Determination 2007/74

6 July 2007

A dispute in relation to the issue of a building consent and associated code compliance certificate for the conversion of a rumpus room to a bed and breakfast/homestay building at 16 Steyne Avenue, Plimmerton, Porirua

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the 2004 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 parties to the determination are:

- the owners of the property in question, 16 Steyne Avenue, Mr and Mrs Wallace and Mabel Sue ("the owners"). Mr and Mrs Wallace are acting as agents for Ms Sue

[1] The Building Act 2004 is available from the Department's website at www.dbh.govt.nz.
[2] The Building Code is available from the Department's website at www.dbh.govt.nz.

- the owners of the adjoining property, 3 Bath Street, Bath Street Limited ("the neighbour") acting through Mr Davies as agent
- the Porirua City Council ("the territorial authority").

1.2 This determination arises from the decision of the territorial authority to issue a building consent and subsequent code compliance certificate for the conversion of a rumpus room into a bed and breakfast/homestay unit ("the conversion"). Because the building consent was issued in 2000, under section 436 of the Building Act 2004 this determination must be considered and determined as if the Building Act 2004 had not been passed, but subject to section 436(3) (which is not relevant in this case).

1.3 The matters to be determined are whether:

- the conversion complied with the fire provisions of the Building Code[2] (First Schedule, Building Regulations 1992) to the extent required by the Building Act 1991
- the decisions of the territorial authority to issue the building consent and the code compliance certificate for the conversion were correct.

1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I also copied this determination to the New Zealand Fire Service by way of consultation under section 170. The Fire Service responded that "after some thought, we have decided to make no comment".

1.5 In this determination, unless otherwise stated, references to sections are to sections of the Building Act 1991 ("the 1991 Act") and the Building Act 2004 ("the 2004 Act") as applicable, and references to clauses are to clauses of the Building Code.

2. The building

2.1 The building work in question comprises the conversion of a rumpus room, situated in an existing garage building, into a bed and breakfast/homestay unit ("the unit"). The converted building adjoins the neighbour's building. The 200 mm thick concrete wall at ground floor level ("the concrete wall") between the two buildings straddles the boundary, being unevenly situated between the two properties. The concrete wall had previously been the subject of a dispute between the owners' predecessor in title and their then neighbours. The dispute resulted in a Court-ordered easement created in 1969 to the effect that part of the concrete wall, some associated plumbing, and two box safes legally encroach onto the owners' property.

2.2 The unit contains a bedroom, living and dining areas and bathrooms, and the existing garage remains in its original form. The roof of the unit is supported by the concrete wall. The existing internal and external walls remain in place and there were no extensions or external changes made to the building. The building work included the relining of the wall between the garage and the unit to provide fire and sound ratings.

3. Background

3.1 The territorial authority issued a building consent for the conversion on 18 May 2000 under the 1991 Act, carried out various inspections during the course of construction, and issued a code compliance certificate on 30 October 2000.

3.2 Between 1 March 2006 and 23 August 2006, the owners and the neighbour exchanged emails concerning the fire-rating between their adjoining buildings. In summary, the neighbour considered that the fire rating was inadequate. The owners responded that as a code compliance certificate had been issued for the building work, it was a matter for the neighbour to discuss with the territorial authority.

3.3 The neighbour obtained a review of the separation between the two properties from a member of a firm of consulting fire engineers ("the fire engineers"). The fire engineers produced a report dated 14 August 2006. In summary, the report stated:

- It appears that the original garage building has never been provided with a boundary wall. As the roof of the conversion is supported from the boundary wall of the adjacent building rather than from a dedicated one, it is difficult to see how code-compliance is demonstrated.

  In other words, the fire engineers took no account of the fire separation provided by the concrete wall because they understood that wall to be part of the neighbour's building and considered that the owners were required to install the necessary fire separation as part of their own building.

- As there is no fire-rating between the enclosed space of the conversion and the boundary, the construction does not comply with the Building Code. As such, the fire engineers were of the opinion that the building consent was issued in error.

- The current construction presents a significant fire risk to the adjoining property.

- The construction of a fire-rated boundary wall would significantly reduce the risk of fire-spread between the adjoining buildings.

The report also referred to Determination 2005/167 (which concerned the sufficiency of fire rating to a boundary wall of a garage) that had a similar layout to the buildings in question.

3.4 The neighbour also corresponded with the territorial authority by e-mail on 24 August 2006 and 6 September 2006. The neighbour forwarded copies of a fire engineer's report and Determination 2005/167 to the territorial authority, stated its reasons for believing that the conversion had fire and acoustic rating issues, and said:

> [The] concrete wall did not belong to [the owners] and they had no approval to attach anything to it. The roof of the homestay should not have been allowed to continue to be structurally supported by this wall.

3.5 The application for a determination was received by the Department on 12 September 2006.

4. The submissions

4.1 The neighbour noted that the matter for determination related to the conversion and asked that the building consent should be amended to provide for a fire-rated wall between the unit and the boundary, together with independent roof support.

4.2 The neighbour supplied copies of:

- the plans and specification
- the correspondence with the owners and the territorial authority
- the fire engineer' report of 14 August 2006
- a sketch detail of the current concrete wall
- photographs of the concrete wall.

4.3 The owners wrote to the Department on 10 November 2006 noting that the territorial authority had considered the fire performance of the conversion and had issued both a building consent and a code compliance certificate for the work. The owners commented further that:

- there had been no structural changes made in the vicinity of the concrete wall. The wall between the garage and the unit already existed, as did the (then) rumpus room. The construction of the unit enhanced the existing fire safety and noise control features of the building
- the owners believed that the neighbour's sketch contained some errors and provided two sketches that they considered were a more accurate representation
- the owners did not accept the fire engineers' presumption that the concrete wall was entirely on the neighbour's property and noted that it unevenly straddled the boundary. In the opinion of the owners, the concrete wall built in 1952 not only supported the neighbour's property but also supported the owners' adjoining garage roof. If the original garage required a boundary wall, then this should have been provided by the neighbour when the 1952 wall was constructed
- the roof space above the unit that existed prior to the conversion was not greatly changed, and is isolated from the unit by fire-rated ceilings
- Determination 2005/167 was decided on materially different facts from the current situation
- the construction of a separate fire-rated wall was not practicable as it would have clashed with a vent pipe as well as with the flats above the unit roof. It would also have adversely affected the foundations of the existing wall.

4.4 The territorial authority forwarded a lengthy submission to the Department, dated 1 December 2006, in which it described the background to this matter and the construction of the conversion. The territorial authority also supported the owners' submissions relating to the roof support and the fire-proofing purposes of the existing concrete wall. The territorial authority was of the opinion that the conversion

complied fully with the provisions of the Building Code and in particular with Clause C3. The territorial authority assessed the building work in terms of a change of use with specific consideration given to structure, fire, and noise issues. The territorial authority official who had undertaken the final inspection was satisfied that a fire cell had been established that complied with the Building Code.

4.5 The territorial authority was also of the opinion that, as Mr Davies was not the owner of the adjoining property, he was not a party in terms of section 176. The territorial authority also questioned whether the neighbour's claim could be considered in light of the Limitation Act 1950 and the fact that the work in question was completed in 2000.

4.6 The territorial authority supplied copies of:

- various certificates of title
- some consent documentation.

4.7 I prepared a draft determination ("the draft") dated 12 March 2007 which was copied to the parties. The draft was to the effect that the conversion did not comply with the Building Code in that it did not include any external wall along the boundary that would resist the spread of fire to the neighbour's property as required by clause C3.3.5, and that the territorial authority's decisions to issue the building consent and the code compliance certificate should be reversed.

4.8 The neighbour accepted the determination but the territorial authority and the owners did not. The territorial authority and the owners set out their objections to the draft and each requested a hearing.

5 The Hearing

5.1 The requested hearing was held on 20 April 2007 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Building Act 2004. The agents for the neighbour appeared on their own behalf, accompanied by a fire engineer, the territorial authority was represented by three of its officers and its legal advisor, and the owners appeared on their own behalf. Four other staff members of the Department attended. The territorial authority and the owners provided written submissions and all the parties spoke at the hearing. The evidence from those present enabled me to amplify or clarify various matters of fact that were identified in the first draft determination. What I consider to be the major issues raised by the parties are summarised below.

5.2 The neighbour was of the opinion that the concrete wall was owned by the neighbour and that the building work carried out was defective as regards fire protection.

5.3 The neighbour's fire engineer was of the opinion that if the concrete wall was the neighbour's property then there was no effective fire rating between the buildings, and in any case there was a potential fire-path through the ceiling space between the top of the concrete wall and the underside of the roof of the unit, and also through the roof itself.

5.4 Through its legal advisor, the territorial authority accepted that the building was not code compliant within the ceiling space but maintained that the territorial authority acted reasonably in issuing the building consent. It argued that the 1969 Court Order

established that the concrete wall was a common boundary wall although not a party wall. It was suggested that, rather than reverse the territorial authority's decision to issue the building consent, the owners should be directed to apply for an amendment to the consent to provide the appropriate fire-rating. The territorial authority also questioned the relevance of the date when the neighbour purchased its property in regard to the Limitation Act.

5.5 The draft had come to the conclusion that the territorial authority's decision to issue the building consent should be reversed. Addressing that point, it was submitted for the territorial authority that:

> . . . the detail submitted in the building consent application, and used during the evaluation process, was such that it did not illustrate any specific cause for concern regarding the potential for fire spread between properties. On that basis, the Council's decision to grant building consent and code compliance certificate was reasonable.
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> . . . [Reversing that decision as contemplated in the draft] puts both the Council, and more particularly, the owners, in a difficult position. The work that the owners have already undertaken, which *is* of itself code compliant, would be deemed to have been undertaken without a consent. The only possible option would be for the owners to apply for a certificate of acceptance for this work, as well as seeking a building consent for the additional work.

5.6 The owners described the history of the two properties and contended that the risk of a fire occurring in the unit was miniscule compared with the risk presented by the neighbour's building. The owners had followed the correct procedures and the work carried out substantially reduced any fire-risk. There was a responsibility for the neighbours to provide continued structural support for the owner's building.

5.7 I also note that the parties are in agreement that this determination is restricted to the fire resistance of the converted section of the owners' building only and does not extend to any other matters of dispute between the owners and the neighbour.

5.8 On 22 April 2007, after the hearing, the neighbour made further written submissions disputing the owners' account of the history of the two properties and repeating that the concrete wall was part of the neighbour's building and was entirely owned by the neighbour. The fact that it encroached over the boundary into the owner's property was authorised by the Court-ordered easement. In support of those contentions, the neighbour submitted:

(a) A statement from a person who remembered the concrete wall when there was "no garage on that side which is now owned by [the owners]".

(b) Drawings, date indecipherable, of "proposed alterations" to what is now the neighbour's building which the neighbour claimed to show that the owner's building could not have been in existence at that time.

(c) A legal opinion saying:

> If [the concrete wall] were a boundary wall the easement would not have been necessary. Neither is it a party wall. The Court Order clearly states that the building (and therefore the wall) are [*sic*] owned by [the neighbour].

5.9 On 2 May 2007 the owners responded, saying:

(a) The owners' submissions as to the historical sequence had been obtained from families who had lived on their property or adjoining property.

(b) The drawings submitted by the neighbour appeared to be from 1946, but several applications for building permits had been made in that year, as shown in attached copies of application drawings.

(c) There was a difference of legal opinions as to the "ownership" of the concrete wall, and:

> . . . it will be difficult to work out a way forward on any remedial work unless the status of the concrete wall is established.

5.10 On the view I take as to the phrase "as nearly as is reasonably practicable" in section 46 of the 1991 Act, see in particular 8.1.4 and 8.4 below, I do not need to consider that the legal situation as to the ownership of the wall.

5.11 The owners also said:

> We are concerned that [the neighbour] is continuing to supply information to you after the hearing. There surely has to be some cut off time to receive submissions and I would have thought that would have been the time of hearing.

I recognise that concern, but take the view that I cannot impose any "cut off time" for submissions because section 19(5) of the former Act, now section 186(5), requires me to consider any submissions that I receive before I have made a determination. However, as mentioned in 5.10 above, in this case the post-hearing submissions have not affected my decision.

5.12 Following the hearing, I prepared a second draft determination dated 13 June 2007, which was copied to the parties and the New Zealand Fire Service.

5.13 The owners and the neighbour accepted the determination and there was no response from the New Zealand Fire Service.

5.14 The territorial authority responded in a letter to the Department dated 20 June 2007. The territorial authority requested that an amendment be made to the decision that would require the owner to apply for an amendment to the existing building consent to provide for additional fire rating. On receipt of this application the territorial authority must then amend the consent accordingly.

5.15 I have considered this request but am of the opinion that such a requirement would be contrary to the intent of the Act, see paragraph 10 below.

6 The legislation

6.1 As the building consent for the building work was issued in May 2000, the transitional requirements of section 436 of the 2004 Act apply to this determination. Accordingly, the relevant sections of the 1991 Act apply as follows:

46. Change of use of buildings, etc

(2) The use of the building shall not be changed unless the territorial authority is satisfied on reasonable grounds that in its new use the building will—

(a) Comply with the provisions of the building code for means of escape from fire, protection of other property, sanitary facilities, and structural and fire-rating behaviour, and for access and facilities for use by people with disabilities (where this is a requirement in terms of section 47A of this Act) as nearly as is reasonably practicable to the same extent as if it were a new building; and

(b) Continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

7 Compliance with the Building Code

7.1 The relevant provisions of the building code are:

> **C3.3.5** External walls and roofs shall have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units, other residential units, and other property.

7.2 The relevant provisions of the acceptable solution C/AS1 are:

(a) For the roof: Paragraph 7.9, which requires either a parapet on the external wall or fire rating that part of the roof that is within 5 m horizontally of the boundary.

(b) For the external wall (being the fire separation between the owners' property and the neighbour's property): Paragraph 7.10.6, which, in this case requires a FRR of 30/30/30 for a wall less than 1 m from the boundary.

7.3 There are special provisions for open sided buildings such as car ports and the like, but they have no application to this case because the roof of the garage is adjacent to the boundary.

8. Discussion

8.1 General

8.1.1 I note that the building work in question involves the conversion of a rumpus room situated in an existing garage building into a bed and breakfast/homestay unit. I also note that the unit accommodates fewer than 6 people (which is relevant to the application of C/AS1 but not to the application of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005).

8.1.2 Because the territorial authority's decision to grant the building consent and the corresponding code compliance certificate were made under the 1991 Act, these decisions must be considered in terms of that Act. In particular, I note that the provisions for a change of use under the 1991 Act, and which are applied in this determination, are significantly different than those described in the 2004 Act.

8.1.3 The 1991 Act does not define the term "change of use". Accordingly, the term must be given its ordinary and natural meaning in context. Would "the ordinary New Zealander in the street" say that the change from a rumpus room to a bed and breakfast/homestay unit was indeed a "change of use"? This is not a technical question but a matter of common sense and the ordinary use of language, and using those criteria, I am of the opinion that there has been a change of use for the purpose of the 1991 Act. Although it is not relevant to this determination, I am also of the opinion that the conversion would be a change of use in terms of the 2004 Act because before the conversion the rumpus room came within either use IA or use SH, depending on whether it was used for sleeping purposes, as defined in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005, whereas after the conversion the unit comes within use SA.

8.1.4 As there has been a change of use, section 46 of the 1991 Act applies and the unit is required to comply as nearly as is reasonably practicable with the provisions of the Building Code for the protection of other property against fire.

8.1.5 I consider that, in accordance with clause C3.3.5, a building is require to protect other property against the spread of fire by a fire separation consisting of open space, or a fire rated external wall, or a combination of the two.

8.2 Determination 2005/167

8.2.1 The circumstances of this determination are different from those of Determination 2005/167, which was concerned with the erection of a new garage having a roof supported by timber posts hard up against a neighbour's existing wall and providing no fire separation between the new garage and the neighbour's property. The question there was whether the new building work complied with the building code as required by section 7 of the 1991 Act (and section 17 of the 2004 Act). The question in this determination is whether the owner's building, specifically the wall between the unit and the neighbour's building, complies as nearly as is reasonably practicable with clause C3.3.5 in its new use.

8.2.2 In other words, whereas Determination 2005/167 was concerned with whether new work complied with the building code, this determination is concerned with whether an existing building has been upgraded to comply as nearly as is reasonably practicable with the building code.

8.3 Compliance "as nearly as is reasonably practicable"

8.3.1 Any decision as to whether any particular item of upgrading will bring the building to compliance as "nearly as is reasonably practicable" with the relevant provision of the Building Code is a matter of weighing the cost and other sacrifices involved in that upgrading against the benefits achieved. This process was described in the High Court decision in *Auckland CC v NZ Fire Service*[3], in the following terms:

> "It must be considered in relation to the purpose of the requirement and the problems involved in complying with it, sometimes referred to as 'the sacrifice'. A weighing exercise is involved. The weight of the considerations will vary according to the circumstances and it is generally accepted that where considerations of human safety are involved, factors which impinge upon those considerations must be given an appropriate weight."

The question of "nearly as is reasonably practicable" has been discussed in previous determinations such as Determination 2002/8.

8.3.2 In this case, if the concrete wall is entirely part of the neighbour's building and not part of the owners' building, then the provision of a new fire-rated wall alongside the existing concrete wall would be a significant part of "the sacrifice".

8.4 The concrete wall

8.4.1 After considering the evidence about the concrete wall I conclude that:

(a) At the time of the Court Order the owner's building was supported by the concrete wall. The surveyor's plan annexed to the order shows a "wooden Lean-to Building against [the concrete] wall".

[3] 19/10/95, Gallen J, HC Wellington AP336/93, partially reported in [1996] 1 NZLR 330.

(b) The order was concerned solely with "legitimising" the encroachment by the neighbour's building into the owners' property. It is silent about the use of the concrete wall to support the owners' building.

8.4.2 Whatever may be the legal situation as the ownership of the wall and whether or not it is entirely part of the neighbour's building and not part of the owners' building, I consider that the benefit of installing a new wall to duplicate the fire protection (and the structural support) already provided by the concrete wall would not outweigh the sacrifice involved. In other words, I consider that it would not be reasonably practicable to install a new fire rated wall.

8.5 Other considerations

8.5.1 The owners have claimed that the unit has been internally fireproofed in the sense that the ceiling provides fire separation between the roof space and the room. The neighbour's fire engineer questioned whether the ceiling did in fact have the required fire rating and said that in any case it was not supported by fire rated construction because the concrete wall was not part of the owners' building. Setting aside the question of support, I take the view that the roof space itself must be separated from the neighbour's building irrespective of the nature of the ceiling. In other words, I consider that the space between the top of the concrete wall and the underside of the roof of the unit must be upgraded to provide fire separation between the two buildings.

8.5.2 I realise that the work required to provide such separation could be difficult. However, there are clearly considerations of human safety in this case, particularly related to the safety of the occupants of the neighbour's building if a fire was to break out in the owners' building. This risk is emphasised in the fire engineers' report. In my opinion this is a case where I must give appropriate weight to the human safety benefits achieved by fireproofing the space between the top of the concrete wall and the underside of the roof of the unit. I conclude that those safety benefits outweigh the sacrifice involved.

8.5.3 I conclude that the code compliance certificate should not have been issued because the building work concerned does not comply with the Building Code to the extent required by the 1991 Act (or the 2004 Act).

8.5.4 I also conclude that there is no need to reverse the territorial authority's decision to issue the building consent. I offer no opinion as to whether the territorial authority should have decided to issue the building consent in the first place, but I accept the territorial authority's submission that reversing that decision would have undesirable consequences (see 5.5 above). The fact is that the building consent was issued and the building work was done in accordance with it, so that in terms of the 1991 Act the problem arises only in relation to the code compliance certificate.

9 Other territorial authority concerns

9.1 The territorial authority has also raised two additional matters. The first of these concerned the position of Mr Davies. I accept the territorial authority's submission that Mr Davies is not a party to this determination. However, subsequent to the territorial authority's submission, I have been informed that Mr Davies is acting as agent for the neighbour. As such, I am able to accept the submissions that he has made on behalf of the neighbour.

9.2 The territorial authority has also questioned, taking into account the Limitation Act 1950, whether the neighbour's claim was out of time. I note that both section 393 of the 2004 Act and section 91 of the 1991 Act refer to limitation defences in relation to "civil proceedings". This raises the issue of whether a determination made by the Department falls within the context of a "civil proceeding".

9.3 In order to address the interpretation of the term "civil proceedings", I sought some clarification of general legal advice about this matter. I have now received that clarification and the legal framework and procedures based on this clarification are used to evaluate this issue. The opinion is set out in terms of the 2004 Act, which because the limitation periods are effectively identical, I consider apply equally to those in the 1991 Act.

9.4 The relevant parts of section 393 of the 2004 Act (corresponding to section 91 of the 1991 Act) state:

> **393 Limitation defences**
>
> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

9.5 The legal opinion took the view that the term "civil proceedings" in section 393 does not include determinations. Rather, "civil proceedings" are confined to proceedings to which the Limitation Act applies (i.e. "any proceeding in a Court of law other than a criminal proceeding"). There were a number of reasons for that view.

9.6 First, subsection (1) in section 393 refers to the Limitation Act applying to "civil proceedings". Subsection (2) is clearly meant to link to subsection (1), in that the limitation referred to in subsection (2) applies to the matters described in subsection (1). Accordingly, the reference to "civil proceedings" in subsection (2) refers back to the "civil proceedings" mentioned in subsection (1), which are those proceedings to which the Limitation Act applies.

9.7 Secondly, section 391 provides that any "civil proceedings" against a building consent authority in respect of the performance of its statutory functions in issuing a building consent or code compliance certificate "must be brought in tort and not in contract". Given that determinations cannot be brought in either tort or contract, section 391 indicates that the term "civil proceedings" in the Building Act does not include determinations.

9.8 Thirdly, all statutory definitions of "civil proceedings" and case law on the meaning of "civil proceedings" are focussed on actions being brought in a court. The usages of "civil proceedings" most often referenced in cases are the definition of proceeding in rule 3 of the High Court Rules as set out above ("any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory

application") and section 2 of the Judicature Act 1908 which defines "civil proceedings" as follows:

> **Civil proceedings** means any proceedings in the Court, other than criminal proceedings.

9.9 These two definitions, other statutory usages, and relevant case law, are all predicated on the basis that "civil proceedings" are court-based. The conclusion reached in the legal opinion was that the Limitation Act and section 393 of the 2004 Act do not apply to determinations, because determinations are neither an "action" under the Limitation Act nor "civil proceedings" under section 393 of the 2004 Act. I concur with that view.

9.10 However, although not mentioned in the opinion, I note that section 295 refers to "disciplinary proceedings" in relation to the licensing of building practitioners, and section 448 refers to "proceedings under section 54 or section 55 of the former Act in relation to complaints against building certifiers, and to proceedings under Part 9 of the former Act "including court proceedings". However, whether or not this determination is "civil proceedings" for the purposes of section 393, , I take the view that neither the Limitation Act nor section 91 of the 1991 Act would have had any affect on the neighbour's claim. This is because I consider that the application for a determination falls within the time limits set out in each of the Acts. Under section 393(3)(a) of the 2004 Act, the 10-year "long-stop" limitation period runs at the earliest from the date of the building consent (18 May 2000), if not from the subsequent date of the issue of the code compliance certificate, both of which were less than 10 years before the date of application for the determination. A further consideration is the neighbour's purchase of the adjoining building after the code compliance certificate was issued. This impacts on the date within the 10 year limitation when the neighbour could have discovered the alleged defect.

9.11 The territorial authority also questioned whether, if the limitation provision of section 393 of the 2004 Act did not apply, nevertheless the neighbour's application was made too late to the point where it should be refused under section 179 of the 2004 Act as being "frivolous or vexatious".

9.12 I take the view that any refusal under section 179 must be made within 10 working days after the receipt of the application as provided by section 184. In fact, I decided to accept the application and it is now too late to say that I should not have done so. However, I offer no opinion as to the circumstances in which I have the power to reject an application under section 179.

10 What is to be done?

10.1 It is not for me to decide directly how the defects are to be remedied and the fireproofing brought to compliance with the Building Code. That is a matter for the owners to propose, by way of an application for an amendment to the building consent, and for the territorial authority to accept or reject.

10.2 It is also not for me to say how urgently the matter should be treated, but I note that:

(a) The risk of fire occurring in the unit and spreading to the neighbour's property does not appear to come within the term "immediate danger" as used in section 128 of the 2004 Act.

(b) That risk has not been significantly increased in that, in terms of C/AS1, the conversion from the original use to the new use did not involve a change of fire hazard category.

(c) The owners have accepted bookings for the unit so that it would significantly increase the sacrifices mentioned in 8.3.1 above if remedial work were to be undertaken during periods when the unit is already booked.

(d) It is for the owners to consider the potential effects of the effective cancellation of the code compliance certificate, whether in terms of insurance or otherwise.

(e) Co-operation between the owner and neighbour will be required to achieve the required building work.

11 The decision

11.1 In accordance with section 188 of the Building Act 2004, I hereby:

(a) Determine that the conversion does not comply as nearly as is reasonably practicable with the provisions of the building code for the protection of other property.

(b) Reverse the territorial authority's decision to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 July 2007.

John Gardiner
Manager Determinations