



Determination 2010/72

Subject to clarification of 31 January 2011¹

The refusal to issue a building consent for a proposed change of use to an existing building to establish a restaurant at 20 Vine Street, Whangarei

1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004² (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to this determination are:

- Whangarei District Council as the applicant carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”)
- L W Nelson Trust, the building owner (“the owner”), acting through the licenced building practitioner
- Mr I Beattie, the licenced building practitioner responsible for preparing the building consent application documentation (“the LBP”).

1.3 This determination relates to the refusal of the authority to issue a building consent for a proposed change of use to an existing building to establish a restaurant, as it considers the documentation provided with the building consent application is inadequate and does not meet the requirements of section 45 the Act³.

1.4 I therefore take the view that the matter for determination⁴ is whether the authority correctly exercised its powers under section 115 for the proposed change of use in that it refused to grant a building consent under section 50.

1.5 I have been informed by the LBP that the application for a building consent has been withdrawn. According to the LBP, this has arisen ‘due to serious structural deformation uncovered in the roof structure’. While matter in dispute may no longer

¹ The clarification is appended to this determination as pages 15 to 21.

² 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.

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.

⁴ In terms of section 177(b)(i) of the Act

exist, the authority has not withdrawn the application and has required me to make a decision on the matter as described in paragraph 1.4.

- 1.6 In making my decision, I have considered the submissions of the parties, an internal Departmental report that I have commissioned (“the report”), the opinion of an independent expert commissioned by the Department (“the expert”), and the other evidence in this matter including that provided at the hearing.

2. The background

- 2.1 A building consent application dated 4 September 2009 was forwarded to the authority by the LBP on behalf of the owner. The application included two attached plans and noted that the ‘internal fitout of restaurant (counters, serverys, etc) not included’.
- 2.2 The LBP forwarded further addenda documents to the authority on 4 September 2009 that included:
- a scope of works and a specification
 - additional detail drawings
 - a set of three drawings showing the structural improvements undertaken in 1979.
- 2.3 The authority issued a project information memorandum (“PIM”) on 29 September 2009.
- 2.4 On 30 September 2009, the authority informed the LBP that, as the documents provided with the building consent application were ‘deficient in detail and are not of a standard that allows the application to be accurately processed in a way that would enable a building consent to be issued’, the building consent application was suspended. The authority requested two sets of amended plans and specifications, and listed some of the items that the authority considered to be outstanding.
- 2.5 The LBP responded in a letter to the authority dated 5 October 2009, rejecting the authority’s contention that the documents presented were deficient in detail or in their presentation. It was noted that they had been prepared by a ‘Level 3 Design Licensed Building Practitioner’ and that it was not considered necessary to have the design reviewed by the Fire Service.
- 2.6 Various meetings were held in early October 2009 involving the authority and the LBP to discuss aspects of the building consent application.
- 2.7 In a letter to the authority dated 23 October 2009, the LBP noted that, in respect of the authority’s queries regarding the building consent application, revised documentation would be provided.
- 2.8 In a fax to the authority dated 2 November 2009, the LBP noted that the sewer was a concrete encased pipe, not the 100mm PVC pipe shown on the 1997 plan, and advice was required from the authority as to its acceptance of the existing line.
- 2.9 On 10 November 2009 the LBP forwarded additional documentation to the authority, including new information over and above that forwarded on 4 September 2009. Also supplied was a producer statement of the same date stating that the ‘development proposal ...has been undertaken in accordance with the New Zealand Building Code’.

- 2.10 The documentation forwarded on 10 November 2009, included plans and amended specifications covering the following elements:
- fire safety precautions
 - roofing
 - entry porch
 - kitchen and bar appliances
 - drainage and waste reticulation
 - gas supply and reticulation
 - ventilation
 - fire design
 - electrical distribution
 - miscellaneous items of kitchen equipment, the attic stairway, and the exit doors.
- 2.11 In a letter to the LBP dated 17 November 2009, the authority advised that, after reviewing the documents supplied for the building consent application, the authority was unable to issue the building consent as the application did not comply with section 45, and that it would be making an application for a determination.
- 2.12 In a memo to the authority dated 18 November 2009, the LBP set out the background to the building consent application and stated that the matter should be resolved without recourse to a determination.
- 2.13 The application for a determination was received by the Department on 23 November 2009.
- 2.14 The LBP wrote to the Department on 24 November 2009, requesting that the authority's application for a determination be refused. The LBP did not consider that there was any dispute between the parties requiring the determinations service of the Department. The LPB also stated that the building consent application did not 'introduce any parameters that could not be approved by the [authority] including the single zone fire design'.

3. The building work

- 3.1 The proposed building work consisted of a change of use within a single-storey commercial building to establish a restaurant occupying the total area of the building. The change of use consisted of a main dining and entertainment area, an 'alfresco' dining area and entrance, a bar, a kitchen, an office, and toilet facilities.
- 3.2 The existing building is constructed with concrete masonry exterior walls and a curved metal-clad roof supported on structural steel framing. According to the LBP, the end walls of the building were strengthened in 1976. I note that the building consent application documentation provided to me does not contain details of the existing building layout or any cross-sections.
- 3.3 I have been informed that the building, which previously housed a video rental shop, has been vacant for some time.

4. The submissions

4.1 In a covering letter addressed to the Department and dated 18 November 2009, the authority stated that it believed that the documentation submitted with the initial building consent application is 'deficient both in quantity and [clarity] of detail and it is not clear what the intended works entail'. The subsequent information that had been supplied to the authority still left the situation confused. The authority was seeking a determination because it was not satisfied that the documentation provided satisfies the conditions of section 45 of the Act.

4.2 The authority supplied copies of:

- the building consent application
- correspondence that had passed between the authority and the LBP
- the various plans and specifications that had been supplied during the building consent application process
- a summary of the authority's assessment and correspondence.

4.3 The LBP responded in the letter to the Department of 24 November 2009, requesting the Department refuse the application (refer paragraph 2.14).

4.4 Copies of the submissions and other evidence were provided to the parties.

5. The internal report

5.1 As described in paragraph 1.6, I commissioned an internal Departmental report regarding the status of the plans and specifications provided by the LBP on behalf of the owner in an application for a building consent. The report was prepared by the group within the Department that has responsibility for the performance of building consent authorities.

5.2 The report listed some quality and design information limitations (omissions and inadequacies) that were identified in the design plans and specifications submitted as part of the building consent application. These comments, which were also confirmed by the expert (refer to paragraph 6.10), were in relation to the quality and detail set out on the plans.

5.3 The report stated that because of these limitations, it would not be possible for a building consent authority to be satisfied on reasonable grounds that the proposed building complied with the Building Code. This is the requirement under the Act before a building consent authority can grant a building consent.

6. The expert's opinion

6.1 Following the comments of the LBP regarding the competence and partiality of the Department, (see paragraph 7.2), I engaged an expert, who is a Registered Architect⁵, to provide me with an expert opinion as to whether or not the documents as submitted by the LBP would satisfy the requirements of section 45.

6.2 The opinion considered in particular the requirements of sections 45(1)(b) and (c), which require that:

⁵ Registered Architects are under the Registered Architects Act 2005 are treated as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

- the plans and specifications submitted be those that are required by regulations made under section 402; or if the regulations do not so require, required by a building consent authority
- the application contain or be accompanied by any other information that the building consent authority reasonably requires.

I summarise the main issues raised by the expert under these two requirements in the following paragraphs.

- 6.3 The expert noted that as the building work involved the conversion of a commercial building to a licensed restaurant, it was a change of use. As such, the Act requires a number of assessments to be made and actions to be taken by the authority. These include the requirement for the authority to be satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the documents submitted. Section 48 entitled the authority to require further information in respect of the application during the course of processing the building consent. An authority also requires an applicant to describe the proposed specified systems in order to issue a compliance schedule.
- 6.4 Section 115 describes the code compliance requirements in relation to change of use. The opinion focused on the documentation required to satisfy the six areas where compliance is required as nearly as is reasonably practicable under section 115, and the adequacy of documentation for other code compliance assessments. If section 115 was not satisfied, or assessment was not possible, the building owner would be unable to proceed with the change of use or any related building work. Under section 115, the authority must decide if it is able to provide the building owner with 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 every provision of the building code that relates to:
- i) means of escape from fire
 - ii) protection of other property
 - iii) sanitary facilities
 - iv) structural performance
 - v) fire-rating performance
 - vi) access and facilities for people with disabilities.
- 6.5 Regarding the compliance schedule specified systems, it was noted that on the building consent application form: the boxes for building maintenance units and mechanical smoke control were ticked despite these elements not being shown on the plans and specifications; whereas the boxes against automatic or manual emergency warning systems for fire or other dangers and the final exits, which were shown on the documentation, were not. Accordingly, the submitted documentation was both incorrect and inadequate for the purposes of issuing a compliance schedule.
- 6.6 The opinion also considered in detail the six requirements as set out in paragraph 8.4 that are required to be considered by the authority in terms of section 115. The conclusions reached by the expert were:

- i) With regard to the means of escape from fire, the 'Fire Design' submitted on 10 November 2009 is a specification or a scope of work but does not describe how the LBP has calculated what has to be provided to obtain C/AS1⁶ compliance. In the absence of a fire report or design notes, the authority would have to carry out its own calculations or application of C/AS1 to determine compliance with the means of escape from fire. However, sufficient information had been provided of what was intended and an initial assessment of compliance for the purposes of section 115 was required. Possibly, such an assessment would highlight non-compliance or the need for further detail, but that would then become a request for further information under section 48.
 - ii) With regard to the protection of other property, there was no information provided concerning such matters as the current fire-rating of the boundary walls, details of existing or proposed parapets or other fire-containment construction, the required fire-rating for the boundary walls and the like. This was information necessary to enable an assessment to be made. As such, the submitted documentation was inadequate and deficient in detail for the purposes of making an assessment under section 115.
 - iii) Considering the sanitary facilities detailed, there was a discrepancy in the occupant load of over 150 between the 'design' occupant load and the 'provided' occupant load, as well as an incorrect application of the male/female split of occupant load, and no explanation was provided for the proposed significantly lesser provisions. As the submitted documentation was inconsistent and incorrect, it was inadequate and deficient in detail for the purposes of making an assessment under section 115.
 - iv) There was no structural report or information provided addressing such matters as the structural performance of the whole building as existing, the required code-compliant structural performance of the building, and what additional necessary structural work may be proposed to enable an assessment to be made. Accordingly, the submitted documentation was inadequate for the purposes of making an assessment under section 115.
 - v) There was no information provided concerning the current fire-rating performance or what was required for compliance with the building code to be met; all of which was necessary to make a proper assessment under section 115.
 - vi) As there was no information provided on critical aspects of accessibility for people with disabilities, the submitted documentation was inadequate and deficient in detail for the purposes of making an assessment under section 115.
- 6.7 The expert also considered the means of compliance with other clauses of the Building Code. In general, the expert was of the opinion that the documentation was deficient in construction detailing and specification, which led to uncertainty and confusion regarding what was intended, how it was to be built and finished, and how code compliance would be achieved. One obvious example of this was how the roof access was to be built initially and how it would be rendered weathertight thereafter. Again, the submitted documentation was inadequate and deficient in detail for the purposes of making an assessment of code compliance.

⁶ Compliance Document C/AS1 Fire Safety

- 6.8 In considering the subsequent correspondence and documentation that had been submitted, the expert noted that though it was difficult to follow the changes the end result still left an unacceptable level of uncertainty and a lack of clarity and detail about what was proposed. In these respects, the submitted documentation remained inadequate and deficient in detail for the purposes of making an assessment under section 115 or for establishing code compliance.
- 6.9 The expert found that the documentation provided was of a poor quality, not easy to follow and lacked clarity about the scope and detail of intended work. Basic information, such as a site plan, existing floor plan and demolition notes, was missing, as was cross-referencing (either by section or detail markers), construction and finishing details, and the necessary dimensional information. Information was also missing on the copies, due to annotations being too close to the sheet edges. The expert was also of the opinion that the specification was a description of the scope of work rather than a technical specification.
- 6.10 The expert concluded that:
- The submitted documentation was inadequate and deficient in detail for the purposes of making an assessment under section 115 or for establishing code compliance
 - To make up for the inadequacies of the design and documentation, the documentation was reliant to an unacceptable level on a highly competent builder being involved. Such a builder was required if the finished building work was to achieve code compliance
 - With respect to the application, it was the expert's opinion that the documents and information submitted did not satisfy the requirements of section 45 of the Act and the authority was correct to refuse to issue a building consent.
- 6.11 The LBP commented on the expert's report in a letter to the Department in an email dated 16 April 2010. I summarise the relevant matters raised by the LBP as follows:
- as the building has always been occupied as a commercial building, the LBP did not agree with the expert's opinion that a change of use had occurred
 - the authority's application for a determination was made prematurely
 - the LBP queried whether the expert had been supplied with all the relevant documentation, especially as regards the Fire Design supplied by the LBP
 - the LBP referred to the lack of the implementation by the authority of its 1991 and 2004 Earthquake Prone Building Policies
 - because of the concerns that had been raised by the LBP, a hearing would be appropriate.
- 6.12 In two emails to the Department sent on 20 April 2010, the expert reiterated that he did not consider that the LBP had provided a 'fire report' or 'design notes'. Based on what is required in these instances the expert considered that what had been supplied was more a specification or a scope of work. While this states what is intended to be supplied, no calculations are provided to substantiate this. Accordingly, while the provision for means of escape is adequately described, how compliance with C/AS1 is achieved is not. This requires the authority to carry out its own investigations.

- 6.13 The expert also confirmed that he had been provided with all the documentation that had been forwarded to the Department regarding this determination.
- 6.14 In an email to the Department dated 20 April 2010, the LBP queried if a change of use under section 115 was applicable, why was it not notified on the PIM? Unless the determination recorded that the authority 'did not reasonably enquire for further information and overlooked sections 115 and 122', then a hearing would be necessary.

7. The first draft determination

- 7.1 The first draft determination was forwarded to the parties for comment on 3 February 2010.
- 7.2 The LBP did not accept the draft determination and responded in a letter to the Department which was received on 26 February 2010. The letter contained comments on various paragraphs of the draft determination but also made references regarding the partiality and competence of the Department and the authority. I do not think that this determination is the correct vehicle to address those comments and they should be dealt with in due course through other channels. In addition, the LBP asserted that 'The involvement of a senior level LBP should be sufficient to ensure compliance in its structure'.
- 7.3 The LBP's submission disputed several of the statements made in the internal report and also commented on certain paragraphs of the draft determination. The LBP compared the set of documentation for this project to a set of documentation for a previous determination made by the Department.
- 7.4 Finally the submission noted:

Even though the 'determination' has now become irrelevant, as we are obliged to withdraw the building consent due to serious structural deformation uncovered in the roof structure, we will still insist that the 'final determination' record an acceptance of the building consent documentation as being sufficient to demonstrate that compliance would have been achieved with the issue of a building consent.
- 7.5 I have carefully considered the comments made by the LBP but apart from some minor clarifications, I see no reason why the determination should be amended as requested. The expert's opinion set out in paragraph 6 gives additional weight to this decision.
- 7.6 The authority accepted the draft determination without further comment. The owner did not respond.

8. The hearing

- 8.1 Following the request from the LBP, a hearing was held at Whangarei on 20 May 2010 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act.
- 8.2 The hearing was attended by:
- the authority, represented by three of its officers
 - the LBP
 - the expert

- one other officer of the Department.

8.3 All the attendees spoke at the hearing and the evidence presented by those in attendance enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination. I also note that the expert raised some matters on my behalf with the LBP, in particular the fire safety issues of the proposed building work. The responses of the LBP are included in the following summary.

8.4 I summarise the matters raised by the LBP as follows:

- The initial building consent plans submitted to the authority on 4 September 2009 as a part of the building consent application were outline only and did not detail the restaurant. Further discussions and correspondence ensued between the LBP and the authority. On 30 October 2009, an additional nine plans were supplied and on 10 November 2009, the fire report was discussed with the authority.
- While the LBP was not a fire design expert, the fire design report provided full information that was not responded to by the New Zealand Fire Service. In addition, the authority only raised one query regarding the position of the fire alarm panel.
- The LBP objected to the authority applying for a determination only four working days after the last discussions about the building consent application, and contended that such an application was not necessary in this instance. The LBP also expressed concern that the authority had not raised any concerns regarding the structural stability of the building and other outstanding matters during its negotiations with him.
- It took three weeks to obtain a PIM from the authority and the PIM did not make any reference to the authority's earthquake-prone buildings policy as was required. The authority had not supplied the LBP with any documentation relating to this policy, nor did the property files contain such information.
- While there was no specific application of sections 112 or 115, the actual description of the proposed building work was in itself a change of use. This involved changing an empty building into one containing a restaurant.
- The LBP accepted that there were anomalies in the submitted compliance schedule application form, but pointed out that the building was a relatively simple single-zone building to which C/AS1 applied. The plans clearly indicated what was to be provided in respect of fire safety and if the authority had any concerns, it should have raised these with the LBP. This also applied to compliance schedule items.

8.5 I summarise the authority's response as follows:

- The authority's earthquake-prone buildings policy documentations had been forwarded to the Public Trust ("the owner's trustee") and as there was no requirement to forward them to the LBP, this had not occurred. Details were provided on the authority's web site and the authority had not received any confirmation regarding the policy's implementation from the client. In

addition, the authority was of the opinion that there was no requirement to notify the policy on the building PIM.

- The requirements of sections 112 and 115 were more onerous than the earthquake-prone buildings policy and overrode it.
- The authority considered that the initial application was a full one. The supplementary information might have required a second building consent but it was decided to process it as part of the initial application.
- The authority was of the opinion that, as the documentation finally submitted on 10 November was still inadequate, it was necessary to apply for a determination.
- The lack of detail provided with the first building consent application meant that it was not until 10 November 2010 that the authority was aware the change of use requirements of the Act would apply to the proposed building work. The documents supplied on 10 November did not reflect these requirements.
- The fire design provided a good deal of information but no calculations were provided with it to establish compliance.

8.6 During the process of the hearing, both the authority and the LBP agreed that I could access and consider the submissions made in respect of a complaint raised between the parties.

9. The second draft determination

9.1 Following the hearing, I forwarded the second draft determination to the parties for comment on 15 June 2010.

9.2 The authority accepted the second draft determination without comment. The owner advised that it had no comment to make on the second draft determination.

9.3 The LBP did not accept the second draft determination and made further comment in a letter to the Department dated 1 July 2010. I summarise the LBP's comments as follows:

- The authority did not seek further information from the LBP as required to do so under section 48, nor did not attempt to communicate with the LBP.
- The authority did not raise matters concerning the change of use.
- 'Neither section 112 nor 115 appeared in the building consent application and the [LBP] sought guidance on these issues from [the authority] at the earliest opportunity.'
- The authority did not follow the requirements of its earthquake-prone building policy which stated that the status of the building be recorded on the PIM.

9.4 I have considered the LBP's comments and have amended the determination as I consider appropriate.

10. Discussion

10.1 The dispute between the parties

- 10.1.1 The LBP is of the opinion that, as there is now no dispute between the parties (refer paragraph 7.4), there is no requirement to involve the Department in a determination process and the authority's application for the determination be declined. I do not accept that there is no dispute at this stage between the parties.
- 10.1.2 The authority has clearly not accepted the application for a building consent on the grounds of lack of adequate information. This clearly comes within the terms of section 177(b)(i) concerning a building consent authority's decision to refuse a building consent. Accordingly, I accept that the matter arising between the parties is determinable in terms of the Act.

10.2 The standard of the documentation and the building's change of use

- 10.2.1 I accept the views expressed in the report as described in paragraph 5 and the expert's opinion as described in paragraph 6, which confirms the authority's concerns about the standard of the documentation. Accordingly, I am of the opinion that both the original and the addenda building consent application documentation, prepared by the LBP on behalf of the owner, is lacking the required detail to fully meet the requirements of section 45.
- 10.2.2 While the above deficiencies are of concern, I consider that the major deficiency arising from the documentation centres on the consideration of section 115 of the Act. This section relates to the change of use of a building that requires an authority to be satisfied, on reasonable grounds, that a building after its change of use will comply, as nearly as practicably, with certain provisions of the Building Code.
- 10.2.3 The proposed use of the building as a restaurant constitutes a change of use as described in Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-Prone Buildings) Regulations 2005. The change is from a retail store (designated as having a Working Low (WL)) to a restaurant (with a Crowd Large (CL)). That being the case the requirements of section 115 apply and the building's compliance with the following areas of the Building Code must be considered:
- means of escape from fire
 - protection of other property
 - sanitary facilities
 - structural performance
 - fire-rating performance
 - access and facilities for people with disabilities.
- 10.2.4 In respect of the listed items, I agree with the submissions of the authority and the expert that these matters, with the exception of the means of escape, are not adequately dealt with in the documentation so far provided on behalf of the owner.
- 10.2.5 From the comments made at the hearing and the LBP's response in his email of 16 April 2010 regarding the change of use as identified in the expert's report, I do not believe that the LBP is adequately familiar with the section 115 requirements. This

in turn, is reflected in the building consent application plans. This is despite the LBP having ticked the 'yes' box (against item 6.3 of the building consent application form) that asks, 'Will the building work result in a change of use?'

- 10.2.6 The LBP has noted that the authority did not request further information in the period between when the building consent was applied for and when the application for a determination was made. In this respect, I am of the opinion that the authority could have been more proactive by requesting the additional information that it needed to fully assess the implications of the building's change of use. I note that the original building consent application form supplied by the LBP clearly stated that there was to be a change of use.
- 10.2.7 Therefore, I am of the view that the authority's decision not to issue the building consent was correct. In so doing I note the matters raised herein, in respect of the building consent application documentation, require amendment to the satisfaction of the authority.
- 10.2.8 The LBP has emphasised that he is licenced building practitioner for the licensing classes of Level 3 for 'Site and Design' and that this 'should be sufficient to ensure compliance in [the building's] structure'. However, I consider that this in itself is insufficient to make up for the perceived lack of appropriate details and plans that are evident in the matter to be determined.
- 10.2.9 Indeed, I also note that the fact that the project will not now proceed, because there are serious structural deformations uncovered in the roof structure, is a clear indication that the lack of a specific engineering design in the building consent application documentation was a crucial omission. The Act specifically requires such matters to be considered when a building is undergoing a change of use and this should have been considered before the building consent application was made.
- 10.2.10 The expert has also raised concerns about the incorrect identification, and the inadequacy, of supporting information for specified systems that were to be included in the building. The LBP indicated on the building consent application that the building in question did not have a compliance schedule.

10.3 Conclusion

- 10.3.1 Taking into account the discussion set out above, I have reached the conclusion that the building consent application documentation provided by the LBP, on behalf of the owner, lacked sufficient detail in order to meet the requirements of section 45 of the Act.

10.4 The earthquake-prone building policy

- 10.4.1 During the course of the hearing, the matter of whether the application of the authority's earthquake-prone building policy should have been noted on the building's PIM was raised. The LBP has also submitted that he was not aware that the earthquake-prone building policy existed. In my opinion LBP should have been aware of the policy given his level of approval as an LBP.
- 10.4.2 I am of the opinion that the status of the building in relation to the earthquake-prone building policy is a matter covered by section 35(1)(a)(ii) as being a 'special feature' of the land and should have been included in the information set out on the PIM.

However, I note that the requirement for an authority to issue a PIM to an owner was removed from the Act as from 31 January 2010.

- 10.4.3 While I accept the LBP's comments about the lack of reference on the PIM to the earthquake-prone policy, I do not consider this matter is relevant to the proper application of section 115.

11. The decision

- 11.1 In accordance with section 188 of the Act, I determine that the authority correctly exercised its powers under section 115 for the proposed change of use when it refused to grant a building consent under section 50.

Determination 2010/72 was signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 September 2010.

John Gardiner
Manager Determinations

Appendix: The relevant legislation

The relevant provisions of the Act are:

35 Content of project information memorandum

- (1) A project information memorandum must include—
- (a) information likely to be relevant to the proposed building work that identifies—
 - ...
 - (ii) each special feature of the land concerned (if any);...

45 How to apply for building consent

- (1) An application for a building consent must—
- (a) be in the prescribed form; and
 - (b) be accompanied by plans and specifications that are—
 - (i) required by regulations made under section 402; or
 - (ii) if the regulations do not so require, required by a building consent authority; and
 - (c) contain or be accompanied by any other information that the building consent authority reasonably requires; and
 - ...
 - (f) if the owner applies for a project information memorandum for the building work under section 32 and the project information memorandum is then issued, be accompanied by—
 - (i) the project information memorandum; and
 - (ii) a development contribution notice under section 36 (if any); and
 - (iii) a certificate issued under section 37 (if any); ...

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.

Clarification of Determination 2010/72 regarding the refusal to issue a building consent for a proposed change of use to an existing building to establish a restaurant at 20 Vine Street, Whangarei

1. Background

- 1.1 This clarification of Determination 2010/72 is made by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department, under section 189 of the Building Act 2004 (“the Act”).
- 1.2 The application for Determination 2010/72 (“the Determination”) was received on 23 November 2009, under Part 3, Subpart 1 of the Act. The Determination was made on 2 September 2010.
- 1.3 The parties to the determination were the applicant Whangarei District Council (“the authority”), the owner of the building L W Nelson Trust (“the owner”), and the licensed building practitioner Mr I Beattie (“the LBP”) who was responsible for preparing the building consent documentation.
- 1.4 The determination arose from the refusal of the BCA to issue a building consent for a proposed change of use to an existing building to establish a restaurant. The authority considered that the documentation provided with the building consent application was inadequate and did not meet the requirements of section 45⁷ of the Act.
- 1.5 I considered that the matter for determination was whether the authority correctly exercised its powers under section 115 for the proposed change of use in that it refused to grant a building consent under section 50.
- 1.6 The determination found that the authority correctly exercised its powers under section 115 for the proposed change of use when it refused to grant a building consent under section 50.

2. The application for clarification

- 2.1 I received a letter dated 27 September 2010 from the LBP seeking a clarification of the determination in terms of section 189 of the Act. The letter concluded that the decision of the determination should be modified to record that the authority was ‘obliged to engage the applicant in the provision of further reasonable information that would satisfy the requirements for the issue of a building consent’.
- 2.2 On 14 October 2010 I responded to the request, informing the parties of my views on the matters raised by the LBP and my conclusion that no clarification was required. I invited the parties to make submissions on my proposal not to make a clarification.

⁷ References to sections are to sections of the Act (prior to 7 July 2010), and references to clauses are to clauses of the Building Code.

- 2.3 The authority responded in a letter dated 28 October 2010 and agreed that none of the items required clarification.
- 2.4 The LBP responded in a letter dated 26 October 2010, disputing details contained within the determination and expanding upon the original request for clarification.

3. The legislation

- 3.1 Section 189 of the Act says:

The chief executive may, within 20 working days after making a determination, amend the determination to clarify it if--

- (a) the chief executive... on the application of a party to the determination, considers that the determination requires clarification; and
- (b) the clarification is either--
 - (i) not material to any person affected by the determination; or
 - (ii) agreed to by the parties to the determination; and
- (c) no appeal against the determination is pending.

- 3.2 I am treating the LBP's letters of 27 September 2010 and 26 October 2010 together as an application for clarification under section 189 of the Act.

4. The draft clarification

- 4.1 Copies of a draft clarification were forwarded to the parties for comment on 10 November 2010.
- 4.2 The authority accepted the draft without comment.
- 4.3 The LBP did not accept the draft clarification and responded in a letter to the Department dated 23 November 2010. I have carefully considered the comments made by the LBP and have made amendments where appropriate.

5. Discussion

- 5.1 In seeking the clarification, the LBP originally sought my opinion on the actions the authority 'should have taken' in fulfilling its regulatory duties under the Act.
- 5.2 I note that it is a requirement of the determination process that any submissions made in respect of a determination are copied to the other parties, and that in this determination two drafts were issued to the parties to provide the opportunity for the correction of any errors and for comment.
- 5.3 Paragraph 9.3 of the Determination noted the LBP's submissions in response to a second draft determination, and the Determination was amended to respond to those submissions as I considered appropriate. In this respect I am of the view that, in large part, the Determination has already dealt with the matters raised in the request for a clarification.
- 5.4 I have reviewed the determination and corresponding documentation provided to the determination and respond to items raised for clarification (shown in italics and itemised) below.

5.5 Item 1

In reference to paragraph 2.6 of the determination, there were no ‘series of meetings during the course of the [building consent] application’.

5.5.1 In its application for a determination the authority provided a summary of events titled ‘Summary of BC Assessment/Correspondence’. This referred to the following meetings and provided brief summary of the discussion:

- 12 October 2009, LBP and Senior Building Officer – [refer details in clarification paragraph 6.1]
- 14 October 2009, lessee and Senior Building Officer – outlined the building consent approval process
- 21 October 2009, lessee and Senior Building Officer – explained minimum requirements for further processing of the building consent. (I note it is unclear whether the meeting took place in person or if it was a phone conversation)

5.5.2 In response to the draft clarification the LBP disputes attending a meeting on 12 October and contends that the ‘need for a separate fire design was first raised at the 10th November 2009 meeting and was submitted on 13th November 2009’. I note that the LBP’s view conflicts with the evidence in the authority’s letter of 30 September 2009 to the LBP, which listed outstanding items including:

- a. a fire report from a suitably qualified person
- b. ...
- c. This is a change of use and under Section 46 of the Building Act, must be sent to the NZ Fire Service Design review unit. ...

5.5.3 The LBP also noted that the authority’s references to the ‘lessee’ are incorrect as the ‘restaurantor (*sic*) whom was interested in the property’s development has never been the lessee’.

5.5.4 In respect of this matter the determination is amended as described in paragraph 6.1.

Item 1a

There is no evidence that the authority undertook any processing of the “Fire Design” document in the two working days it had possession of it to substantiate that it contained insufficient information.

5.5.5 In response to the draft clarification the LBP has submitted that ‘No processing of the building consent application could have commenced until after 13th November 2009 when the final submission was provided to the authority’.

5.5.6 Though there was no evidence submitted to the Department which records the authority’s process in reviewing the “Fire Design”, I am of the view that information on how the authority came to its view is not required for me to make a determination as to the authority’s decision. I also note that the expert’s report corroborates the view held by the authority in respect of the adequacy of the documentation provided by the LBP.

Item 1b

The authority did not require further reasonable information in respect of the [building consent] application, and therefore the authority was incorrect in its decision to suspend the application under section 48(2), and

the position the authority should have taken in processing the application with regard to sections 45(1)(c) and 48(2) of the Act in being 'required to engage the applicant in the provision of further reasonable information.'

- 5.5.7 I have not been provided with any record of what specific information was sought by the authority from the LBP, however I note that the letter to the LBP referred to in paragraph 2.4 of the determination included a list of 'some but not all of the outstanding items' that the authority sought.
- 5.5.8 Paragraph 6.1 of this clarification describes further contact between the authority and the LBP. It would appear that the matter of the adequacy of the information supplied and the requirements for further information was in dispute. Although it is not clear whether a 'list' was provided, the authority wrote to the LBP on 27 October 2009 and confirmed that the consent was suspended until the information [as described in a fax from the LBP to the authority] was received. The letter also referred to requirements that would come into play if the consent was staged.
- 5.5.9 The determination found the authority's actions in refusing to issue the building consent were correct due to insufficient detail provided to meet the requirements of section 45 (refer paragraph 10.3.1).
- 5.5.10 I note that the application of section 48(2) to 'suspend' the application for a building consent whilst waiting for further information was also correctly applied by the authority (refer paragraph 2.4 of the determination).
- 5.5.11 Paragraph 10.2.6 of the determination already comments on the actions of the authority in regard to information that it could have required specifically in respect of the change of use.

5.6 Item 2 and Item 4

The 'Earthquake Prone Building Policy' was not a public document, and the building owner was not given advice on the matter. The status of the building was not 'made available' to the LBP or the owner of the building.

No 'formal advice' regarding structural deficiencies was received by the building owner, nor were any 'aspects of an equivalent nature' on the building file held by the authority.

The position the authority should have taken on receipt of the building consent application in regard to section 35(1)(a)(ii) that 'requires the authority to provide relevant information on the special features of the land concerned'

In reference to paragraph 10.4.1 of the determination, how the LBP could have known of the existence of the Earthquake Prone Building Policy.

- 5.6.1 In the LBP's letter of 27 September 2010 seeking a clarification he refers specifically to earthquakes and the possible existence of asbestos within the property as being information that the authority is obliged to provide to the applicant. In response to the draft clarification the LBP states that the 'Dangerous, Insanitary and Earthquake

Prone Buildings Policy' document is not publicly available and that there is no register of earthquake prone buildings.

- 5.6.2 I note that paragraph 10.4.1 to 10.4.3 of the determination covers the matter of the earthquake-prone policy and I believe the view I have taken on this matter is clear and the explanations of this view are already sufficiently detailed in the determination.
- 5.6.3 In addition I note that the 'Dangerous, Insanitary and Earthquake Prone Buildings Policy' provided under the Act is a publicly notifiable document and was developed by the authority after consultation with Whangarei community. The policy document is publicly available, including on the authority's website, and I note that 5.7 of the policy document on the authority's website states that 'Copies of the register will be made available on request and subject to appropriate fees.'
- 5.6.4 The building owner had been formally advised of the status of the building with respect to structural deficiencies and this information was recorded on the building's property file. According to the authority, the LBP was involved in work completed in June 2008 to re-roof the building and remove asbestos. The authority advised that work was undertaken without its knowledge.
- 5.6.5 In response to the draft clarification the LBP stated that the owner has never been advised of the status of the building and that the LBP was not involved in the re-roofing and removal of asbestos prior to June 2008. It was also the LBP's view that the implementation of section 35[(1)(a)(ii) and (2)(a)] must take precedence over section 115.
- 5.6.6 In my view an assessment of the building's structure as required by section 115 would have led to proper consideration of the performance of the building with respect to Clause B1 Structure. The broader requirements of the 'Dangerous, Insanitary and Earthquake Prone Buildings Policy' would have been subservient to such an assessment.
- 5.6.7 In respect of this matter the determination is amended as described in paragraph 6.2.

5.7 Item 3

In reference to paragraph 10.3 of the determination;

specification of the additional information that the authority should have reasonably required for the building consent application to meet the requirements of section 45.

and, no evidence is available (such as processing records of the building consent application) to substantiate that the submission lacked sufficient detail, and 'every relevant clause of the New Zealand Building Code is recorded in the Specification with documentation to support compliance'.

- 5.7.1 The determination is not intended to provide the parties with an exhaustive list of defects or inadequacies but rather to come to a view as to whether the authority's decision was correct. In making the determination I sought evidence, in the form of two reports (refer paragraphs 5 and 6 of the determination) that would assist me by corroborating the views of one party or the other. The reports are also not intended as an exhaustive list; however, they can provide some guidance to the parties.

- 5.7.2 Paragraph 1.5 of the determination also notes that the LBP had withdrawn the application for a building consent; therefore the need for a complete list of information required for the authority to process the consent application is now redundant.
- 5.7.3 In making the determination I sought evidence, in the form of two reports (refer paragraphs 5 and 6 of the determination) as to the adequacy of the detail provided in the building consent application documentation. Both reports supported the view that the information submitted did not satisfy the requirements of section 45 of the Act and I concur with that view.
- 5.7.4 Accordingly I make no clarification of the Determination in this respect.

5.8 Item 5

In reference to the decision of the determination (paragraph 11), how this decision was reached under sections 115 and 50 when ‘at no time was consideration given to either [of these sections] by the [authority]...’

As there is ‘no evidence that the application for a building consent was ever processed’ (refer also item 3) the authority could not have considered the implications of sections 115 or 50. The only section referred to in correspondence from the authority refers to non-compliance with section 45.

- 5.8.1 The nature of the building work, as described in paragraph 3.1 of the determination, requires that I consider the adequacy of the documentation to establish compliance in terms of section 115 of the Act. Paragraph 10.2 considers the requirements of section 115 and concludes that the documentation provided was inadequate in this respect.
- 5.8.2 I note that a building consent application may be ‘suspended’ under section 48 of the Act, but that a refusal to grant an application for a building consent is made under section 50. The authority advised the LBP in a letter dated 17 November 2009 that the building consent application was refused.
- 5.8.3 It is my opinion that the references to sections 115 and section 50 of the Act have been correctly applied in the decision and therefore I make no clarification of the Determination in this respect.

6. Clarifying amendments to the determination

- 6.1 In accordance with section 189 of the Act, I hereby amend Determination 2010/72 as follows:

Paragraph 2.6 is removed and replaced with:

The authority's records (refer clarification paragraph 5.5.1) indicate the LBP met with the authority on 12 October 2010 at which time the authority advised the LBP that the project would require input from NZFS DRU⁸, and that the plans and report as supplied needed to be to ‘a greater standard’ to allow them to be sent to the DRU and for the plans to be further processed. I note here that the LBP disputes that the matter of the requirement for a separate fire design was raised at this time (refer clarification paragraph 5.5.2).

⁸ New Zealand Fire Service Design Review Unit

6.2 Paragraph 10.4.1 to read:

During the course of the hearing, the matter of whether the application of the authority's earthquake-prone building policy should have been noted on the building's PIM was raised. The LBP has also submitted that he was not aware that the earthquake-prone building policy existed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 31 January 2011.

John Gardiner
Manager Determinations