



Determination 2019/055

Regarding the authority's decision to issue a building consent with a section 37 certificate attached, for a proposed building at 83 Marshs Road, Christchurch

Summary

This determination considers the decision by the authority to issue a building consent with a section 37 certificate attached. The determination discusses what the section 37 test 'will or may materially affect building work' means.

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, Calder Stewart Development Limited ("the applicant")
 - Christchurch City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The application for this determination arises from the authority's decision to issue a building consent with a certificate issued under section 37 of the Act attached. The applicant is of the view that the section 37 certificate incorrectly prevented the building work from proceeding, as although a resource consent was required for works at the site, the items to be covered by the resource consent do not meet the criterion for a section 37 certificate in that the resource consent will not materially affect the work covered by the building consent.
- 1.4 The matter to be determined² is therefore whether the authority correctly exercised its powers of decision in issuing a building consent for the proposed building work with a certificate issued under section 37 attached, given the information available to it at the time.
- 1.5 In making my decision, I have considered the submissions from the parties, and the other evidence in this matter.
- 1.6 I note that this dispute involves issues related to the Resource Management Act 1991 ("the RMA"). While I must consider the application of section 37 of the Act which

¹ The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at www.building.govt.nz, as well as past determinations, compliance documents and guidance issued by the Ministry.

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

concerns the effect of a resource consent on building work covered by a building consent, I have no jurisdiction under the RMA, and this determination therefore only considers matters relating to the Act and its regulations.

- 1.7 Unless otherwise stated, in this determination references to sections are to sections of the Act, and references to clauses are to clauses of the Building Code. The relevant sections of the Act are provided in Appendix A.

2. The building work and background

- 2.1 The proposed building is a 11406m² warehouse comprising two warehouse areas, and including a 4220m² canopy area along the north-west side of the building. The warehouse has a 200m² office area to the south-west side of the building. The area to the south-west of the building comprises a yard and carparking area.
- 2.2 The construction of the building is precast concrete columns and panel walls in part, and corrugated steel cladding over steel framing walls in part, with profiled long run roof cladding.

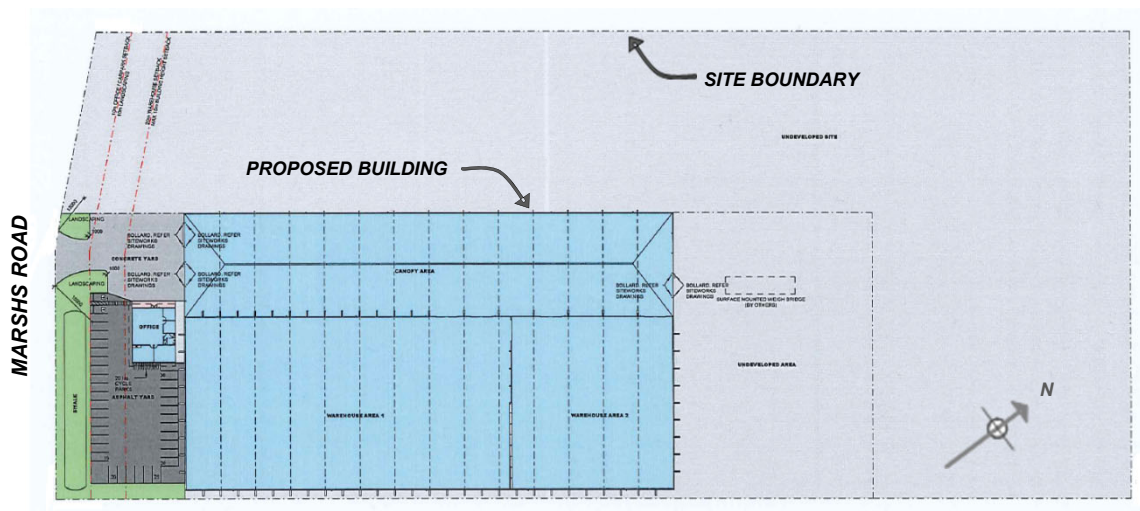


Figure 1: Site plan (not to scale)

- 2.3 The applicant lodged a building consent application on 24 January 2019 for Stage 1 of the construction of the warehouse building. The Stage 1 building work consisted of the foundations, superstructure and in-ground services. The plans also showed carparking spaces for the building.
- 2.4 On 15 February 2019 the authority granted building consent BCN/2019/100 and issued it on 19 February 2019. The building consent for Stage 1 was issued subject to a section 37 certificate which was attached to the consent.
- 2.5 The section 37 certificate was dated 29 January 2019, and stated:
- As these resource consents will or may materially affect the building work to which the attached project information memorandum relates, until they have been granted:
No building work may proceed
- 2.6 The section 37 certificate listed non-compliances with the District Plan that would result from the building work referred to in the Stage 1 building consent. These generally related to: 'area-specific' restricted activities for the subject site (being within the 'Industrial Heavy Zone (South West Hornby)' area), built form standards,

transport standards (including parking, vehicle movements and direct access onto Marshs Road), landscape areas, water supply for firefighting and signage.

- 2.7 On 18 February 2019, the applicant lodged a land use resource consent application with the part of the authority which processes resource consents.
- 2.8 On 21 March 2019, the applicant wrote to the authority about whether the authority would withdraw the section 37 certificate in part, so work on the foundations of the building could begin.
- 2.9 On 22 March 2019, the applicant sought confirmation from the authority of what building work covered by the building consent is materially affected by the application for resource consent. The applicant noted it would be applying for a resource consent for non-compliances with the District Plan.
- 2.10 On 22 March 2019, the authority responded to the applicant stating it did not consider it appropriate to remove the section 37 certificate, and that it had not made a decision on ‘notification’³ of the resource consent or received the relevant response to the notification decision.
- 2.11 The applicant responded to the authority with additional background information on the 23 March 2019 and made a further request to the authority for confirmation of the non-compliances on 28 March 2019.
- 2.12 On 2 April 2019, the authority wrote to the applicant stating it was of the view that the resource consent will or may affect the building work, and it was not prepared to withdraw the section 37 certificate. The authority noted its reasons included: the proposed use (which differs from the current use) of the site as a whole triggers non-compliance with the District Plan, the proposed activity impacts on rural character and amenity, and the proposed activity will result in different (heavier vehicles) and greater level of traffic movements. The authority also stated that there were two decisions to be made in terms of the resource consent, which were whether the application needs to be notified, and whether the application would be granted or declined.
- 2.13 On 8 April 2019, the applicant lodged a building consent application for the Stage 2 building work, consisting of the fire design, mechanical and electrical design, architectural design, and the balance of the building work. It is my understanding the section 37 certificate dated 29 January 2019 (refer paragraph 2.5 and 2.6) was also attached to the Stage 2 building consent when it was issued.
- 2.14 The Ministry received an application for determination on 15 April 2019.

3. The submissions

- 3.1 The applicant provided a submission dated 12 April 2019 with its application for determination, and also provided copies of:
- a submission setting out the background to the dispute
 - the section 37 certificate dated 29 January 2019
 - copies of the Stage 1 building consent drawings
 - emails between the applicant and the authority between 21 March 2019 and 2 April 2019 about the issue of the section 37 certificate.

³ In respect of assessing resource consent applications, refers to the level of consultation or notification of the resource consent with relevant persons affected by the work in which the resource consent relates.

- 3.2 In a covering submission, the applicant set out its view that the authority's position is incorrect, and that the Stage 1 building work, approved in the building consent, could be progressed ahead of the resource consent (which the applicant is of the view is only required for the transport activities). In the applicant's opinion the outcome of the required resource consent would not materially affect the Stage 1 building work.
- 3.3 The authority acknowledged the application for determination on 17 April 2019. The authority noted that its position on the matter was set out in correspondence provided by the applicant in the application for determination.
- 3.4 On 3 May 2019 and 6 May 2019 the applicant responded to emails from the Ministry about the determinations process, noting that:
- as it disagreed with the authority that a resource consent was required for the whole activity (i.e. the proposed use of the site and all building work in association), and as resource consent is only required for the entrance way onto Marshs Road (which is a 'restricted discretionary activity'⁴), it disagreed that Stage 1 building work should not be allowed to proceed
 - the property is 'zoned' and as such the building and activity is permitted. The vehicle access is a restricted discretionary activity, and as a vehicle entry does not require a building consent, the section 37 notice is not relevant.
- 3.5 On 23 May 2019, the authority submitted that it had undertaken a review of the District Plan compliance of the building on the site, and noted that there are non-compliances with the District Plan that will result from the 'use' of the building that are ignored for the purposes of the section 37 certificate because in the authority's view they will not necessarily materially affect the building. The authority provided a list of three non-compliances resulting from the construction of the building including, the 'area-specific' restriction of any development on the subject site (being within the 'Industrial Heavy Zone (South West Hornby)' area), non-compliance with the built form standards, and earthworks near the network waterway.
- 3.6 On 27 May 2019, the applicant noted that the non-compliances identified by the authority above were newly identified and had not been listed on the original section 37 certificate, and the authority (in its 23 May 2019 correspondence) was correct that the non-compliances listed on the section 37 certificate are not relevant to the building work (refer paragraph 2.6).
- 3.6.1 Subsequent events**
- 3.6.2 On 30 May 2019, the authority wrote to the applicant issuing the applicant with an abatement notice under the RMA also dated 30 May 2019. The abatement notice was issued because the applicant had commenced construction of the building without first obtaining a resource consent. The abatement notice stated that the applicant must cease all development and cease all construction of the building, including all foundation work and building work, other than any work necessary to secure and make safe the building work.
- 3.6.3 On 17 July 2019, the authority advised the Ministry that resource consent for the building work was issued on 11 July 2019, and the section 37 certificates for the two stages of building consent lapsed at that time. The authority provided copies of the report on the resource consent and the decision. Despite the resolution provided by

⁴ The RMA classifies activities into six primary categories, which determine aspects such as whether resource consent is required or whether a resource consent may be granted. A restricted discretionary activity is an activity that requires resource consent.

the issuance of the resource consent overtaking the matter to be determined, on 23 July 2019 the applicant requested a determination still be made on the matter.

3.7 Draft determination and submissions in response

3.7.1 The draft determination was issued to the parties for comment on 18 October 2019.

3.7.2 The authority responded on 5 November 2019 accepting the draft determination subject to non-contentious amendments: I have incorporated amendments accordingly.

3.7.3 The applicant responded on 5 November 2019 accepting the draft determination subject to non-contentious amendments: I have incorporated amendments accordingly.

4. Discussion

4.1 Under section 37 of the Act, when considering a project information memorandum or building consent application, an authority is required to consider situations where resource consent has not been obtained.

4.2 Resource consent is required when the proposed use of land or proposed building work or both does not comply with the authority's District Plan rules and regulations, which are set out under the RMA. Land cannot be used in a way that contravenes a rule in a District Plan without authorisation by way of resource consent.

4.3 Section 37 states.

1. This section applies if a territorial authority considers that—
 - (a) a resource consent under the [RMA] 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.

4.4 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. Even if the proposed building work requires resource consent, this does not prohibit an authority from granting a building consent if the building consent meets the test under section 49.

4.5 This is because an authority, when issuing the building consent under section 51(1)(b)(iii) of the Act, must attach a copy of “a certificate issued under section 37 (if any)” to the issued building consent, 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 for the building work and prohibits all (or if specified, some of) the building work from proceeding until a resource consent has been obtained.

- 4.6 In this case, the authority made a decision under section 37(1)(a) that resource consent was required for non-compliance with the District Plan, and under section 37(1)(b) that the resource consent will or may have materially affected the building work that the building consent relates to, and therefore issued a certificate under section 37(2)(a). The certificate was attached to the building consent when the consent was issued under section 51 of the Act.
- 4.7 The applicant is of the view that none of the building work covered by the building consent was materially affected by the resource consent. The building work comprises the foundations, super structure and in-ground services for the building, and the applicant is of the view that the non-compliances with the District Plan identified in the section 37 certificate are in respect of work that did not require building consent, including: parking space numbers, vehicle crossing, 'high trip' vehicle movements, landscaping, water supplies for firefighting, and area specific access.
- 4.8 In order to consider the authority's decision to issue a certificate under section 37(2), I must consider what the test 'will or may materially affect building work' means.
- 4.9 The term materially means 'in an important or noticeable way'⁵. I am of the view that the use of the term 'materially' means the resource consent must be capable of having an effect on the building work, and that the effect must be relevant to the building consent and more than minor or trivial. However, the test also contains the word 'may', which means the effect need only be a possibility, and does not need to be a certainty.
- 4.10 Based on this, an authority needs to consider whether particular non-compliances with the District Plan which require resource consent could have an effect on building work included within the building consent and whether the effect is more than minor or trivial. I am also of the view that this includes considering the effect on the building work were resource consent to be declined. I consider this is supported by section 37(2) and section 51(2), which provides further context to the test in section 37(1)(b). Section 37(2) means that the building work cannot proceed, or can only proceed to the extent stated in the certificate, until a resource consent is obtained. Section 51(2) means that the issue of a building consent does not of itself relieve the owner of the building work or permit the building work to breach any other Act. These provisions mean that if resource consent was not obtained the building work could not proceed, despite being subject to an issued building consent, because the building work would be in breach of the RMA.
- 4.11 It is therefore my view that section 37 serves the purpose of notifying of the requirement of resource consent so that building work under the Act does not breach the RMA. I am also of the view that the threshold from the section 37(1)(b) test of 'the resource consent will or may materially affect building work' can be considered to be a fairly low threshold; the effect on the building work is relevant and more than minor or trivial, and need only be a possibility.
- 4.12 In this case, the nature of the staged application for the proposed development of the site meant that at the time the building consent for Stage 1 was granted, the authority did not have the complete set of information about what was proposed. The land use resource consent application was lodged after the building consent for the Stage 1 building work was granted.

⁵ "Materially", *Dictionary.Cambridge.org*. Cambridge Dictionaries, n.d. Web. 4 Aug. 2019.

- 4.13 Further, in this case, it is not one specific aspect of the building work that triggers non-compliance with the District Plan, but the development and proposed activity of the site as a whole. The way the non-compliances with the District Plan may have been addressed through the resource consent process may well have impacted the development of the site, including necessitating changes to the building work that was within the scope of the Stage 1 building consent, or may have resulted in the development not receiving resource consent at all and therefore potentially allowing building work to be constructed but that would be in breach of the RMA.
- 4.14 Given this was not clear when the authority granted the building consent, I consider that the test in section 37(1)(b) was met: resource consent was required and not obtained, and the resource consent could impact or materially affect the building work covered by the building consent. On that basis I consider the authority was correct to issue the section 37 certificate.
- 4.15 I note the authority reviewed the list of non-compliances with the District Plan listed in the section 37 certificate, and submitted a revised list (refer to paragraph 3.5). The authority noted that there are other non-compliances with the District Plan, in addition to the revised list, that would result from the use of the building but these will not necessarily materially affect the building work. The applicant is of the view that as some non-compliances are no longer referred to by the authority in the revised list, the applicant was correct that non-compliances listed in the section 37 certificate were not relevant to the building work.
- 4.16 I note that information required for a building consent application may not cover all the information that may be needed to determine whether a resource consent is needed. In this case, at the time the building consent was granted the authority did not have the resource consent application or other information which explained the building work's compliance with the District Plan, therefore did not have the complete set of information about what was proposed.
- 4.17 The authority now considers that not all the non-compliances listed on the section 37 certificate would have necessarily materially affected the building work of the building consent, however, this does not change my view of the issue of the section 37 certificate in this case, given the information available to the authority about the development of the site at the time the building consent was granted.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct to issue building consent BCN/2019/100 for the proposed building work with a certificate issued under section 37 attached, based on the information it had at the time and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 November 2019.

Katie Gordon
Manager Determinations

Appendix: The legislation

A.1 Relevant provisions of the Building Act 2004

A1.1 The relevant sections of the Act discussed in this determination include:

37 Territorial authority must issue certificate if resource consent required

- (1) This section applies if a territorial authority considers that—
 - (a) a resource consent under the [RMA] 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.

49 Grant of building consent

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.

51 Issue of building consent

- (1) A building consent must—
 - ...
 - (b) have attached to it a copy of—
 - (iii) a certificate issued under section 37 (if any)...
 - ...
- (2) 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.