

Determination 2009/113

The refusal to issue a certificate of acceptance for building work to a relocated house at 896 Owhiwa Road, Parua Bay, Whangarei



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The following are the parties to this determination:

- The owner of the house, Jonda Enterprises Ltd (“the applicant”) acting through a consultant (“the consultant”) who is a licensed building practitioner.
- The Whangarei District Council carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.2 This determination arises from the decision of the authority to refuse to issue a certificate of acceptance for building work to a relocated house and garage, because it is not satisfied that the building work complies with the Building Code (Schedule 1, Building Regulations 1992).

1.3 I therefore take the view that the matter for determination² is whether the decision of the authority to refuse to issue a certificate of acceptance for the building work carried out on this property was correct. I have explained the building work that can

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

be considered with respect to the application for the certificate of acceptance in paragraph 7.7.

- 1.4 In making my decision I have considered the application, submissions, the report of the expert commissioned by the Department to advise on this dispute (“the expert”) and the other evidence in this matter.

2. The building work

- 2.1 The house is situated on part of a large rural property, in a medium wind zone for the purposes of NZS 3604³. The excavated building platform is elevated and gently sloping.
- 2.2 A small relocated 1940’s two bedroom house forms the eastern section of the building. Two additions were constructed in similar materials as the existing building, and added to the existing house to form a ‘u’ shaped building. The south side extension has a small deck and the west side extension has a deck forming an infill to the recessed area of the ‘u’ shape. The decks are constructed of strip timber decking.
- 2.3 The three sections of the house sit on new foundations. Construction is conventional light timber frame, with braced timber piles, with weatherboard cladding to the walls and a heavy clay tile hipped and gabled roof.
- 2.4 The garage appears to be the conversion of an existing shed, with some new framing and bracing added, and the walls and roof newly clad.

3. Background

- 3.1 It appears that the owner arranged to have the 1940’s house moved onto the property during 2002. There was no building consent issued for the relocation of the house or for any building work carried out in the construction of the completed building.
- 3.2 It appears that the owner sought to legitimise the situation by applying for a certificate of acceptance for the building work, and engaged the consultant to assess the building work and prepare an application, in the form of a report, which was submitted to the authority in February 2008. The consultant’s report described the house and the garage, including the foundations and the decks, and reviewed the services. The report included an engineering report on the on-site effluent disposal and the septic tank.
- 3.3 The authority subsequently met with the owner on-site on 27 May 2008 and informed the owner that it would not issue a certificate of acceptance as it was ‘unable to see the foundations or the effluent system’. Subsequent correspondence followed between the consultant and the authority without resolution, and in a letter dated 23 September 2008, the authority confirmed that it would not issue a certificate of acceptance, noting:

² In terms of sections 177(c)(ii) of the Act

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

Section 96 says the "Territorial Authority may issue a Certificate of Acceptance in certain circumstances". It does not say "must". [The authority] is not willing to take on any liability, at the cost of the ratepayer, for work carried out in contravention of Section 40(1) of the Building Act 2004.

- 3.4 An application for a determination was received from the consultant on 5 November 2008. In a letter to the consultant dated 24 November 2008, the Department explained options and sought clarification on the building work for which the certificate of acceptance was sought.

4. The submissions

- 4.1 The consultant stated that the matter for determination was the authority's refusal to issue a certificate of acceptance 'for the relocated dwelling'. The consultant forwarded copies of:

- drawings of the house and the garage
- subdivision drawings
- a report applying for the certificate of acceptance
- correspondence with the authority
- various other information.

- 4.2 In a letter to the Department dated 27 November 2008, the consultant noted that:

...we would not expect the [authority] to exceed its liability in the issue of a [certificate of acceptance]. In some respects a [certificate of acceptance] simply records the existence of an unconsented structure and verifies the integrity of the observable elements.

- 4.3 The authority provided a submission to the Department, dated 28 November 2008, in which it noted:

In summary, this [certificate of acceptance] application was assessed by an experienced senior building officer, [named], after he had undertaken a site visit and due consideration made of all the information supplied by with the application.

A decision not to issue a [certificate of acceptance] was made because he could not be reasonably satisfied the completed works complied with the relevant [clauses] of the [Building Code].

- 4.4 The authority considered:

- the extent of the illegal building work to be a significant breach of the Act
- it has no knowledge of the house moving company or the builder responsible for the foundations, so can make no decisions on the amount of checking required based on knowing whether the contractors were reputable and experienced
- it is not possible to be reasonably satisfied that the drainage and effluent system complies with the Building Code
- it is not aware of whether a resource consent for the effluent system has been applied for or obtained from the regional authority.

- 4.5 Copies of the submissions and other evidence were provided to each of the parties. Neither the applicants nor the authority made any further submissions in response to the submissions of the other party.

The draft determination

- 4.6 Copies of a draft determination were issued to the parties on 28 August 2009.
- 4.7 The applicant accepted the draft determination without further comment.
- 4.8 The authority did not accept the draft and in a letter to the Department, dated 30 September 2009, noted:
- only the bearer issues identified in paragraph 6.4 of the draft could be rectified as compliant, and compliance of the other building elements could not be fully ascertained
 - with only minimal knowledge of any of the building work, it was unable to verify compliance in terms of section 99(3), a position that is supported by the draft determination and the expert's report
 - it did not wish to assume responsibility and contended that it was reasonable to refuse to issue a certificate of acceptance after due consideration.
- 4.9 In response to the authority's 30 September 2009 submission, the consultant wrote to the Department noting:

The [authority] appears to interpret the [Act], section 99, in a manner that would preclude them from ever issuing a [certificate of acceptance] because in every case there would be numerous elements that could not be viewed or verified as compliant due to their concealment within the foundations and cavities.

Our understanding of the [Act] in regards to [certificates of acceptance] was that they were to record the existence of unconsented structures. In doing so the obvious deficiencies would be addressed by the issue of a Notice to Fix and the [certificate of acceptance] would record what was not able to be inspected in accordance with section 99(2).

Contrary to the view of the [authority], section 99.3 states that the [authority's] liability is limited to the elements that were able to be inspected. It would never have been the intention to expect the [authority] to assume any further liability.

5. The legislation

- 5.1 The relevant provisions of the Building Act are:

7 Interpretation building work—

- (a) means work
- (i) for, or in connection with, the construction, alteration, demolition, or removal of a building
 - (i) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code;...

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

- (1) A person must not carry out any building work except in accordance with a building consent.

96 Territorial authority may issue certificate of acceptance in certain circumstances

- (2) A territorial authority may, on application, issue a certificate of acceptance for building work already done —
- (a) if —
- (i) the work was done by the owner or any predecessor in title of the owner; and
- (ii) a building consent was required for the work but not obtained...
- (3) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.
- (4) This section —
- (a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and
- (b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

97 How to apply for certificate of acceptance

- (1) An application for a certificate of acceptance must—
- (a) be in the prescribed form; and
- (b) if available, be accompanied by plans and specifications that are—
- (i) required by regulations made under section 402; or
- (ii) if the regulations do not so require, required by the territorial authority; and
- (c) contain or be accompanied by any other information that the territorial authority reasonably requires; and...

99 Issue of certificate of acceptance

- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
- (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.

**Form 9 Certificate of Acceptance
Acceptance of compliance**

The territorial authority named below is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it can ascertain, the building work described below complies with the building code: [insert details]

‡The territorial authority was only able to inspect the following parts of the building work and this certificate is qualified as follows: [insert details]

6. The expert's report

6.1 As mentioned in paragraph 1.4, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 8 January 2009 and furnished a report that was completed on 20 January 2009, noting that his inspection was limited to the exterior of the house as he was unable to gain access to the interior.

6.2 With respect to the relocated house, the expert noted the house has been well maintained and the construction quality is good. The expert noted that the areas of the building able to be observed generally appeared to be of an acceptable standard and the building work appeared to have been carried out in a good tradesman like manner.

6.3 In inspecting the building work, the expert noted the following:

Building Code Clause	Element of the building work	Observations
B1	The foundations	The timber braced piles are constructed as required by NZS 3604. The ground bearing and concrete footing to the pile appeared adequate (based on one pile, which was investigated by digging down to check the depth and nature of the pile). The ground provided good resistance to probes. A bearer near the south elevation has been cut between the perimeter pile and the next adjacent pile, and was dependant on support from a 100x50 timber member on its flat. There was also a sag in a bearer below the small deck on the south elevation. Bearer lines require further evaluation and assessment as to whether the sizes are satisfactory.
B1	The garage	Some erosion of the ground around the footing has occurred on the east elevation. The structure is generally satisfactory, however, is not sufficiently underpinned.
E1	The building work and site	There were no problems apparent, and there is a natural slope away from the building platform to the bush below. Stormwater is collected from the roof and directed into the water tank.
E2	The additions	Ground clearances, cladding overlaps, window flashings, penetration sealing, and deck flashings appear adequate, with no indication of likely moisture penetration. The clearances are adequate and the exterior offers no indication of any problems.
F4	The decks	Satisfactory balustrades are provided for the deck areas that are one metre or more above the adjacent ground.
G4	The additions	Spaced baseboards were used below the exterior walls, which provide satisfactory ventilation of the subfloor area.
G12	The water tank and connections	Stormwater is collected from the roof and stored in a polyethylene water tank at the east corner of the house, with a pressure pump for the supply.
G13	The effluent system	The septic tank was located but was unable to be assessed due to the overgrown bush and the differences between the documentation and what was on site. Further evaluation and investigation is required to expose the tank and junctions.

6.4 A copy of the expert's report was provided to the parties on 22 January 2009.

6.5 In a letter from the consultant to the Department dated 13 February 2009, the applicant accepted the recommendations set out in the report provided that they became the subject of a notice to fix.

7. Discussion

The basis for issuing a certificate of acceptance

7.1 Section 40 states that building work must not be carried out except in accordance with a building consent, and section 96(1)(a) provides for the issue of a certificate of acceptance where an owner has carried out building work without obtaining a building consent. In such a situation, a territorial authority may, on application, issue a certificate of acceptance but 'only if it is satisfied, to the best of its knowledge and

belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.’

- 7.2 Section 96(2) requires an authority to consider all the available evidence such as plans and specifications, producer statements, the builder’s records, the owner’s records, any expert reports, and the authority’s own experience and knowledge of the builders and designers involved in the work in order to ascertain whether the building work complies with the Building Code.
- 7.3 Section 96(2) is silent on work that cannot be inspected and for which there is no evidence available to determine whether it complies with the Building Code. However, Form 9 requires an authority to list the building work that complies with the Building Code and in my view this list provides the basis for an authority to list only the building work that can be ascertained complies with the Building Code.
- 7.4 The description of the work covered by Form 9 could be:
- a description of the physical building work, or
 - a description of the Building Code clauses the building work complies with, or
 - a combination of both.
- 7.5 Where a certificate of acceptance does not cover work that is the subject of the application it is essential the certificate clearly set out the nature and extent of the work that is not covered by the certificate of acceptance to ensure the certificate is not misleading. This list of building work that is expressly excluded from the scope of a certificate of acceptance could appear immediately after the list of work that complies with the Building Code. In this way, the contrast between the work that complies with the Building Code and the work that is excluded from the certificate will be clearly apparent to persons reading the certificate.
- 7.6 Section 99(2) and Form 9 both provide for a certificate of acceptance to attach a further list of the building work an authority has been able to inspect for the purpose of limiting the liability of the authority to that work it has been able to inspect. This attachment listing the building work inspected will obviously be narrower than the description of work covered by the certificate of acceptance. This is because the extent to which an authority has been able to ‘inspect’ work will usually be less than the extent to which an authority has been able to ‘ascertain’ whether building work complies with the Building Code. In ascertaining, the authority will take into account all the relevant evidence available, including its knowledge and belief of the circumstances surrounding the building work and the builders and designers who undertook the work, and statements of opinion provided such as producer statements.

The building work to be considered

7.7 The building work that was undertaken in 2002 consists of:

- the foundations and connections to the house
- the two additions
 - to the south elevation of the building including the dining room extension and the small deck
 - to the west elevation of the building including bedroom three and the central deck
- the on-site services and their connections
- the alteration of the shed into the garage.

7.8 The existing buildings, which are not the building work, are:

- the relocated 1940s bungalow itself
- the original shed.

The assessment of the building work

7.9 With respect to an application for a certificate of acceptance, the applicant must provide (if available) plans and specifications, and any other information that the authority reasonably requires. Under section 97 with respect to an application for a certificate of acceptance, it is the applicant who must provide sufficient information to the authority to establish the level of compliance achieved. I note also that the authority may inspect the building work and that this information, along with that supplied by the applicant, would assist the authority in forming a view as to compliance with the Building Code.

7.10 I have considered whether there is sufficient evidence that I can be satisfied, to the best of my knowledge and belief, and on reasonable grounds, that the building work identified as building work in paragraph 7.7, complied with the Building Code at the time of the application for a certificate of acceptance.

7.11 For the building work, I have considered:

- whether the building work can be inspected
- whether the information, specifications, and drawings accurately reflect what is built and whether there is any variation between the supporting documents provided with the application and what is observed on-site.

7.12 For the elements of the building work that are able to be inspected and have sufficiently detailed and accurate information reflecting what is built, I have made a decision as to whether these elements comply with the Building Code.

7.13 For the elements of the building work that cannot be inspected or for which the information is insufficiently detailed or inaccurate and there is variation between the documentation and any observations able to be made on-site, I have concluded that

there is insufficient information and no reasonable grounds to ascertain compliance with the Building Code.

7.14 I have evaluated the building work and come to the following conclusions:

Table 1: building work that I conclude has been constructed in accordance with the Building Code

The following building work was able to be inspected and is supported by sufficiently detailed and accurate documentation that reflects what is built, and for which I therefore have reasonable grounds to conclude complies with the Building Code:

Building Code Clause	Element of the building work	Substantiation
E1	The building and site work	I am satisfied the building and site work has satisfactory provisions for drainage and surface water.
E2	The additions	With respect to the cladding to the additions, I am satisfied the ground clearances, overlap details, flashings at the windows and doors, the roof flashings, the eaves, the clearances from the cladding edge to the roofing, the balcony and deck flashings, the penetration sealing, and the continuity of the cladding behind the obstructions are all adequate. The strip timber decks had adequate flashings and sealing.
E2	The garage	I am satisfied the wall and roof cladding to the garage complies with Clause E2.
F4	The decks	I am satisfied the decks have sufficient provisions with respect to safety from falling.
G4	The additions	I am satisfied the additions have satisfactory provisions for ventilation.
G7	The additions	I am satisfied the additions have satisfactory provisions for natural light.
G12	The external connections to the house and the water tank	I am satisfied the external system and polyethylene water tank comply with Clause G12.

Table 2: building work that I conclude has not been constructed in accordance with the Building Code

The following building work was able to be inspected and I have reasonable grounds to conclude the work does not comply with the Building Code:

Building Code Clause	Element of the building work	Substantiation
B1	The bearers	Remedial work is required to remedy the cut, sagged, and insufficiently connected bearers (refer to paragraph 6.3).

Table 3: building work that I cannot ascertain and reach a conclusion about whether the work has been constructed in accordance with the Building Code

The following building work could not be inspected or the information provided was insufficiently detailed or inaccurate and there was variation between the documentation and the observations made on-site, and I therefore have concluded that there is insufficient information and no reasonable grounds to ascertain compliance with the Building Code:

Building Code Clauses	Element of the building work	Substantiation
B1	The foundations and connections to the house, excluding the deficient bearers	<p>With respect to the foundations, I note the expert dug down to view part of a footing, including its depth and the access to under the house was provided. Nonetheless, there are elements of the foundations and connections to the house that cannot be inspected. I am of the view that this evidence, paired with sufficiently detailed and accurate documentation would provide reasonable grounds to be satisfied of compliance with Code.</p> <p>In this case, deficiencies have been noted with respect to the bearers. I am therefore of the view that there is sufficient variation between the supporting documentation and what the expert observed on site, and I am not satisfied on reasonable grounds, and to the best of my knowledge that these elements of the building work comply with the Building Code. I therefore conclude that a report from a suitably qualified engineer would be required, should the applicant wish to provide satisfactory information for a reasonable grounds assessment.</p>
B1	The garage	<p>I note the garage was a shed that has been converted to a garage with new cladding and a new roof. There is no evidence supporting the application for a certificate of acceptance on the design and remediation of this structure. There are no calculations and no structural assessment, other than a basic list of some of the structural elements. Given the extent that work has been carried out to the old structure, I consider that there are not reasonable grounds to satisfy me that the work has been carried out in accordance with the Building Code. There is insufficient information and evidence as to the condition of the original shed, its structure and durability, and the amount and type of building work, particularly with respect to the structure, involved in converting it into a garage. I also note that, while not directly a part of compliance with Clause B1, there is some erosion to the ground around the footing of the structure, which is a maintenance issue with the gutter to the garage.</p>
E3	The additions	<p>I cannot be satisfied that the additions comply with Clause E3, as the expert was not provided access to the interior of the house and there is no information provided in the application.</p>
G12	The additions	<p>I cannot be satisfied that the additions comply with Clause G12, as the expert was not provided access to the interior of the house and there is no information provided in the application.</p>
G13	The effluent system and the additions	<p>I cannot be satisfied that the effluent system complies with Clause G13, as the expert was unable to fully inspect the septic tank. I therefore conclude that further investigation and information would be required in order to ascertain and confirm the actual construction of the system, should the applicant wish to provide satisfactory information for a reasonable grounds assessment.</p>
H1	The additions	<p>I cannot be satisfied that the additions comply with Clause H1 as this was not able to be inspected.</p>

Other considerations for assessing an application for a certificate of acceptance

- 7.15 Territorial authorities have wide ranging regulatory and enforcement functions under the Act. Where a building consent should have been obtained but the building work was undertaken without a building consent, a territorial authority should keep in mind the other provisions of the Act that may be impacted upon by the unlawful building work.
- 7.16 To ensure the scope and application of a certificate of acceptance is as clear as possible, a territorial authority may wish to clearly note on the certificate of acceptance that it only applies to the building work that has been undertaken without a building consent and does not apply to any existing structure.
- 7.17 Building work undertaken to an existing building without consent may also affect the extent to which the existing building complies with the provisions of the Building Code. In the case where the building work is an alteration to an existing building, the territorial authority may wish to consider whether the building's existing performance has been adversely affected, and may wish to note this on the certificate of acceptance.
- 7.18 A territorial authority should always keep in mind the possible application of the minimum performance requirements of the Act relating to dangerous, earthquake prone, and insanitary buildings. It is also important that a territorial authority keep in mind the possible application of the dangerous and insanitary building provisions of the Act to any building work that has been undertaken, but for which it has concluded that there are not reasonable grounds to ascertain compliance with the Building Code.

Observations about the existing building and the building work for which compliance with the Building Code cannot be ascertained

- 7.19 Based on the observations of the expert, I consider the existing building (refer to paragraph 7.8) is not dangerous or insanitary.
- 7.20 I note that the actual construction of the 1940's bungalow was not building work undertaken without a building consent. A building consent application should have been made for the construction of the new parts of the building, such as the foundations, the alterations, and the relocation of the building. Had a building consent been applied for in this case, the applicant would have been required to show that the existing building was not dangerous and insanitary in its previous location, and how the existing building would comply at least to the same extent as it did before the alterations.
- 7.21 Further to my conclusion that the existing building is not dangerous or insanitary, it is my view, based on the observations of the expert and the information that I have been provided, that it is reasonable to conclude in this case that the existing house complies to at least the same extent as it did before the building work was undertaken. The existing house is a well constructed 1940's weatherboard house with a low weathertightness risk, which has been well maintained. The wind zone of the

site is medium, and I am of the view that the diagonal bracing and joists shown in the supporting documentation for the substructure are sufficient.

- 7.22 As discussed in paragraph 7.18, with respect to the work for which I was unable to ascertain whether it complies with the Building Code (refer to Table 3 of paragraph 7.14), I am satisfied that while it was not possible for the expert to inspect the interior of the house, I accept that the house is well maintained and generally in good condition and is therefore not dangerous or insanitary. The expert was unable to assess the full operation of the water system and effluent system; however, there was no evidence to suggest the systems were operating in such a way as to be insanitary. I also consider that the structures of the house and garage are not dangerous, as they have proven in-service performance, and notwithstanding the issue of the defective bearers to the house, the structure generally appears to be satisfactory.

8. What is to be done now?

- 8.1 I have considered what is to be done now with respect to the conclusions I have reached for the different elements of the building work.

- 8.2 A certificate of acceptance should be issued for the following elements of the building work:

- compliance with Clause E1 of the building and the site
- compliance with Clause E2, G4, and G7 of the additions (see paragraph 2.2 for a more detailed description of the scope of the additions) and Clause F4 of the decks
- compliance with Clause E2 of the garage
- compliance with Clause G12 of the water tank and external connections

The certificate of acceptance should exclude:

- compliance with Clause B1 of the foundations and the garage
- compliance with Clauses E3, G12, G13, and H1 of the additions
- compliance with Clauses G13 of the effluent system.

- 8.3 A notice to fix should be issued for the non compliance of the bearers. I note a building consent will be required for any remedial work and the application for a building consent will need to show how the building elements will be brought into compliance with the Building Code. Further investigation and analysis will be required by a suitably qualified person to the satisfaction of the authority.

9. The decision

9.1 In accordance with section 188 I hereby reverse the decision of the authority to refuse to issue a certificate of acceptance. I determine that a certificate of acceptance should be issued for:

- compliance with Clause E1 of the building and the site
- compliance with Clause E2, G4, and G7 of the additions and Clause F4 of the decks
- compliance with Clause E2 of the garage
- compliance with Clause G12 of the water tank and external connections

and excluding compliance with Clause B1 of the foundations and the garage, compliance with Clauses E3, G12, G13, and H1 of the additions, and compliance with Clause G13 of the effluent system.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 December 2009.

John Gardiner
Manager Determinations