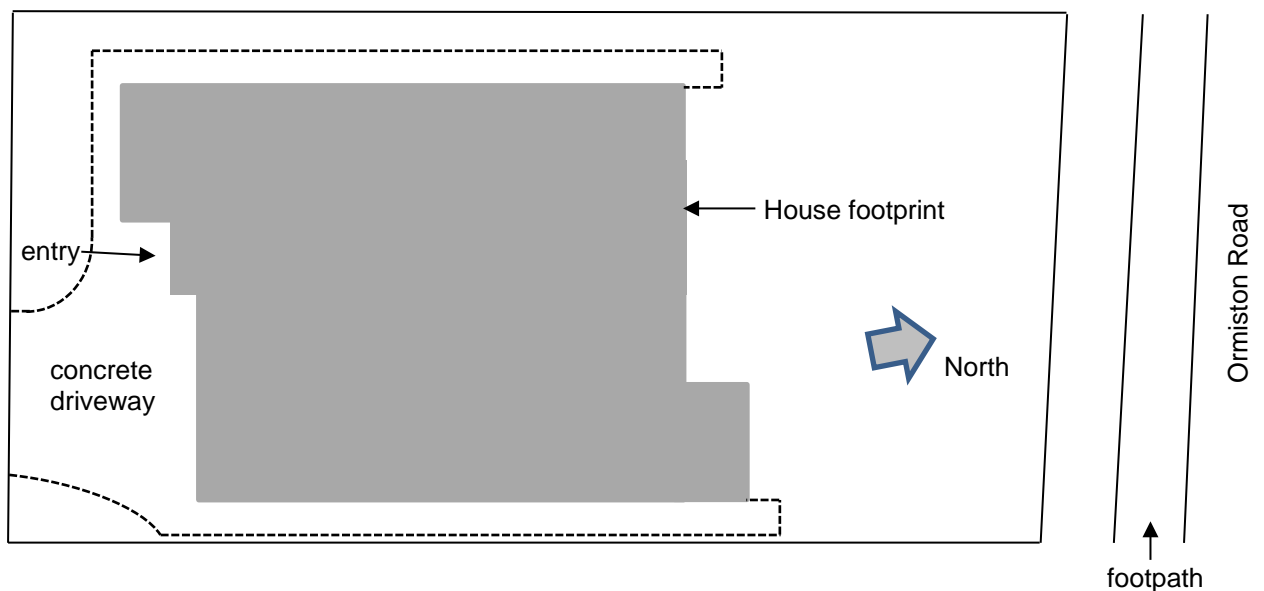
1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

1.6 Matters concerning the Resource Management Act 1991 ("the RMA") are outside my jurisdiction; this determination considers only matters that fall under section 177 of the Act.

## 2. The building work and background

2.1 The building work consists of a proposed two storey house with six bedrooms. The consented drawings show the lounge, kitchen, family room, bathroom, garage and two bedrooms on the ground floor. The first floor contains a living room, four bedrooms and ensuites. The house is located in a high wind zone for the purposes of NZS3604<sup>3</sup>.

2.2 The house is timber framed with a concrete slab foundation. The house is primarily clad with brick veneer, with bevel-back weatherboards above some windows and doors. The truss roof has a 20° pitch and is clad with concrete tiles.



**Figure 1: Outline site plan (not to scale)**

<sup>2</sup> Under sections 177(2)(a) of the current Act

<sup>3</sup> New Zealand Standard NZS3604:2011 Timber framed buildings

- 2.3 The application for building consent for the proposed house was submitted to the authority on 3 December 2015. On 11 December 2015 the authority attached a section 37 certificate to the building consent application to prevent any building work proceeding after the consent was issued. The section 37 certificate required the following matters to be addressed:
- Resource Consent is required for residential development not complying with the Flat Bush Plan Change 20 maximum 5m height and height in relation to boundary rules.
  - Certification of approved mechanical ventilation system for habitable rooms in the moderate aircraft noise area (MANA), as per Rule 5.21.4 of [the authority's] District Plan...
- 2.4 There was correspondence between the parties from 7 January 2016 until 2 February 2016 to resolve the height infringement and ventilation design issues identified on the certificate. These issues were not resolved before the building consent was issued on 24 March 2016, and the section 37 certificate remained attached.
- 2.5 On 27 April 2016, the two issues noted on the certificate were resolved, and according to the authority, the applicant was advised verbally that the certificate was “cancelled”.
- 2.6 Building work commenced on 2 May 2016 and continued for a month, during which time the concrete slab foundation was completed. However, during this period the owners noticed that their house was orientated in a different direction to their neighbours’ buildings, and they contacted the authority about this.
- 2.7 The authority identified that the building work required further resource consent approval because the orientation of the house infringed the District Plan rules (the driveway faced an access road and not the main road). After a meeting between the parties, the authority informed the applicant that it would place a “section 37 tag”<sup>4</sup> on the issued building consent. The tag was to inform the authority’s officers that no further building work was to be carried out on site. The authority did not issue a second section 37 certificate.
- 2.8 The owners were given the option of either seeking resource consent approval so that the driveway remains facing the access road, or amending the consent so the driveway faced Ormiston Road.
- 2.9 On 29 June 2016, the applicant emailed the authority stating that the owners had been unsuccessful in obtaining the consent of the neighbouring parties required for the resource consent.
- 2.10 The authority responded in an email dated 15 July 2016 confirming that the section 37 tag “must remain attached to the building consent, which requires the owner to apply for resource consent, in order to address the District Plan and consent notice infringements”.
- 2.11 The authority also noted that as the resource consent option had been unsuccessful, the only alternative was for the house to be redesigned to ensure it “complies with the consent conditions and District Plan rules”.
- 2.12 The Ministry received an application for a determination on 31 August 2016.

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<sup>4</sup> It is not known what form the section 37 tag took.

### **3. The submissions**

- 3.1 The applicant included a submission with the application that covered the background to the dispute and his view that the authority was not “fully aware” of the “rules and regulations”. The applicant stated that he sought to design the dwelling to the “set rules and regulations”, however, the “fast dynamic changes occurring with the rules and regulations for different areas” meant that it was not uncommon for an issued building consent needing to be amended because of non-compliance.
- 3.2 The applicant provided attached copies of:
- consented drawings
  - correspondence with the authority.
- 3.3 The authority acknowledged the application on 20 October 2016 but made no submission. The authority supplied copies of:
- building consent No. 20153631
  - the original section 37 certificate dated 11 December 2015.

### **3.4 The draft determinations and submissions received**

- 3.4.1 The first draft determination was issued to the parties for comment on 28 April 2017.
- 3.4.2 The first draft determination concluded that the authority was incorrect to grant the building consent with a section 37 certificate attached that failed to identify that the proposed siting of the building would infringe the District Plan under the RMA. The draft reversed the decision to issue the building consent.
- 3.4.3 The authority responded on 11 May 2017 saying it did not accept the draft determination. The authority accepted the analysis in the determination but disagreed with the decision to reverse the building consent because an amendment had been received to bring the consent into alignment with the District Plan. The building work was almost complete and there would be no benefit in reversing the building consent.
- 3.4.4 The authority stated that the determination did not suggest alternative mechanisms to solve these issues when they arise. In its view it identified a problem and acted to bring about a resolution before the issue worsened, which was the appropriate action.
- 3.4.5 The applicant accepted the draft determination without comment in an email dated 12 May 2017.
- 3.4.6 The owners did not respond to the first draft determination.
- 3.4.7 The second draft determination was issued to the parties for comment on 29 June 2017. The draft decision said the authority was incorrect to grant building consent No. 20153631 because the section 37 certificate failed to identify one of three infringements of the District Plan under the RMA. However, as the building consent had been amended to rectify the infringement it would not be appropriate to modify or reverse the building consent, so the decision to issue the building consent was confirmed.
- 3.4.8 The authority responded on 5 July 2017 accepting the draft decision, and reiterating its comments made in the previous submission regarding mechanisms to address these issues.

- 3.4.9 The applicant, on behalf of the owners, accepted the second draft determination without comment in an email dated 26 July 2017.

## 4. Discussion

### 4.1 Legislation

- 4.1.1 Under section 37 of the Act an authority is required to issue a certificate if:
- (1)...
    - (a) a resource consent under the Resource Management Act 1991 has not yet been obtained; and
    - (b) the resource consent will or may materially affect building work to which a project information memorandum or an application for a building consent relates.
  - (2) The territorial authority must issue a certificate, in the prescribed form, to the effect that until the resource consent has been obtained—
    - (a) no building work may proceed; or
    - (b) building work may only proceed to the extent stated in the certificate.
  - (3) The certificate must be—
    - (a) attached to the project information memorandum; or
    - (b) if no project information memorandum has been applied for, provided to the building consent authority.
- 4.1.2 A building consent can only be granted by an authority under section 49 of the Act if it is satisfied on ‘reasonable grounds’ that the building work if completed in accordance with the plans and specifications will meet the provisions of the Building Code.
- 4.1.3 Even if the proposed building work requires resource consent, this does not prohibit an authority from issuing a building consent if it meets the test under section 49. This is because an authority, when issuing the building consent under section 51, must attach a copy of “a certificate issued under section 37 (if any)”, and this notifies the owners that a resource consent is required. The section 37 certificate is notice to the owner that a resource consent will be required and prohibits all (or some) of the building work from proceeding until one has been obtained.
- 4.1.4 Resource consent is required when the proposed building work does not comply with or will infringe the authority’s District Plan rules and regulations that are set out under the RMA.

### 4.2 Issuing the section 37 certificate

- 4.2.1 The orientation of the building in this case infringed the District Plan rules. The section 37 certificate issued by the authority should have included the orientation infringement as well as the height and ventilation matters required by the RMA. However, the authority only issued a section 37 certificate to the consent for height infringement and ventilation requirements. When the applicant altered the design to comply with the District Plan requirements that the authority had identified, the section 37 certificate was cancelled.
- 4.2.2 In *Rawlings v Pilcher*<sup>5</sup> the Court considered that while the authority in that case did not issue a section 37 certificate with the building consent, it did not mean that the

<sup>5</sup> *Rawlings v Pilcher*, ENV-2-13-CHC-121, ENV-2013-CHC-122, ENV-2013-CHC-123 [2014] NZEnvC 49

building work was exempt from requiring resource consent when the building work infringed the District Plan rules.

- 4.2.3 In this case, although a section 37 certificate was issued and then cancelled by the authority, the certificate only served as a notice that a resource consent was required. The removal of the section 37 certificate did not exempt the building work from requiring resource consent.
- 4.2.4 I note the authority placed a “section 37 tag” on the building work. A section 37 certificate can only be issued in accordance with the requirements of section 37 of the Act. One of those requirements is that the certificate is issued in respect of “building work to which ... an application for a building consent relates”. The territorial authority therefore has no power to issue a section 37 certificate after a building consent has been granted. Consequently, the authority could not issue a second section 37 certificate at the point when the omission in the original certificate was identified.
- 4.2.5 The authority was correct to identify the potential infringement of the RMA requirements relating to the siting of the building and to bring that to the attention of the owner. However, in the absence of a section 37 certificate, any infringement of the RMA was to be remedied under the enforcement provisions of that Act, not the Building Act. This is because, once a building consent has been issued, the authority has limited powers under the Building Act to address noncompliance with other Acts. When the infringement was discovered:
- a notice to fix could not be issued because the owner had complied with the Act and the building consent complied with the Building Code;
  - a section 37 certificate could not be issued because the building consent had already been issued.

### **4.3 Obligations and responsibilities**

- 4.3.1 Under section 49 of the Act a building consent authority must issue a building consent if it is satisfied 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 building consent application. The obligations of an authority are summarised in section 14F of the Act, which states:

A building consent authority is responsible for—

- (a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that—
    - (i) an application for a building consent complies with the building code;
    - (ii) building work has been carried out in accordance with the building consent for that work;
  - (b) issuing building consents and certificates in accordance with the requirements of this Act.
- 4.3.2 When issuing a building consent the authority is primarily concerned with assessing whether the building work complies with the Act. The authority, as a building consent authority, complied with its obligations under section 49 of the Act to ensure the proposed building work in the plans and specifications would comply with the Building Code; and also complied with section 51(1)(b)(iii) by attaching to the building consent the section 37 certificate prepared by the territorial authority.

- 4.3.3 I note that should an authority issue a building consent without a section 37 certificate it is not confirmation that the building work does not require resource consent. Under section 51(2) it is noted that:
- the issue of a building consent does not, of itself,—
- (a) relieve the owner of the building or proposed building to which the building consent relates of any duty or responsibility under any other Act relating to or affecting the building or proposed building; or
  - (b) permit the construction, alteration, demolition, or removal of the building or proposed building if that construction, alteration, demolition, or removal would be in breach of any other Act.
- 4.3.4 While the authority, as a building consent authority, properly carried out its obligations under the Act in respect of the building consent, the authority, as a territorial authority, failed to identify that the proposed siting of the building would require a resource consent under the RMA. The territorial authority had an obligation under section 37 to identify issues of non-compliance with the District Plan. It failed to fulfil this obligation in full because it omitted one item of non-compliance from the section 37 certificate.
- 4.3.5 However, it is not solely the responsibility of the authority to identify that resource consent is required. The owners of the building also have responsibilities under section 14B for “obtaining any necessary consents, approvals, and certificates...”, and this includes a responsibility to ensure that their design complies with the relevant Acts.
- 4.3.6 I note that the owners had involved the applicant, who is a licensed building practitioner, in the design of the house. The owners may have expected the applicant to identify any compliance issues under the RMA. Whether that was a reasonable expectation will depend on the terms of the contractual arrangements between the owners and the applicant. Under section 14D of the Act the licensed building practitioner only has a responsibility to ensure that the building work will comply with the Building Code.

#### **4.4 Conclusions**

- 4.4.1 I consider that the authority, as a territorial authority, incorrectly identified the items that need to be identified on the section 37 certificate, and it was incorrect to remove the section 37 certificate when it did as the proposed building work still required resource consent.
- 4.4.2 While the authority, as a building consent authority, has complied with its obligations under the Act in respect of the building consent, the authority, as a territorial authority, did not fulfil its obligations under section 37 of the Act. As a consequence, when it was issued the building consent did not comply with the Act.
- 4.4.3 I note that the owners and the applicant also failed to recognise that the proposed building work required resource consent.
- 4.4.4 The question under section 188 of the Act is whether the building consent should be confirmed, reversed or modified. I understand that an amendment to the building consent was applied for and has now been granted by the authority. I do not have any information as to the nature and extent of that amendment. However, in the circumstances, it would be inappropriate for this determination to modify or reverse the building consent when it is no longer the same building consent that was in existence at the time the application was made for this determination.

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to grant building consent No. 20153631 with a section 37 certificate that failed to identify that the siting of the proposed building would infringe the District Plan under the RMA. However, given the building consent has been amended since this determination was applied for it would not be appropriate to modify or reverse the building consent and, accordingly, I confirm the building consent authority's decision to issue the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 August 2017.

John Gardiner  
**Manager Determinations and Assurance**