



Determination 2019/012

Regarding the issuing of a building consent at Wilson Road North, Rangioru

Summary

This determination considers the authority's decision to issue a building consent that was issued in error. A building consent was granted for building work that had already been completed or was near completion when the consent was issued.

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, Katie Gordon, Manager Determinations, 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 property who applied for the determination, Trinity Lands Limited ("the applicant") acting through a legal adviser
 - Western Bay of Plenty District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority, acting through a legal adviser.
- 1.3 This determination arises from the authority's decision to grant a building consent for building work that had already been completed or was near completion when the consent was issued. The applicant sought a reversal of building consent No. BC 90803 to enable an application to be made for a certificate of acceptance.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers of decision in issuing a building consent for building work that was complete or near completion.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. Background

- 2.1 On 20 October 2017 a building consent application was lodged to construct six timber framed accommodation cabins, an amenities facility and an onsite wastewater treatment system. The cabins and amenities were purpose-built to be used as seasonal worker accommodation.
- 2.2 On 17 November 2017 the authority requested information in respect of the building consent application.
- 2.3 Building work commenced on the property in late November 2017.

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.

² Under sections 177(1)(b) of the Act

- 2.4 On 8 February 2018 the authority sought further information regarding the consent application in order for it to be processed. Over February 2018 further matters were updated and clarified about the onsite wastewater treatment system.
- 2.5 The authority issued building consent BC 90803 on 17 April 2018.
- 2.6 From November 2017 through April 2018 the applicant constructed the six cabins and amenity facility on the property. Construction was complete or near completion prior to the building consent being issued.
- 2.7 The building work was inspected during construction by independent consultants, although over this time the authority was not aware of the construction work taking place and did not itself undertake any inspections.
- 2.8 On 25 June 2018 the authority began to investigate a potential breach of section³ 40 of the Act in relation to the building consent application made on 20 October 2017. Section 40 provides that “building work should not be carried out except in accordance with consent” and a failure to comply with section 40 is an offence under the Act. The authority sent a letter to the applicant in regard to the investigation.
- 2.9 On 29 May 2018 the applicant applied for a code compliance certificate and on 3 July 2018 a certificate of acceptance. The authority responded to these applications saying “that while some aspects of the build have been inspected and passed for compliance by consultants there [is] some building work that the authority cannot satisfy will comply with the Act and/or code”.
- 2.10 The Ministry received an application for a determination on 11 January 2019 requesting that the building consent be reversed so that the completed building work could be considered for a certificate of acceptance.

3. The submissions

- 3.1 The applicant included a submission in support of the application for determination that stated (in summary):
- That it is appropriate that the building consent be reversed so that [the authority] has an opportunity to consider an application for a certificate of acceptance.
 - Determination 2009/115 considered there were compelling reasons to reverse the decision to issue the building consent in that case and the applicants believe that the matter in this instance is akin to the circumstances in Determination 2009/115.
- 3.2 With its application the applicant provided:
- a background and chronology of events that took place over 2017 and 2018 in relation to the building work.
 - site inspection reports
 - photographs of the building work done
 - an undertaking between Trinity Lands Limited (applicant) and the authority
 - an application for a code compliance certificate dated 29 May 2018
 - an application for a certificate of acceptance dated 3 July 2018

³ In this determination references to sections are to sections of the Act.

- the building consent documentation.
- 3.3 The authority made a submission in response to the application dated 11 February 2019 that stated (in summary):
- It agreed with the view taken by the applicant that the building consent should not have been issued and does not oppose the reversal of building consent.
 - It was unaware that building work had been carried out prior to the consent being issued. If it had been aware of this, it would not have granted the consent.
 - Once it learned that the building work had been carried out it immediately commenced an investigation in relation to a breach of section 40 of the Act.
 - It was satisfied that the buildings are not dangerous or insanitary in terms of sections 121 and 123 of the Building Act, and that they have adequate means of escape from fire. Other than this the buildings' compliance with the Act and the Building Code has not been determined.
 - It reserved its position in regard to the application for a certificate of acceptance pending reversal of the building consent. It agreed that it would only be possible to obtain a certificate of acceptance in relation to the building work if the building consent was reversed.
- 3.4 A draft determination was issued to the parties for comment on 4 March 2019.
- 3.5 In response the applicant accepted the draft on 8 March 2019 with no comments.
- 3.6 The authority made a submission in response to the draft determination on 19 March 2019. It emphasised that it was unaware building consent had been granted for building work that had already been completed or was near completion when consent was issued.

4. Discussion

- 4.1 Section 40 of the Act requires that building work must not be carried out except in accordance with a building consent. Section 40(1) states that “a person must not carry out any building work except in accordance with a building consent”. Section 42A allows certain work to be carried out without building consent having been sought, but that provision does not apply here.
- 4.2 Section 49 of the Act requires that an authority ‘must grant a building consent if it is satisfied on reasonable grounds that the provisions of the [Building Code] would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application’ (emphasis added).
- 4.3 I have received no information to suggest the parties dispute the authority’s decision to grant the building consent based on the information provided.
- 4.4 In this case the authority considered and granted the building consent without knowledge that the work was complete or near completion and the applicant carried out the building work without first obtaining the building consent.
- 4.5 I am of the opinion that building consent authorities can be expected to accept and process an application for building consent on the basis of the information provided without confirming that the building work has not commenced, and in this case it was the applicant’s error not to advise the authority that the building work was

underway. I therefore consider the authority was correct in the exercise of its powers of decision when it granted the building consent based on the information it had before it at the time.

- 4.6 It is now apparent that the building consent was issued when the building work to which the consent application related was complete or nearing completion. The parties do not dispute this.
- 4.7 A building consent cannot be issued for building work that has already been completed. This has been considered by the District Court in *Environment Waikato v Sutherland*⁴ which is also referred to in Determination 2016/046⁵.
- 4.8 The issuing of a building consent is a statutory decision authorising building work to be undertaken. As stated in the High Court decision of *Suanui v Hi-Qual Builders Ltd*⁶, the only way for an authority to seek to withdraw a building consent is by applying for a determination regarding its power of decision to issue the building consent under section 177 of the Act.
- 4.9 The approach in *Suanui* has been recently applied in previous determinations⁷ and most recently in Determination 2018/049. It is my view that the reasoning and decisions reached in these determinations are applicable to the present case. It is therefore appropriate that this determination reverses the authority's decision to issue the building consent.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority correctly exercised its powers of decision when it granted building consent No. BC 90803 based on the information before it at that time. However, for the reasons discussed in this determination, I hereby reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 April 2019.

Katie Gordon
Manager Determinations

⁴ *Environment Waikato v Sutherland* District Court Wellington CIV-2010-085-629, 1 March 2011

⁵ Determination 2016/046 The refusal to grant an amendment to a building consent for the use of imported composite slate roofing tiles on a house (26 September 2016)

⁶ *Suanui v Hi-Qual Ltd*, HC Auckland CIV-2008-404-1576, 26 June 2008.

⁷ Determination 2016/054 and Determination 2009/006.