



Determination 2020/015

Regarding the refusal to issue a code compliance certificate for building work on a relocated house at 1510 State Highway 2, Featherston

Summary

This determination considers the authority's refusal to issue a code compliance certificate due to building work to strengthen the existing roof of the house. The determination considers the as-built compliance of the building with Building Code Clause B1 Structure.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("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
- 1.2 The parties to the determination are:
 - M Bruce, the owner of the property that the building work relates to ("the applicant")
 - South Wairarapa District Council, carrying out its duties as a territorial authority or building consent authority ("the authority").
- 1.3 The determination arises from the authority's refusal to issue a code compliance certificate for building work associated with the relocation of a house onto the applicant's property. The authority refused to issue the certificate on the grounds that the building work to strengthen the existing roof of the house had not been completed in accordance with the building consent.
- 1.4 Accordingly, the matter to be determined² is whether the authority correctly exercised its powers of decision in refusing to issue a code compliance certificate. In determining this matter, I must also consider whether the as-built building work on the roof complies with Clause B1 Structure of the Building Code.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. This determination is limited to the matter outlined above. It does not consider any other aspects of the building work or compliance with other clauses of the Building Code.

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)(a) and 177(2)(d) of the Act.

2. The building work and background

2.1 The applicant's house is a two-storey house located on a semi-rural property near Featherston. The house was originally constructed in Wellington around the 1920s. It was relocated to another property in Wellington in the 1970s, then relocated again to the applicant's property in 2016. The house is timber-framed, with weatherboard cladding, wooden joinery and a corrugated steel roof. The main two-storey part of the house is a simple rectangular shape with a hip roof. At the back, the house drops to a single storey, also in a simple rectangular shape with a hip roof.

2.2 Both levels of the existing roof are timber-framed with a central ridge board, and rafters. The roof on the single-storey portion of the house ("the single-storey roof") has purlins fixed to the rafters, while the roof on the two-storey portion of the house ("the second-storey roof") uses solid sarking³ in place of purlins.

2.3 In 2016, the applicant applied for a building consent to relocate the house and carry out some alterations to it. The building consent documentation was prepared and filed on the applicant's behalf by the company that was relocating the house ("the house movers"). The cover document for the building consent documentation stated:

Building Documentation for construction are to be interpreted as a full set. No individual sheets/parts are to be interpreted separately...

Existing structure to be confirmed on site & variations reported to designer.

2.4 The building consent documentation included architectural drawings or plans; specifications and information about specific design components; and a Producer Statement - Design ("PS1") dated 27 September 2016, prepared by a structural engineer ("the engineer"), and regarding the building work's compliance with Building Code Clauses B1 and B2.

2.5 Two parts of the building consent documentation relate specifically to the roof:

- Sheet 4 of the plans (which shows the elevations of the existing house and contains design notes about specific elements), and
- the engineer's PS1 described above.

2.6 Sheet 4's design notes relating to the roof all concern additional roof fixings or connections to be added because the house was being relocated into a very high wind zone. Some of these notes apply solely to the single-storey roof, some to the second-storey roof, and some to both. The design notes (taken from 'Existing Elevation 1' on Sheet 4), and the area of roof and connections they relate to, are as follows:

Area of roof	Connection	Drawing note
Single storey	Existing roof cladding	Existing roof to be refixed to accommodate relocation into Very High Wind Zone, C1 fixing pattern as per table below – Hit 1, miss 1...
Two storey	Existing rafters to ridge board	All existing rafter (<i>sic</i>) to ridgeboard to be refixed to accommodate relocation into Very High Wind Zone with 25x1mm steel strap below the ridge board (one side only) with 6/30x3.15mm bracket nails per rafter, refer to Engineers details

³ Solid sarking in this case means boards (nominally 20-25mm thick) laid side by side over-fixed to the rafters. The roof cladding is fixed directly to the sarking.

Area of roof	Connection	Drawing note
Both storeys	Existing purlins to rafters	All existing purlins to be refixed to existing rafters to accommodate relocation into Very High Wind Zone with 1/14g self-drilling type 17 screw, 100mm long
	Existing rafters to top plates	All existing rafters to be refixed to existing top plates to accommodate relocation into Very High Wind Zone with 2 skew nails (existing) and 2 wire dogs each or [named proprietary] ceiling ties, refer to Engineers details

- 2.7 The engineer's PS1 states that the engineer was engaged to provide 'Structural Design and Construction Monitoring Services' in respect of the building work's compliance with Clauses B1 and B2, and that this was done in accordance with 'AS/NZS1170'⁴. The documents attached to the PS1 included a design sketch drawing for the 'Rafter Connection Upgrade'. The drawing shows a 25x1mm steel strap being attached between the rafters, with the strap fixed with '6 nails per rafter'.
- 2.8 The drawing also shows the existing connection between the rafters and the top plates (as 'two skew nails (existing)', and '2 wire dogs or [named proprietary] ceiling ties'⁵) to be added to the existing fixings. The drawing shows the rafters with sarking boards laid on top. There is no other reference to the roof or its design in the PS1.
- 2.9 On 29 November 2016 the authority issued building consent (No. 160379), which described the authorised building work as:
- Relocate 2 storey dwelling and associated drainage, alterations including new fireplace, bracing and roof framing upgrade, remove wall.
- 2.10 The building consent stated that it was "subject to the following advice notes", which were then listed. These included:
- The structural engineer is required to inspect the structural work during construction to ensure work is done to their design concept. A PS4⁶ and site inspection records are to be submitted to [the authority] from the engineer prior to the issue of the Code Compliance Certificate.
- ...
- A memorandum (record of building work) is required to be supplied to the Building Consent Authority from each Licensed Building Practitioner who carried out and supervised Restricted Building Work. These are to be submitted as part of the application for Code Compliance Certificate at the end of the project.
- 2.11 In December 2016 the house was relocated on to the applicant's property. To enable the house to be shifted, the second storey was removed and the two storeys transported separately. Neither the single-storey roof nor the second-storey roof was removed during the shift, and no alterations were made to any of the structural elements that make up these roofs. The building work to reposition and provide foundations for the house on its new site, reconnect the two storeys and carry out the associated alterations covered by the building consent was done by the house movers and a licensed building practitioner engaged by the applicant ("the builder").

⁴ Australia New Zealand joint standard AS/NZS 1170 Structural Design Actions

⁵ The ceiling ties are folded galvanised steel straps secured with 3.15mm diam. nails.

⁶ Producer Statement – Construction Review

- 2.12 On 21 August 2017, a pre-line inspection was held and this was attended by the applicant, the engineer and an officer of the authority. The applicant states that at this inspection the authority's officer and the engineer inspected the second-storey ceiling and agreed what further inspections would be required. It was also agreed that the engineer would provide a PS4 to cover the structural work. The authority's site notice for the inspection confirms that the engineer was present and would provide a PS4 to cover the structural work.
- 2.13 Later that day, after the inspection, the engineer completed a PS4 confirming that building work had been completed in accordance with Clauses B1 and B2. The PS4 was stated to apply to "part only" of the building work, and was accompanied by a 'Construction Monitoring Record' detailing the inspections conducted by the engineer, including the 21 August 2017 inspection⁷ as follows:
- 21-8-17
- Building inspector on site.
 - ...
 - Additional roof connections have been fitted to all full length rafters.
 - Rafters connected to ceiling joists with 6 kN straps
 - Ceiling joists connected to top plate with [concealed purlin] cleats
 - Top plate connected to studs with sarking & weatherboards
- 2.14 The authority carried out a final inspection on 19 March 2018. The site notice for this inspection records that it failed on several grounds, but does not mention the roof or its connections.
- 2.15 The applicant submitted amended plans to reflect as-built building work and these were approved by the authority on 20 December 2018. Sheet 4 of the amended plans was revised (to remove a fireplace that was no longer being installed), but the drawings and design notes relating to the roof connections remained unchanged.
- 2.16 Also in December 2018, the applicant applied for a code compliance certificate for the building work.
- 2.17 On 7 January 2019, the authority carried out a further final inspection of the building work. This inspection again failed, with the site notice recording that the building was not ready for its final inspection and that all work was to be completed 'to the consented plans' before a new final inspection was booked. With respect to the roof, the notice states:
- Fixings for roof and reconnection of buildings have not been inspected. Owner said the engineer was covering this work with his PS1 design and PS4 inspections.
- The notice also notes that the '[PS4] from structural engineer for work supervised' had been accepted.
- 2.18 On 13 January 2019, the builder provided a record of building work confirming (among other things) that the builder had supervised 'extra screws to roofing iron as per plan'.

⁷ The Construction Monitoring Records provided by the applicant reference both 2016 and 2017: it is assumed 2017 is the correct date.

- 2.19 On 28 February 2019, the authority wrote to the applicant identifying several ‘outstanding issues’ that were preventing a code compliance certificate being issued for the building work. These included:
- inadequate information and evidence with respect to the ‘construction monitoring’
 - changes in the work performed without this being recorded and, specifically with respect to the roof, aspects of the ‘engineering design’ not being mentioned
 - inspections by the authority not being called for in relation to the engineered work, so that the authority had no records of its own and had to rely on the engineer’s records
 - no records of work being provided for restricted building work performed on the ‘roof timbers’ and ‘roofing iron’, as shown on Sheet 4 of the plans
 - no inspections called or inspection records for work performed ‘on the roof’.
- 2.20 The applicant responded to this email on 15 March 2019, directing the authority to the builder’s record of work and the engineer’s PS4. The applicant noted the engineer’s inspections of the building work were a condition of the building consent (refer to paragraph 2.10), which had been complied with, and the work to the roof cladding iron had been supervised by the builder. Regarding the work on the roofing timbers, the applicant said the ‘connection methodology’ varied from the options outlined in the engineer’s drawings ‘due to practicality issues’, with structural timber connectors used instead. The applicant queried whether the plans needed to be updated to reflect this.
- 2.21 On 21 March 2019, the authority emailed the applicant stating (among other things) that there was no licensed building practitioner ‘attached to the roof strengthening’ and the authority would need to inspect this work.
- 2.22 On 27 March 2019, the engineer wrote to the authority confirming that the additional connections had been fitted to the rafters, and providing a further copy of the site inspection record. The engineer said:
- Additional connections were fitted to all rafters (except shorts at the hip⁸) as follows:
- 6kN strap between rafters at apex, below ridge board.
 - 6 kN strap between rafter and ceiling joist
 - [Concealed purlin cleat] connections between ceiling joist and top wall plate.
- These were all inspected on 21-8-17.
- 2.23 The engineer also provided a ‘Memorandum from licensed building practitioner: Certificate of design work’, as required by section 45 of the Act, dated 27 March 2019. The memorandum confirmed that the engineer had carried out the restricted building work design work with respect to the roof, specifically the ‘Rafter connections for [very high] wind zone’, and that the work complied with the Building Code.

⁸ It is assumed the connectors are required where rafters join the ridge board, and not for the sorter jack rafters terminating at the hip rafters (using the terminology for framed roofs in NZS 3604:2011 Timber-framed buildings).

- 2.24 The authority carried out a further final inspection on 16 April 2019. The site notice for the inspection noted that the roof fixings had been inspected and that the strapping to the ridgeline had been ‘performed to the engineer’s drawings’. However, the inspection failed because (among other things):
- the rafter to top plate connection differed from the engineer’s design, the rafters were meant to be ‘uprated’ under the PS1, and this had not been ‘performed to design’
 - the engineer’s design and PS1 called for the purlins to be strengthened and the roof cladding to be re-screwed to the purlins, but there were no purlins in the roof
 - no licensed building practitioner record of work had been supplied for the ‘roof work’.
- 2.25 The authority emailed the applicant on the same day, advising that the applicant would ‘need to apply for an amendment for the engineering’ and that this required more than just updated drawings.
- 2.26 On 14 May 2019, the applicant emailed the authority seeking to clarify its concerns about the roof. The authority replied on 4 June 2019, confirming that its concerns related to ‘how the work was completed’ and specifically to the change in connections used on the rafters and the absence of purlins in the second-storey roof. The authority stated:
- The design was changed without informing the [authority], and a PS4 was submitted with very light design notes...and no accompanying photographic evidence... There is also no record of work showing that [a licensed building practitioner] performed this work.
- The plans quite clearly state that the purlins were to be uprated and the [cladding] screwed off into the uprated purlins on both roofs. If work clearly shown on the consented plans has not been performed then [the authority is] unable to be reasonably satisfied that the finished building will comply with the building code.
- The authority again said the applicant should apply for an amendment to the consent.
- 2.27 On 2 June 2019, the applicant made a complaint to the authority about the way that the building consent had been handled. Additional points made by the applicant in this complaint that are relevant to the matter being determined are:
- The substituted connection used between the rafters and the top plate had a higher capacity rating (4kN) than the consented connection (3kN). The substitution was made at the applicant’s request because it was not possible to use the consented connection on the house. The variation was agreed to by the engineer and covered in the engineer’s PS4.
 - The roof cladding had been re-screwed to the purlins on the single-storey roof, and to the sarking boards on the second-storey roof, and the builder’s record of work confirmed that they supervised this work on both storeys.
- 2.28 The authority replied on 27 June 2019 noting that the issue arose because the building work had not been carried out in accordance with the consented plans. The authority noted that any changes to the proposed work were required to be altered through an amendment or variation to the building consent.

- 2.29 On 5 July 2019 the authority further confirmed that the outstanding matters were (among other items):
- the work did not comply with the consented plans, because purlins were not present in both roofs: in the authority's view this constituted 'changes to the engineer's design' so could not be treated as a minor variation
 - the PS4 was invalid because the PS1 was not followed
 - the authority had not inspected the work on the roof and the PS4 lacked information.
- 2.30 The applicant applied for a determination that was received by the Ministry on 30 August 2019. Between September and November 2019 the Ministry wrote to the applicant and the authority requesting further information.
- 2.31 On 30 October 2019, the authority formally notified the applicant by way of a letter that it was refusing to issue a code compliance certificate in respect of the building consent under section 95A of the Act. The reason given for the refusal was that 'the building work has not been completed in accordance with [the] approved building consent'.

3. The submissions and the draft determination

3.1 The initial submissions

The applicant

- 3.1.1 With the application for a determination, the applicant supplied copies of:
- the building consent and other documentation relating to the building work
 - the correspondence between the parties
 - photographs of the house and building work.
- 3.1.2 On 30 September 2019, the applicant replied to the Ministry's first request for information. The applicant set out the background to the matter and said they believed they had completed all of the items required to get a code compliance certificate for the building work. The applicant said the engineer's PS4 was 'for all of the structural work covered by the building consent' and was accepted by the authority. However, in February 2019 the authority advised of 13 'mostly procedural' issues it wanted resolved before it would issue the code compliance certificate. The applicant said these requirements kept changing even though no new building work other than remediation had occurred since February 2018.
- 3.1.3 With respect to the roof, the applicant stated that:
- none of the consented plans require purlins to be added to the existing roof, and the drawings for the 'rafter upgrade' on the second-storey roof show rafters and sarking, not purlins
 - two concealed purlin cleats have been substituted for the ceiling ties; these changes are detailed in the PS4
 - the second-storey ceiling was inspected by the authority's officer and the engineer on 21 August 2017
 - the single-storey roof already had rafters, which are attached to the purlins with 100mm screws, and existing purlins attached to the top plate with existing

ceiling ties. Additional screws have also been installed, and this is documented in records of work and the updated floor plans, but the authority has not inspected the work

- the engineer is adamant the PS1 has been followed and the PS4 is valid. The authority says it is not valid because no new purlins have been added and the consented plans are incorrect, but this is ‘illogical’ as there were no purlins in the design of the second-storey roof
- the authority is requesting upgrades for items that were pre-existing and not the subject of the building consent.

3.1.4 On 7 October 2019 the applicant confirmed that they had not yet received formal refusal from the authority to issue a code compliance certificate. The applicant repeated that all of the building work had been completed in accordance with the consented plans and drawings, and the engineer had supplied a PS4 to this effect.

3.1.5 On 25 November 2019 the applicant responded to the authority’s advice in response to the Ministry (see below), refuting the authority’s position that the building work was unconsented and saying that the authority had held a full set of updated plans since August 2019.

The authority

3.1.6 On 30 October 2019, the authority responded to the Ministry’s first request for information. The authority confirmed that it had ‘taken the decision to refuse to issue the [code compliance certificate] as we do not believe the work has been carried out in accordance with the consented documents’. The authority attached its formal letter of refusal sent to the applicant, also dated 30 October 2019.

3.1.7 On 25 November 2019, the authority responded to the Ministry’s second request for information. The authority expressed the view that determination decisions should not ‘minimise section 40 of the Act’⁹ and said it was a ‘concept in law that if a person follows their consented plans – and properly administers any changes, they should be assured (in most part) that a [certificate] will be issued’. The authority said the applicant could not rely on this principle because changes were made to the consented plans without the authority’s prior approval, so the test in section 94(1)(a)¹⁰ could not be met.

3.1.8 For the same reason, the authority considered itself ‘unable to inspect or give approval to unconsented building work’, and declined to comment on whether it considered the building work to be Code compliant. In the authority’s opinion, an amendment had not been applied for or obtained for the changes, and as the work had already been carried out no application for an amendment could now be considered. Approval for the building work was now only available through a certificate of acceptance.

3.2 The draft determination

3.2.1 A draft determination was sent to the parties on 22 May 2020.

3.2.2 On 27 May 2020 the applicant accepted the draft determination without further comment.

⁹ Section 40 Buildings not to be constructed, altered, demolished, or removed without consent

¹⁰ Section 94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- 3.2.3 On 10 June 2020 the authority accepted the draft determination with non-contentious amendments, requesting guidance regarding the “hierarchy of documentation where there is discrepancy or conflict” including the information provided in an LBP’s record of work in a PS4. The authority considered the Ministry’s guidance on the issue was “outdated”.

4. Discussion

4.1 General

- 4.1.1 The matter to be determined is whether the authority was correct to refuse to issue a code compliance certificate for the consented work on the applicant’s house.
- 4.1.2 The authority has refused the certificate on the grounds that the building work has not been carried out in accordance with the building consent. The authority considers that it is unable to inspect the building work to establish whether it complies with the Building Code. It also considers that, even if it was established that the building work was Code compliant, it would be unable to treat it as an amendment to the consent as the work has already been carried out.
- 4.1.3 The applicant considers that the work has been carried out in accordance with the consent, and has been proven to be Code compliant.
- 4.1.4 Accordingly, in determining whether the authority’s decision was correct I must also consider whether the building work complies with the building consent and, if not, whether it complies with the Building Code and can be treated as a minor variation to the consent.

4.2 The legislation

- 4.2.1 The relevant legislation can be found in sections 94 and 45A of the Act, and in Regulation 3 of the Building (Minor Variations) Regulations 2009 (“Regulation 3”).
- 4.2.2 Section 94 establishes that, in deciding whether to issue a code compliance certificate, an authority must consider whether the building work complies with the building consent.

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—

(a) that the building work complies with the building consent; and

...

- 4.2.3 Section 45A makes provision for some amendments to building consents to be treated as minor variations. Minor variations do not require a formal amendment to the building consent. They can be arranged informally between the parties, but must be noted in writing by the authority.

45A Minor variations to building consents

- (1) An application for a minor variation to a building consent—

(a) is not required to be made in the prescribed form; but

(b) must comply with all other applicable requirements of section 45.

- (2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.

- (3) A building consent authority that grants a minor variation—
 - (a) must record the minor variation in writing; but
 - (b) is not required to issue an amended building consent.

4.2.4 Regulation 3 defines a minor variation and gives some examples of what is meant by this term.

Minor variation defined

- (1) A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.
- (2) The following are examples of minor variations and do not constitute an exhaustive list:
 - (a) substituting comparable products (for example, substituting one internal lining for a similar internal lining):
 - (b) minor wall bracing changes:
 - (c) a minor construction change (for example, changing the framing method used around a window):
 - (d) changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).
- (3) The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.
- (4) To avoid doubt, a minor variation does not include any building work in respect of which compliance with the building code is not required by the Building Act 2004.

4.3 The disputed building work

4.3.1 The authority's concerns around non-compliant and unconsented building work have extended, at times, to areas other than the roof. However, I understand that most of these other areas have now been resolved to the authority's satisfaction, and the disputed building work is now limited to the work to strengthen the roof.

4.3.2 The roof is an existing construction: it was not removed when the house was moved onto the applicant's property. All of the work on the roof detailed in the building consent was for the purpose of strengthening the existing roof now that the house has been shifted into a higher wind zone from where it was last located. The details of this work are set out in paragraph 2.6. Only two aspects of this work remain in dispute between the parties, namely:

- the work to re-fix the existing purlins to the existing rafters (noted on the plans as occurring on the single and second-storey roofs)
- the work to re-fix the existing rafters to the existing top plates.

Re-fixing the purlins to the rafters

4.3.3 Turning first to the purlins, the authority considers that the building work does not comply with the building consent because there are no purlins in the second-storey roof. The authority believes this represents 'changes to the engineer's design', which cannot be treated as a minor variation.

- 4.3.4 I do not agree that this is the case. The documents that form part of the building consent include both the consented plans and the engineer's PS1. The issue arises because:
- the note on the consented plan (Sheet 4) relating to the re-fixing of the existing purlins indicates that it applies to both the single-storey and second-storey roofs, but
 - the engineer's sketch drawing attached to the PS1 – which reflects how the second-storey roof is actually constructed – shows the second-storey roof with sarking boards and not purlins.
- 4.3.5 I consider this ambiguity in the consented documents is a matter of error rather than non-compliance. However, in spite of this ambiguity, nothing in either document can be read to infer the requirement to install new purlins. The reference in the plans is clearly to re-fixing the 'existing purlins': if no purlins exist then the requirement does not apply.
- 4.3.6 The applicant has sought to resolve this ambiguity subsequently by advising the authority of the existing construction of the roof. The authority has refused to accept this, but I do not consider it has grounds for doing so. The engineer's drawings show the second-storey roof with no purlins, so there is no change to the engineer's design.
- 4.3.7 In addition, the cover sheet for the consented plans notes that the building documentation consists of the plans, the specifications and the 'specific design components', and that this documentation is to be: 'interpreted as a full set. No individual sheets/parts are to be interpreted separately'. Taking this approach, and what was subsequently known of the design of the existing second-storey roof (i.e. it not having purlins) it becomes a matter of common sense that the notation on the plan does not apply to that roof.
- 4.3.8 In my opinion, this is a simple documentation error and is easily rectified through the authority making a note on the file. However, the matter highlights the need for clarity and accuracy both in the original building consent documentation and in the subsequent correspondence about it. Had the ambiguity not been present, it is unlikely the issue would have arisen.

Re-fixing the rafters to the top plate

- 4.3.9 The situation is different with respect to re-fixing the existing rafters to the existing top plate. Here, the issue has arisen because a different design of connector was used than that specified in the plans and the drawings; namely, two concealed purlin cleats were used instead of the wire dogs or ceiling ties specified.
- 4.3.10 This is a departure from the building consent which, in my opinion, is exactly the type of change that the minor variation provisions in the Act are intended to cover. The substituted connector does not 'deviate significantly from the plans and specifications' (which is part of the definition of minor variation in Regulation 3(1)) and is a similar example to that given in Regulation 3(2)(a); i.e. substituting comparable products.

- 4.3.11 I have considered what constitutes a minor variation and the implications of this in previous determinations¹¹. In essence, if a variation to a building consent is considered to be minor, then a building consent authority is not required to issue an amended building consent in respect of it (section 45A(3)(b)). This means that an authority can still issue a code compliance certificate for the building work, based on the original building consent, provided the building work that represents the variation also complies with the Building Code.
- 4.3.12 The applicant states that at the August 2017 inspection the authority was advised of the variation and inspected the second-storey ceiling, and that the engineer subsequently recorded the variation in writing in the PS4. The authority's site notice confirms that the engineer would provide a PS4 to cover the structural work.
- 4.3.13 The Ministry's published guidance¹² on minor variations makes clear that on-site conversations of this nature are sufficient to constitute a proposal to make a minor variation, provided they are documented afterwards.
- 4.3.14 However, the guidance also makes clear that minor variations should be communicated to the building consent authority before the work is carried out. This is also the view taken by the authority, which considers that because it was not notified of the variation before the building work occurred, the variation cannot now be treated as a minor variation.
- 4.3.15 The authority is correct that the ideal scenario is for minor variations to be notified and approved by an authority before the work is completed. However, I think it is also important to take into account the context in which the minor variation occurs.
- 4.3.16 In the applicant's case, the variation is the substitution of one design of connector for another where either method provides a compliant solution. The connector was being added to an existing roof, and was substituted because the specified connector was not practical to use. The engineer with responsibility for the structural aspects of the building work approved the substitution, and subsequently advised the authority of the change and documented it. It is not a large-scale or significant change.
- 4.3.17 The Ministry's guidance explains¹³ that section 45A was added to the Act to 'formalise a number of pragmatic and efficient practices already being operated by some [building consent authorities] to deal with minor changes during construction'.
- 4.3.18 In past determinations, I have directed the parties to treat already constructed building work as a minor variation, and I am in no doubt that some authorities also allow this. The authority has stated that to adopt such an approach undermines sections 40 and 94 of the Act. I do not agree. Rather than undermining the consenting process, allowing a minor variation is supporting the sort of pragmatic approach that section 45A is intended to foster. In every case, it will be a matter of weighing the nature and context of the variation, and its impact on compliance.
- 4.3.19 Accordingly, I conclude that, provided the as-built building work in this case is demonstrated to comply with the Building Code, it can be treated as a minor variation to the building consent and the authority can record the variation in writing.

¹¹ See Determination 2019/004 Regarding the decisions to refuse to issue a code compliance certificate and to issue a notice to fix in respect of a solid fuel heater (18 March 2019), Determination 2020/002 Regarding the consented alterations to the walls and roof of a house and its compliance with Building Code Clause B1 (17 March 2020).

¹² *Minor variations to building consents: Guidance on definition, assessment and granting* (1 January 2010); available at: www.building.govt.nz/projects-and-consents/build-to-the-consent/making-changes-to-your-plans/minor-variations-guidance/

¹³ In the Background section on page 1 of the guidance

4.4 Does the as-built building work comply?

- 4.4.1 A matter that has prevented the authority issuing a code compliance certificate is that no formal inspections were called for, or carried out, for the building work on the roof. As a result, the authority considers it cannot be satisfied that the work is Code compliant. The authority is now refusing to inspect the work on the grounds that it cannot inspect unconsented work.
- 4.4.2 The applicant was of the understanding that these inspections were to be conducted by the engineer, and the engineer shared this view. The engineer inspected the building work on the roof and issued a PS4 based on those inspections.
- 4.4.3 I agree with the applicant that the building consent “advice notes” indicate that the engineer, rather than the authority, would be responsible for the inspection of the ‘structural work’ (see paragraph 2.10). I also consider that the authority’s officers have in the past shared this view, based on some of the notes made in the site inspection records. If the authority did not carry out particular inspections itself, it is entitled to rely on inspections by others or have verification provided by other means.
- 4.4.4 In any event, the engineer has provided a PS4 covering the building work to the roof, as well as a construction monitoring record. More recently, the engineer has also provided a certificate of design work for the roof, confirming it complies with the Building Code.
- 4.4.5 In these circumstances, I consider the authority can be satisfied on reasonable grounds that the as-built building work on the roof complies with the Building Code. I also consider it relevant that the authority has never raised any concerns about the Code compliance of the building work; only about the process by which it was carried out.
- 4.4.6 As an aside, with respect to the authority’s refusal to inspect the building work, the authority is able to inspect unconsented work. Such an inspection would be necessary, for example, in situations where a certificate of acceptance rather than a code compliance certificate was being called for.

4.5 Conclusion

- 4.5.1 Accordingly, I conclude that the discrepancies between the as-built and the consented building work relating to the roof can be treated as a minor variation to the consent. I also consider there is sufficient evidence before the authority for it to be satisfied on reasonable grounds that the as-built building work complies with both the Building Code, and building consent subject to the minor variation.

5. The decision

5.1 In accordance with section 188 of the Act, I hereby determine:

- the as-built building work on the roof complies with Clause B1 Structure
- the authority was incorrect to refuse to issue a code compliance certificate for building consent (No. BC160379) and I reverse that decision, requiring the authority to make a new decision taking into the account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 14 July 2020.

Katie Gordon
Manager Determinations