



Determination 2010/043

Strengthening of a two-storey commercial building subject to a change of use at 1 Shakespeare Road, Napier

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 the Department.
- 1.2 The parties to this determination are:
- the owner of the building, The Barons Ltd (“the applicant”), acting through its legal advisors (“the applicant’s legal advisors”)
 - the Napier City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.3 The determination arises from the decision of the authority to refuse to issue a code compliance certificate in respect of an amended building consent for work to a two-storey building undergoing a change of use, following the applicant’s decision not to carry out work on the upper floor.
- 1.4 While the applicants have sought a determination on whether the authority was correct to refuse the code compliance certificate, I consider I am required to base the matter to be determined on the statutory decisions the authority was required to make with respect to the amendment of the building consent. The matter for determination² is whether the authority correctly exercised its powers under section 115³ when it considered the application for the amendment to the building consent, and therefore whether the authority’s decision to issue the amended building consent was correct.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

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.

² In terms of section 177(b)(i) of the Act

³ In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The building

2.1 The building dates from around 1934. The building comprises a steel frame encased in concrete with double brick infill panels, reinforced concrete floors, and timber-framed internal partitions. The roof comprises steel cladding on timber trusses. The existing two-storey commercial building contained offices and associated facilities on the upper floor and retail premises on the ground floor.

2.2 The scope of the original work

2.2.1 The original consent was for the building to be gutted and hotel suites to be provided on the upper floor, and retail premises to be reinstated on the ground floor.

2.2.2 The work constituted a change of use under the Building (Specified Systems, Change of Use and Earthquake-prone Buildings) Regulations 2005, and therefore triggered the change of use provisions under the Act.

2.2.3 Accordingly, the whole building was to be structurally upgraded, which included the construction of concrete shear walls, strengthening the double brick panels, and securing the brick parapets to the roof at the upper level.

2.3 The scope of the revised work

2.3.1 The applicants decided not to proceed with the hotel suites on the upper floor, and the work to the upper floor was reduced to changes to the stairway foyer only.

2.3.2 The ground floor conversion was revised to provide one retail outlet and two small cinemas. This change of use would also have triggered the change of use provisions under the Act. Strengthening work to the ground floor only was completed as part of this work.

3. Background

3.1 The applicant applied for a building consent on 23 October 2007 and a building consent (No 071084) was issued by the authority on 17 December 2007. The application for the consent noted that the building work was to:

Earthquake strengthen and upgrade the structural frame of the existing building, then convert the upper floor into 10 hotel suites with en-suites. Ground floor conversion to reception/office and service areas with separate retail tenancy.

3.2 The consent documentation included a detailed set of structural drawings numbered S1 to S13. The drawings detailed strengthening work to the ground and upper floors, including addition of several new reinforced concrete shear walls, as well as securing the building's parapets. In this determination when reference is made to upper floor strengthening this is to be taken as meaning all strengthening work other than that for the ground floor.

3.3 I have assumed that the consent was considered by the authority as a change of use in terms of section 115 and that it considered the structural proposals detailed in drawings S1 to S13 would bring the building into compliance with the Building Code as near as is reasonably practicable.

3.4 On 23 January 2008, the applicant applied for a certificate for public use. The application noted that the application was for:

The ground floor only of the [building] for the purpose of a shop displaying areas of local produce including wine tasting and sales, jewellery, local foods and locally produced products/artworks/photos.

- 3.5 On 4 February 2008, the authority issued a certificate for public use that related to “all of the ground floor and foyer of the [upper] floor only”. The work on the ground floor level was constructed in general accordance with the plans and specifications, and a PS4 Construction Review producer statement has been issued by the design engineer.
- 3.6 Following a decision by the applicant to modify the ground floor of the building only, meetings were held between the applicant and the authority, regarding the amended re-development. The applicant maintains an authority officer agreed the amended proposal could proceed on the basis that a structural upgrade would not be required for the upper floor.
- 3.7 This view was not supported by the authority. On 1 May 2008, the authority’s officer wrote to the applicant stating:
- With reference to our meeting on the 30th April 2008.
- I can confirm that to create the proposed small public theatres in the building, a further change of use will occur.
- Before approval can be given for the change of use, the structural upgrade as proposed in Building Consent 071084 will have to be completed.
- 3.8 However, in a letter to the applicant dated 20 May 2008, the authority’s officer stated:
- With reference to my letter dated 1 May 2008.
- I can confirm that the structural upgrade mentioned in the letter applies to the ground floor only.
- 3.9 The applicant forwarded the “Deviation Application Form for an Approved Building Consent” on 27 August 2008 and the authority approved the application on 29 August 2008. The description on the application stated:
- Creating two small cinemas max 50 people each – suitable for 20 min[ute] films.
- I note that the ‘two small cinemas’ referred to are located on the ground floor.
- 3.10 A drawing dated “Sept’ 08” showing the proposed upper and ground floor amendments was prepared by the applicant’s architects. The upper floor plan was notated “existing floor plate – no work required”.
- 3.11 On 30 September 2008, the authority wrote to the applicant noting:
- I can confirm that now the [hotel suites] have been removed from the top floor of the building the proposed Type 2F Fire Alarm system will comply with the Building Code.
- 3.12 On completion of the work the applicant approached the authority for the issue of a code compliance certificate. The authority declined to issue the certificate because all the strengthening work as detailed in drawings S1- S13, specifically the upper floor strengthening, had not been carried out.
- 3.13 The applicant’s legal advisors wrote to the authority on 2 September 2009, setting out the background to the dispute and noting that the applicant would not have proceeded with the project had it been aware that the strengthening of the upper floor was required. It was understood that there was ‘no dispute about the work undertaken, it being compliant in all respects with the amended consent and applicable Code requirements’. The letter also set out opinions relating to the applicant’s legal position, which supported the issuing of a code compliance certificate for the building work as carried out.

3.14 In a letter to the applicant's legal advisors dated 9 September 2009, the authority noted that:

It was not the intent of [the authority's officer's] letter dated 20 May 2008 to give a waiver from the structural upgrade of the top storey of the building. It was to allow [the applicant] to complete the ground floor area and open the building to the public for the start of the Cruise ships arriving for the summer period.

Before a Code Compliance Certificate can be issued the structural work to the top storey must be completed in accordance with the building consent issued.

3.15 The application for a determination was received by the Department on 2 November 2009.

4. The submissions

4.1 I consider that the applicant's legal advisors' letter to the authority dated 2 September 2009 clearly sets out the applicant's arguments regarding the determination.

4.2 In a letter to the Department dated 24 November 2009, the authority stated that it was not its intention to waive the structural upgrade of the upper floor. Rather, it was to allow for the issuing of a certificate of public use for the ground floor. The authority was of the opinion that the structural upgrading of the upper floor will have to be completed before a code compliance certificate can be issued for the building. The upgrading was required even though the upper floor was no longer to be developed.

4.3 The authority forwarded copies of the:

- building consent and associated documentation
- structural specification and calculations (the latter in a report dated August 2007)
- authority's inspection sheets
- Certificate for Public Use and the application for same
- Deviation Application Form
- Fire Design Report
- correspondence between the parties.

4.4 Further to the information provided with the application for a determination, the applicant's legal advisors wrote to the Department on 15 December 2009 forwarding additional information.

4.5 This additional information included copies of the:

- building consent application, including structural drawings S1 to S13
- Certificate for Public Use and the application for same
- drawing dated September '08 showing the amendments to the two floors and noting for the first floor "existing floor plate – no work required"
- Producer Statement (PS4) from the applicant's structural engineer, in respect of the "seismic strengthening to ground floor of existing two storey building"
- Fire Design Report
- correspondence between the parties.

5. The draft determination

5.1 Copies of a draft determination were forwarded to the parties on 12 February 2010. The authority responded on 25 February 2010 accepting the draft without further comment.

5.2 The applicant's legal advisors responded to the draft determination in a letter dated 24 March 2010. The letter stated that the applicant had concerns regarding paragraph 6.3.4 of the draft (now paragraph 7.3.4) saying that:

the issue taken up [in 7.3.4] of the draft determination was not the issue in fact put up for determination, and that in effect the Chief Executive has retrospectively extracted the Authority from a series of decisions upon which the applicant relied ... when on account of the information provided, it was open to the Chief Executive to find that there has been compliance as nearly as is reasonably practicable.

Further that there is no substantive (as opposed to opportunistic) reason for the Code Compliance Certificate not to be issued for the work actually done.

5.3 I do not accept the applicant's legal advisor's position, as, in my view, the matter that I was asked to determine was based upon on incorrect application of the legislation by the authority. I therefore do not accept the need to amend the matter to be determined.

5.4 The second draft determination was forwarded to the parties for comment on 1 April 2010. The authority accepted the second draft without comment.

5.5 The applicant's legal advisors said that the second draft was 'not accepted but no further comments or submissions will be forthcoming, nor is a hearing sought'. The applicant's legal advisors said that they 'look forward to a copy of the final determination'.

6. The relevant legislation

6.1 The relevant sections of the Act include:

112 Alterations to existing buildings

(1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—

(a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—

(i) means of escape from fire; and

(ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and

(b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

(2) Despite subsection (1), a territorial authority may, by written notice to the owner of a building, allow the alteration of an existing building, or part of an existing building, without the building complying with provisions of the building code specified by the territorial authority if the territorial authority is satisfied that,—

(a) if the building were required to comply with the relevant provisions of the building code, the alteration would not take place; and

(b) the alteration will result in improvements to attributes of the building that relate to—

- (i) means of escape from fire; or
 - (ii) access and facilities for persons with disabilities; and
- (c) the improvements referred to in paragraph (b) outweigh any detriment that is likely to arise as a result of the building not complying with the relevant provisions of the building code.

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will—
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

(1) Meaning of earthquake-prone building

122 Meaning of earthquake-prone building

- (1) A building is **earthquake prone** for the purposes of this Act if, having regard to its condition and to the ground on which it is built, and because of its construction, the building—
- (a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); and
 - (b) would be likely to collapse causing—
 - (i) injury or death to persons in the building or to persons on any other property; or
 - (ii) damage to any other property.

6.2 The relevant section of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005 include:

7 Earthquake-prone buildings: moderate earthquake defined

For the purposes of section 122 (meaning of earthquake-prone building) of the Act, moderate earthquake means, in relation to a building, an earthquake that would generate shaking at the site of the building that is of the same duration as, but that is one-third as strong as, the earthquake shaking (determined by normal measures of acceleration, velocity, and displacement) that would be used to design a new building at that site.

7. Discussion

7.1 General

- 7.1.1 Various discussions and additional exchanges of correspondence have taken place between the applicant and the authority. There are conflicting views between the parties as to the intent of these negotiations.
- 7.1.2 From the information that I have received, and in view of the applicant's structural engineer's PS4 (refer paragraph 4.5), I am of the opinion that, in terms of section 115, the adequacy of the building work undertaken to date is not in dispute.
- 7.1.3 Accordingly, this determination only considers the effect the building's change of use has on the authority's decision not to issue a code compliance certificate for the work completed to date, and to require the structural upgrading of the upper floor.

7.2 The change of use

- 7.2.1 In the letter to the authority of 2 September 2009, the applicant's legal advisors have argued that section 115 should be subject to the same analysis as section 112 in respect of the matter in dispute. However, I note that unlike section 112, section 115 requires that a building in its new use must comply, as nearly as is reasonably practicable with the "structural performance" provisions of the Building Code.
- 7.2.2 The change of use as currently intended is in accordance with the uses set out in Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-Prone Buildings) Regulations 2005. While the documentation provided to me indicates a very confused process, I am of the opinion that the overall revised change of use as currently intended is in respect of:
- the inclusion of two cinemas on the ground floor of the building, which are substituted in lieu of the retail areas detailed in the originally approved building consent documentation and that area continuing without alteration in its pre-existing use
 - the deletion of the 10 hotel suites on the upper floor shown on the originally approved building consent documentation and that area continuing without alteration in its pre-existing use.
- 7.2.3 While a plan was produced showing the reduced work to the upper floor, its date of September 2008 post-dates the Deviation Application Form of 29 August 2008 for the creation of two cinemas. The letter from the authority to the applicant of 20 May 2008, which confirmed that the structural upgrade applied to the ground floor only, was on the authority's letterhead and specifically referred to building consent No 071084. The authority also confirmed in its letter to the applicant's fire engineers of 30 September 2008 that the hotel suites had been removed. These two letters can be considered as being documented acceptance of changes to the building consent regarding the upper floor.

7.3 Amendments to the original building consent

- 7.3.1 The applicant's legal advisors are of the opinion that the authority has approved an amended consent that did not include the requirement to structurally upgrade the upper floor. Therefore, the authority must issue a code compliance certificate for the as-built work as that work complies with the amended building consent.

- 7.3.2 The Deviation Application Form approved by the authority on 29 August 2008 was “for an approved building consent”. Therefore, while it was couched in terms of a change of use (in relation to the creation of the cinema spaces), I consider that it is in effect an approved amendment to the original building consent.
- 7.3.3 However, the Deviation Application Form does not mention what is accepted in terms of the requirement to structurally upgrade the upper floor level. The applicant’s view is that the authority’s correspondence of 20 May confirmed the authority deleted this requirement. The authority is of the opinion that this correspondence was merely in regard to the application for a Certificate of Public Use relating to the lower floor only. The applicant maintains that the ground floor alteration would not have taken place if it had known that there was still an upper floor strengthening requirement.
- 7.3.4 Regardless of what was intended by the parties, I consider that I must determine the matter at issue in terms of the requirements of the Act. As such, I must decide whether an amendment that excluded the structural strengthening of the upper floor would be appropriate in the current circumstances.

7.4 The extent to which the building is earthquake-prone

- 7.4.1 I have seen no information from the parties about the degree to which the building is considered earthquake prone under section 122 of the Act, the authority’s policy with respect to earthquake-prone buildings under section 131 of the Act, and the time that has been given for the building to be strengthened.
- 7.4.2 In my view, any consideration of the required strengthening work under section 115 should not be taken in isolation from the outcome of the assessment conducted and any policy developed under sections 122 and 131 of the Act.

7.5 Compliance “as nearly as is reasonably practicable”

- 7.5.1 Section 115 requires a territorial authority to give the owner written notice that it is satisfied on reasonable grounds that the building in its new use will comply, as nearly as is reasonably practicable, with certain provisions of the Building Code, including those regarding the structural performance of the building. Based on the documentation that has been provided by the parties, there is no evidence that the required written notice was given by the authority with the amended change of use.
- 7.5.2 It is noted that in the authority’s approach to the original building consent for the first proposed change of use, the “as nearly as is reasonably practicable” test under section 115 appears to have been properly applied.
- 7.5.3 In Determination 2006/78 I said:
- 5.1.5 In considering any particular item of upgrading, the [precursor to the Department] applied the interpretation of the words “as nearly as is reasonably practicable to the same extent as if it were a new building” decided by the High Court in *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330, an appeal against Determination 93/004, in which it was held that:
- [Whether any particular item of upgrading is required] 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.

7.5.4 The intention of the original building consent, in terms of section 115, was for the whole of the building to be strengthened. However, regarding the reduced scope of the as-built work, I consider it appropriate to reapply the same approach set out in Determination 2006/78, whereby the life-safety benefits of the building as a whole being structurally upgraded, must be weighed against the sacrifices involved in carrying out that work.

7.5.5 In this case the following questions arise:

- what is the balance of the benefits and the sacrifices if the owner decides not to do work on the upper floor, and seeks an amendment to upgrade the ground floor only?
- Does not upgrading the upper floor maintain (or create) an unacceptable hazard to people in the upgraded ground floor, e.g. from falling masonry?

7.5.6 Given a proper analysis of the matters outlined in paragraph 7.5.5 in the context of the extent to which the building is earthquake-prone as outlined in paragraph 7.4, it might well be reasonable for the authority to allow the building to be upgraded in stages with successive building consents issued floor by floor.

7.5.7 The work as it currently stands underwent no such assessment, and I consider the Council erred in its letter of 20 May 2008 and in issuing its Deviation Application Form of 29 August 2008.

7.6 The issue of a waiver

7.6.1 Lastly, the applicant's legal advisors submit that the authority has the ability to issue a waiver regarding the additional structural strengthening pursuant to section 67, which I take to mean a waiver of Building Code Clause B1 Structure.

7.6.2 In my view the issue of a waiver of Clause B1 in this situation is inappropriate as the Act, under section 115, specifically provides for the upgrading of existing buildings when they undergo a change of use.

7.6.3 Under the provisions of the Act, the appropriate decisions about code-compliance are made by the authority at the time a change of use is sought.

8. What is to be done next?

8.1 The authority should withdraw the amendment to the building consent that it allowed by its letter of 20 May 2009 and its approved Deviation Application Form of 29 August 2008.

8.2 The authority should then instruct the applicant to reconsider the matter of what is now "as nearly as is reasonably practicable" in terms of structural up-grade given the reduced extent of the revised as-built work.

8.3 In response the applicant should apply for an amendment to the building consent. The application must be accompanied by plans and specifications, including revisions to structural drawings S1-S13, detailing the revised strengthening work along with justification as to why the applicant considers its proposals are adequate in bringing the building into compliance with the Building Code "as nearly as is reasonably practicable".

8.4 I note here that, given that the upper floor is no longer to be gutted, as was originally proposed, the full extent of the strengthening required in the originally consented

work may no longer be reasonably practicable. That is not to say that no strengthening work is required or can be undertaken. It may, for example, be reasonably practicable to secure the roof parapets. Whether this is the case or not is for the applicant to substantiate to the authority.

8.5 On receipt of the applicant's application for amendment to the building consent, the authority must consider the arguments and details presented to determine if the requirements of section 115 will be met. If so, it must issue an amendment to the building consent.

8.6 When the work detailed in the amended building consent has been completed, the applicant can apply for a code compliance certificate in respect of the amended consent.

9. The decision

9.1 In accordance with section 188 of the Act, I determine that the authority did not correctly exercise its powers under section 115 when it issued the amendment to the building consent. I therefore reverse the authority's decision to issue the amended building consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 May 2010.

John Gardiner
Manager Determinations