



Building Consent Authority Complaint 2017/002

6 October 2017

Complaint against Auckland Council

1. About this complaint

- 1.1 This is a complaint under Part 3 Subpart 1 of the *Building Act 2004*¹ (“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 This decision relates to a complaint received by the Chief Executive of the Ministry of Building, Innovation and Employment (“the Ministry”) against a building consent authority under section 200 of the Building Act 2004 (“the Act”).
- 1.3 The decision on this complaint has been made by me, Katie Gordon, Manager Determinations, for and on behalf of the Chief Executive of the Ministry. However the decision to accept this complaint for investigation under section 203 of the Act, and the conduct of the investigation, were actions of the previous Manager Determinations.

2. The grounds for complaint

- 2.1 The complaint was lodged by M Karmarkar (“the complainant”) acting in his capacity as a director of Jayashree Ltd, the owner of the property that the complaint relates to. It was received by the Ministry on 22 August 2016. The complaint was lodged against the building consent authority (“the BCA”) of Auckland Council under section 200 of the Act.
- 2.2 Under section 200(2) of the Act, the Chief Executive has discretion whether to accept or decline a complaint. Where the Chief Executive decides to accept a complaint, the Chief Executive must notify the parties (under sections 200(3) and 202(2)(a) of the Act) and advise them of the grounds on which the complaint will be investigated (section 202(2)(b)).
- 2.3 The complaint related to two building consents (B/2012/7929D and B/2012/7929E) that the BCA issued for building work consisting of alterations and additions to the complainant’s existing dwelling. The complainant is of the view that the BCA failed without good reason to properly perform its functions in issuing these consents, in particular in relation to some of the drawings that formed part of the consents.
- 2.4 I advised the parties in a letter dated 21 April 2017 of the specific grounds of complaint that I had accepted for investigation, as follows:
 1. The alleged failure of the [BCA] in performing its function of issuing an amended building consent, specifically in relation to the drawings for the foundations that formed part of the building consent B/2012/7929D.

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

2. The alleged failure of the [BCA] in performing its function of issuing amended building consents, specifically in relation to the drawings for the bracing for the internal and external walls of the new and existing dwelling that formed part of building consents B/2012/7929D and B/2012/7929E.

I discuss each of these matters in more depth in Section 5.

2.5 In my letter of 21 April 2017, I advised the parties that my investigation would focus on the BCA's actions, processes and adherence to its policies in relation to the grounds for complaint, as opposed to determining any technical building compliance matters in relation to the building work.

2.6 Declined matters for complaint

2.6.1 In my letter of 21 April 2017 I also declined to accept for investigation two further grounds for complaint, which had been raised by the complainant during my preliminary investigations. These matters related to the BCA's performance of its function in issuing a building consent (B/2012/7929) for a foul water drain and waterproofing membrane, both in the basement area of the dwelling.

2.6.2 With regard to the foul water drain, the matter was declined because preliminary enquiries showed the council did not fail to recognise the need for a pump for the new drain (as alleged), as no new drain was indicated on the consented plans. Instead the plans noted that the existing drain would need to be checked onsite. It was implicit in this note that the existing drain may be found to no longer be adequate, once the alterations progressed, and this is in fact what happened.

2.6.3 With regard to the waterproofing membrane, the matter was declined, as at the time that alleged flooding occurred (which the complainant took as evidence of failure), the building work to install the waterproof membrane (as shown on the consented plans) was incomplete and the council had not been called to inspect it. The complainant alleged that the waterproofing system shown on the plans could never have been compliant. I saw no evidence as to whether or not this aspect of the building work, once complete, would have achieved compliance with the Building Code, and this was not in any case a matter that could be dealt with by way of complaint.

3. The legislative framework

3.1 Under section 203 of the Act, the Chief Executive has specified powers regarding a complaint. For a complaint to be upheld, after conducting an investigation and considering submissions I must be satisfied that the BCA has failed without good reason to properly perform its functions or has been negligent in performing those functions.

3.2 The functions of a BCA that are relevant in the current case are those relating to processing, granting or refusing to grant, and issuing building consents, under sections 48 to 51 of the Act.

3.3 More detail as to how these functions are to be discharged is given in the Building (Accreditation of Building Consent Authorities) Regulations 2006 ("the Regulations"). The relevant provisions in the current case are clauses 5, 6, 7 and 16.

4. The background and complaints process

4.1 The complainant made a complaint dated 20 August 2016 in relation to the BCA's exercise of its functions in assessing, processing and granting building consents. In particular, the complainant alleged that on 10 May 2016 the authority had:

- issued the wrong engineering drawing as part of an amendment to a building consent (B/2012/7929 D) – the drawing had been superseded by a later drawing, which should have been attached instead
- incorrectly approved a drawing as part of the amended building consent (B/2012/7929 D) leading to the complainant having to apply for a further amendment to the consent (B/2012/7929 E).

The complainant was of the opinion that in relation to these two matters the BCA had failed in the performance of its statutory function to process and issue building consents, or was negligent in its performance of the statutory function.

4.2 I engaged an expert to assist me in this complaint. The expert is a registered architect and building consultant. The expert reviewed the documents and plans provided by the complainant and the authority's property file. He also made three site visits to the complainant's property during September and October 2016, and held discussions with the complainant, the builder and the project engineer.

4.3 The expert provided a report dated 28 November 2016. The report sets out the background to the complaint, and the expert's findings and conclusions in relation to the matters for complaint. The parties were provided with a copy of the expert's report on 29 November 2016. The authority made a submission in response to the report dated 1 February 2017. The complainant made a submission in response dated 4 February 2017.

4.4 Having considered the expert's report and the parties' submissions, I advised the parties in a letter dated 21 April 2017 of the specific grounds of complaint that I had accepted for investigation (see paragraph 4). The letter requested some further information from the BCA relating to its systems and procedures for processing applications for building consents. The BCA made a further submission in response to this letter on 8 May 2017. The complainant made no further submission in response to the letter.

4.5 I note that in December 2016, the BCA issued a stop work notice in respect of the building work on the complainant's dwelling, due to issues relating to a suspected change in use. The complainant was advised he could apply for a determination if he did not agree with the BCA's decision in relation to the stop work notice. However those matters did not impact on the process of investigating and reaching a decision on the complaint.

4.6 The information considered

4.6.1 I have considered the following information in making this complaint decision:

- The complainant's original application and the supporting documentation provided with it (correspondence between the parties and consented plans).
- Subsequent correspondence between the complainant and the Ministry, and the supporting documentation.
- The report of the expert commissioned by the Ministry to assist with the investigation of this complaint.

- The parties' submissions in response to the expert's report and the supporting documentation.
- The BCA's submission in response to the Ministry's letter of 21 April 2017.

5. Analysis

5.1 The original building consent (B/2012/7929) was issued in August 2012 and related to building work to convert an existing dwelling on the complainant's property into two units. I understand the complainant subsequently decided not to pursue this conversion, and the building consent was amended to instead enable alterations and additions to the existing dwelling.

5.2 The amended building consents that are relevant in the current complaint are:

- B/2012/7929 D: Amendment – internal revisions, extension to basement, re-roof, issued 16 May 2016
- B/2012/7929 E: Amendment – additional bracing work, issued 16 August 2016

5.3 There are two separate matters of complaint, which the complainant alleges demonstrate that the BCA has failed or been negligent in the performance of its functions in relation to processing and granting these amended building consents. I will deal with each of these matters separately.

5.4 Matter 1: the basement foundation drawings – B/2012/7929 D

5.4.1 This matter of complaint relates to two sets of revised structural drawings for the foundations of a new basement room, which the complainant was adding as an extension to the basement of the existing dwelling. This extension was originally shown in an application for an amended building consent (B/2012/7929 C), which was rejected by the BCA on 21 March 2016.

5.4.2 The complainant lodged a further application for an amended consent on 1 April 2016 (B/2012/7929 D). The BCA requested further information in relation to the structural drawings for the basement foundations. The complainant provided revised structural drawings (SD03 R3) on 18 April 2016. The revised drawings show enlarged retaining wall foundations, and reinforcement for the foundations for the basement room. The need for this enlargement was one of the matters raised by the BCA in its request for further information. The revised drawings were stamped as approved by the BCA. The date on the stamp is 20 April 2016.

5.4.3 The BCA also requested more information on 20 April 2016, and I understand this was supplied by the complainant on 10 May 2016. The amended building consent (B/2012/7929 D) was then issued on 16 May 2016.

5.4.4 The difficulty arises because the version of the structural drawings attached to the amended consent was an earlier version (SD03 R2) and not the correct updated version (SD03 R3). The version SD03 R2 was stamped as approved by the BCA, with the date stamp showing 10 May 2016.

5.4.5 The complainant alleges that the BCA attached the wrong version of the drawings to the consent due to a processing error, and that this had caused him expense and delays.

- 5.4.6 The BCA asserts that the incorrect drawing (SD03 R2) was provided by the complainant with the additional information he provided on 10 May 2016, after the BCA had already approved the correct version (SD03 R3). The BCA says it did not realise that the wrong version had been provided and this is why the amended building consent was issued with it attached. The BCA alleges that the complainant was aware he had supplied the wrong version of the plan, and on 20 May 2016 brought it back to the BCA to be stamped as approved.
- 5.4.7 Whichever version of events is correct, it is clear that the earlier version of the drawings (SD03 R2) was stamped as approved on 10 May 2016 and attached to the amended building consent (B/2012/7929 D) when it was issued on 16 May 2016. This version of the drawings was incorrect, as it had been superseded by a later version (SD03 R3) produced in response to the BCA's request for further information. Although the BCA asserts that the complainant deliberately provided the wrong version of the drawing, nevertheless it remains the BCA's responsibility to ensure that the correct documentation has been provided in these situations, and to double-check documentation before it issues consents.
- 5.4.8 The question therefore becomes whether these circumstances amount to a failure of the BCA in the exercise of its statutory function. In my opinion it does not. In its submissions the BCA has described the systems it uses to process building consent applications and avoid documentation handling errors from occurring. These appear to me to be sufficiently robust, although I note that the BCA's detailed scanning process, as described in its submission of 1 February 2017, is not replicated in its 'Building Consent Processing' policy and procedures (document AC1101), and could usefully be added.
- 5.4.9 The latter procedures include an instruction, with respect to revised plans that are received during processing, that 'Superseded plans must be removed, stamped as superseded and retained for record-keeping purposes'. If followed, such an approach would help avoid the scenario that has arisen in the current case.
- 5.4.10 It is evident in the current case there was much to-ing and fro-ing between the parties, with numerous requests for further information and iterations of plans and specifications. In such situations, despite there being adequate systems and safeguards in place, errors can inevitably occur. Such errors are not sufficient in themselves to amount to a failure of performance of function. To be considered a failure, something more substantive or systemic must be evident; some serious flaw in the BCA's processes or its execution of those processes.
- 5.4.11 This high threshold stems from the specific words and purpose of the complaints investigation function in section 200 of the Act, the focus of which is on the proper performance of the BCA's functions. The scope of the complaints powers are set out in section 200(1) where it states:
- The chief executive may receive complaints alleging that a building consent authority—
- (a) has failed, or is failing, without good reason to properly perform any of the authority's functions under this Part or Part 2:
 - (b) has been, or is, negligent in performing those functions.
- 5.4.12 The complaints powers focus on a BCA's performance of its statutory functions. This focus on the proper performance of functions can be contrasted with other provisions of the Act that focus on the performance of functions in relation to particular matters of building work. It is the latter provisions that focus on individual

decisions about the design, construction, alteration, demolition, or removal of building work that can give rise to the liability in tort of a BCA for its decisions about the compliance of building work. See, for example, the words of section 393 that establish the limitation provisions applicable to such decisions by a BCA about building work, and contrast these with the words in section 200, which focus on a BCA's performance of its functions and make no mention of decisions about building work.

- 5.4.13 It is my view that a one-off or minor mistake in one of the BCA's processes and approaches that make up its functions does not mean that BCA is not performing its functions properly. In addition, the complaints powers in section 200 are not intended to usurp the role of the courts in determining the liability of a BCA for decisions about the compliance of the design, construction, alteration, demolition, or removal of building work.
- 5.4.14 This focus of the complaints powers on the statutory functions of a BCA and not on individual decisions of BCAs about building work is carried through to the powers available to the Chief Executive after accepting a complaint. Section 202 of the complaints process confers wide ranging 'investigation' powers on the Chief Executive to reach broad conclusions about a BCA's performance of its statutory functions. See, for example, the power of the Chief Executive under section 204(2)(b)(ii) and (iii) to require a BCA to "answer any question that relates to the performance of functions under this Act [and] answer any question that relates to a complaint". The Chief Executive also has the power under section 204(2)(c) to require "any person" to supply information about the performance by a BCA of its functions under the Act or about a complaint. Such powers are consistent with the focus of the complaints powers on a BCA's performance of its functions at a supervisory and systems level, and are not consistent with individual decisions about the compliance of particular building work.
- 5.4.15 This interpretation of what is required for something to amount to a failure to perform functions is also reflected in the powers available to the Chief Executive when a failure is established. Under section 203(2) of the Act, where following a complaint investigation the Chief Executive is satisfied that the building consent authority has failed without good reason to properly perform any of its functions, he or she may do one or more of the following:
- issue a warning to the building consent authority
 - require the building consent authority to take remedial action
 - require the building consent authority to monitor and report to the Chief Executive on the progress of the remedial action
 - limit the functions that the building consent authority may perform under the Act.
- 5.4.16 Such measures are not designed to address or remediate low-level lapses or errors by a BCA. The remedies available to the Chief Executive in section 203 focus on ways of improving a BCA's performance of its functions or limiting the scope of those functions so as to limit the risks to a BCA's customers. Unlike the powers available under a determination, a finding that a BCA has failed to perform a function under section 203 does not enable the Chief Executive to correct a particular erroneous decision. Nor do the remedies under s203 provide the ability to award costs or remedial action to the benefit of an individual. Instead, the available powers are of a broader supervisory nature, designed to correct ongoing and serious issues that affect

a BCA's ability to effectively perform its functions. Examples of such issues might include misinterpretation of legislation in a policy that the BCA is applying, or a persistent disconnect between the actions of the BCA's officers and the approach outlined in its policies.

- 5.4.17 In addition, I note that there are processes available to complainants to access remedies for possible breaches of their personal rights arising from such situations, such as the determinations process under section 177 of the Act, or a BCA's own complaints process (which BCAs are required to have under Clause 7 of the Regulations), or via the Courts.
- 5.4.18 In the current case, there is no evidence of such a failure. The BCA had adequate systems and documentation in place, and these have largely been adhered to. When the error has been detected it has been recognised as such and dealt with promptly. Accordingly, this matter of complaint is not upheld.

5.5 Matter 2: the internal and external wall bracing – B/2012/7929 D and B/2012/7929 E

- 5.5.1 The second matter of complaint relates to structural drawing SD02 R2, which was approved and issued by the BCA as part of amended consent B/2012/7929 D on 16 May 2016. Among other things, the drawing shows the bracing codes for the new external walls of the extensions. It appears that the bracing for these walls was intended to be independent of the existing structure. Also approved with the amended consent were two architect's drawings that made reference to the need to review the adequacy of the existing bracing and wall framing during construction.
- 5.5.2 On 20 July 2016, a BCA inspector carried out an inspection of the building work, during which he noted that:
- ...all exterior walls have been stripped off without per bracing and calculation. Although it was mentioned in plans but structural integrity of the building is been compromised.
- 5.5.3 I understand that this comment referred to the internal linings and external cladding of the existing external walls. The inspector marked the inspection as 'failed' and required the complainant to apply for an amendment to the building consent.
- 5.5.4 In response, the complainant's engineer produced a revised drawing (SD02 R4), which showed additional bracing elements in all the external walls and some of the internal walls of the existing dwelling. I assume that in doing so the engineer was aiming to achieve full compliance with NZS3604: 2011 Timber framed buildings. This revised drawing was lodged with a further building consent amendment, which the BCA approved on 16 August 2016 (B/2012/7929 E). The bracing proposed for the extensions to the dwelling was unchanged under this amendment.
- 5.5.5 The complainant is of the view that this course of events represents a failure of the BCA's function to assess and issue building consents. He asserts that the original drawing showing the bracing, which was approved as part of amended consent B/2012/7929 D, was 'not adequate for the purpose'. He further contends that the architect's drawings included with that consent showed that the internal linings and external cladding of the existing dwelling were to be replaced, and that as such 'the bracing should have been rejected' at that stage 'rather than [the] inspector asking for it and delaying the project'.
- 5.5.6 In my opinion, the requirement for the existing wall bracing to be reviewed during construction was foreseen and noted in the architect's drawings that formed part of

amended building consent B/2012/7929 D. It is not unusual for further building work, not covered by the original consent, to be required during construction, where the original building work involves alterations or additions to existing buildings. BCAs have processes in place for dealing with this eventuality, including requiring building owners to apply for an amended consent.

- 5.5.7 In the current case, when the inspector carried out the pre-line inspection on 20 July 2016, he noted that the internal linings and external cladding of the existing walls of the dwelling had been removed, and that no provision had been made for this in the consented plans. The inspector formed the opinion that there was potential for this additional work to compromise the structure of the existing dwelling, and accordingly he called for an amendment to the consent to address this situation. The inspector was entitled to make this assessment, and the process he then followed in failing the inspection and requesting an amendment was, in my opinion both reasonable and in accordance with the BCA's documented policy and procedures for:
- undertaking inspections (document AC1201)
 - deciding whether variations from consented building work can be dealt with as a minor variations or whether an amended consent is required (document AC2224).
- 5.5.8 Section 112 of the Act states that a BCA must not grant a building consent for an alteration to an existing building unless it is satisfied that (among other things) after the alterations the existing building will continue to comply with the other provisions of the Building Code to at least the same extent that it did before the alteration. This provision has been considered in numerous determinations and other advice from the Ministry and the degree of compliance that must be achieved in these situations is now well established.
- 5.5.9 In the current case, there was no requirement for the complainant to provide a level of bracing for the existing walls beyond that which they had achieved before the building work. It follows that when the inspector called for the amendment, it was open to the complainant to either reinstate the lining or provide the BCA with evidence that the structural integrity had not in fact been compromised.
- 5.5.10 The complainant did neither of these things, and instead lodged revised drawings that achieved a degree of compliance that potentially went beyond that provided by the existing walls before. However, responsibility for any unneeded work or costs incurred by this decision cannot be placed on the BCA. Having received the revised drawing, the BCA's responsibility was solely to assess whether the proposed work would achieve compliance to the extent required by the Act. If the complainant's engineer chose to provide a degree of compliance beyond what was actually required, it was not the BCA's responsibility to deter them from that course.
- 5.5.11 Whether or not the inspector's assessment, made during the pre-line inspection, that the additional building work compromised the existing building was accurate is a separate matter and not one that can be dealt with by way of the complaint process.
- 5.5.12 What this complaint investigation was concerned with is the systems, policies and procedures that the BCA followed in exercising its functions; in particular, whether these existed, were adequate and were followed. In my opinion they did and were, and accordingly this matter of complaint is not upheld.

6. Conclusion

- 6.1 I consider that there is no evidence that the BCA has failed to properly perform its statutory function of issuing building consents. Therefore the complaint is not upheld.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 October 2017.

Yours sincerely

Katie Gordon
Manager Determinations