



Building Consent Authority Complaint 2014/001

19 September 2014

COMPLAINT AGAINST THE BUILDING CONSENT AUTHORITY OF THE DUNEDIN CITY COUNCIL

1. The matters of complaint

- 1.1 This is a complaint under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The complaint was lodged by B and A Wilson (“the complainants”), received by the Determinations and Assurance Group of the Ministry of Business, Innovation and Employment on 13 June 2014 against the Building Consent Authority (“BCA”) of the Dunedin City Council in accordance with section 200 of the Act.
- 1.3 The complaint centred on the length of time taken to issue the complainant’s building consent, and the charges associated with the building consent. The complaint claimed that the building consent took 44 working days to be issued, which was over the statutory time frame of 20 working days. Further, the BCA charged \$603.68 for further assessment and processing fees as the consent was processed in Auckland by an external contractor.

2. The legislation

- 2.1 Under section 200 of the Building Act 2004, the Chief Executive may receive complaints alleging that a BCA has been negligent in or has failed or is failing, without good reason, to properly perform any of its functions. The functions of a BCA include the issuing of building consents, notices to fix, code compliance certificates and inspecting building work for which it has granted consent.
- 2.2 Specific to this complaint, the BCA is governed by the Building (Accreditation of Building Consent Authorities) Regulations 2006. Two key aspects for the complaint relate to the following Regulations:

7) Performing building control functions

- (1) A building consent authority must have policies and procedures for performing its building control functions.
- (2) The policies and procedures must cover the following:
 - d) for applications that comply with the requirements that the Act and any applicable regulations under the Act specify for applications,—

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

- (iii) allocating the applications to employees or contractors to process; and
- (iv) processing the applications to establish whether they comply with the requirements that the Act, the building code, and any other applicable regulations under the Act specify for buildings; and
- (v) granting, refusing to grant, and issuing building consents; and
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8 Ensuring enough employees and contractors

(1) A building consent authority must have a system for ensuring that it has enough employees and contractors to perform its building control functions.

(2) A building consent authority must have a system for assessing the need to employ contractors if it does not have enough employees to perform its building control functions.

- 2.3 Processing of the building consent applications must be completed within 20 working days as per section 48 of the Building Act unless suspended under section 48(2).

48 Processing application for building consent

(1) After receiving an application for a building consent that complies with section 45, a building consent authority must, within the time limit specified in subsection (1A),—

- (a) grant the application; or
- (b) refuse the application.

(1A) The time limit is—

- (a) if the application includes plans and specifications in relation to which a national multiple-use approval has been issued, within 10 working days after receipt by the building consent authority of the application; and
- (b) in all other cases, within 20 working days after receipt by the building consent authority of the application.

3. The Ministry's Approach

- 3.1 I have undertaken enquiries on this matter including collecting evidence by:

- providing the BCA with an opportunity to make submissions and provide a formal written response to the complaint
- seeking further information from the BCA regarding:
 - the 7 working day suspension of the building consent application;
 - the policies and procedures in place for having adequate employees and contractors in place; and
 - the fees breakdown of the building consent application
- inviting the complainant to provide a response to that provided by the BCA

- 3.2 I have performed a careful and extensive review of the information collected and submissions provided to determine whether there is evidence of a failure and/or negligence on the part of the BCA.

- 3.3 I provided the parties with a draft complaint decision on 6 August 2014 seeking further submissions or response if necessary. I did not receive any further comment from either party.

4. Response to the complaint from the BCA

- 4.1 The application details were sent to the BCA on 16 June 2014. The BCA responded on 26 June 2014 noting that:

The application was received by [the BCA] on 28 March 2014 it took a total of 63 days to process with 21 being non- working, 7 suspended and 35 being working days. The application was processed by one of our contractors in Auckland and was granted on 30 May 2014.

- 4.2 The BCA responded to the request for further information on 1 July 2014 acknowledging it has struggled to meet the statutory time frames for several months and currently has 19 applications exceeding the 20 working day statutory time period. The BCA expanded on the difficulties it is currently facing in recruiting staff and securing external contractors.

5. Analysis

- 5.1 Under section 203 of the Act the Chief Executive has specified powers regarding a complaint. After conducting an investigation and considering the submissions made by the BCA, I must be satisfied the BCA has failed without good reason to properly perform their functions or has been negligent in performing those functions.
- 5.2 There has been conflicting information provided to me regarding the length of time take to complete the building consent application. The application was received by the BCA on the 28 March 2014. The application was granted on the 3 June available for the applicant to pick up. The BCA has alleged there were seven suspended days. I do not believe this is a correct calculation. From the building consent documentation a letter from the BCA's contractors dated 26 May 2014 was sent requesting further information. This information was sent back on the same day and is date stamped received by the BCA's contractors on the 28 May 2014. I calculate this as a three working day suspension for the purposes of section 93(4) of the Act. Taking into account 4 public holidays within this time period I calculate the total timeframe for the issuing of this building consent to be 40 working days. This is double the statutory time frame of 20 working days under section 48 of the Act.
- 5.3 In relation to the alleged \$603.68 charged by the BCA. After reviewing the breakdown of fees this does not appear to be an administrative error in charging the same amount twice but is a query surrounding the prescribed fees charged by the BCA and the external contractor. A complaint in this regard does not come within the scope of the Building Act 2004 and fall under the Local Government Act 2002. This also includes fees where an external contractor has been engaged. Any complaints relating to the fees charged should be made through the

ombudsman. Further information on this process can be found here:

<http://www.ombudsman.parliament.nz/make-a-complaint>

- 5.4 I have reviewed the BCA's policies surrounding external contractors and employees found within the BCA's Building Control Manual². I acknowledge that the BCA has had difficulty with recruitment of permanent staff following three resignations in December 2013, the position has been advertised three times this year and there remains one vacancy. The difficulty in processing building consent applications has been felt nationwide, the BCA has acknowledged the external contractor they had been using on a regular basis advised earlier this year they had been contracted by Christchurch City Council's BCA and have only been able to provide assistance in the last few weeks. The BCA informs me that they have recently managed to negotiate a contract with the Waimakariri BCA who had some spare capacity to assist.
- 5.5 Under clause 8(2) of the Building (Accreditation of Building Consent Authorities) Regulations 2006 a BCA must have a system for assessing the need to employ contractors if it does not have enough employees to perform its building control functions. In my view the BCA does have a system in place and is actively working towards employing contractors to assist with the work load.
- 5.6 In my view the likelihood of the defence for a BCA that has failed to perform its functions for a "good reason" is likely to be infrequent. This is an objective assessment and will usually constitute situations that are outside of a BCA's control. From my investigations of the BCA's situation and policies, I do not consider they had good reason to fail to deliver the complainants' building consent within the statutory time frame or 20 working days.
- 5.7 Although I sympathise with the BCA's position, at any given day in any employment situation staff are able to resign and the employer should be prepared for more than one person resigning at a time. The BCA has struggled to secure an external contractor, I do not consider the difficulties faced by the BCA constitute good reason, a significant period of time passed before the complainant's building consent was sent to the external contractor. The issues regarding the availability of contractors should have been pre-empted and prepared for. I consider the BCA was failed, without good reason, in performing their duties by taking 40 working days to issue the complainant's building consent.

² MS-10 Contractors and Consultants, and MS-13 Human Resource Management

6. Conclusion

- 6.1 I am not satisfied that the BCA had good reason to fail to issue the complainants building consent within the statutory 20 working days for building consents and therefore uphold the complaint.
- 6.2 Under s203 (2) I am issuing a warning to the BCA regarding the time taken to issue the complainant's building consent.
- 6.3 In this case I do not consider it practical to require remedial action to be taken by the BCA. The BCA has taken steps to ensure that the backlog is resolved by employing additional contractors, negotiating a contract with another BCA's and continual advertising to fill the remainder permanent staff position.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 September 2014.

Yours sincerely

John Gardiner
Manager Determinations and Assurance