



Determination 2014/049

The proposed refusal to issue a building consent without a certificate of acceptance first being obtained for building work to convert a shed to a dwelling at 6 Allan Street, Waikari



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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are

- the owner of the dwelling, M Parsons (“the applicant”)
- Hurunui District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the proposed decision of the authority to refuse to issue a building consent for repairs to a dwelling (refer paragraph 3.12). The refusal arose because:

- the authority is of the view that the building underwent a change of use² in terms of section 115 of the Act; and
- the authority required the applicant apply for a certificate of acceptance for the change of use and required information regarding the compliance of the building work with the relevant clauses³ of the Building Code (First Schedule, Building Regulations 1992).

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

² For the purposes of sections 114 and 115 of the Act, “change of use”, in relation to a building means to change the use as determined in accordance with regulation 6 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

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

1.4 The matter to be determined⁴ is therefore the proposed exercise by the authority of its powers of decision in relation to the condition placed on the issue of the building consent.

1.5 In making my decision, I have considered the submissions of the parties, a Weathertight Homes Resolution Services (“WHRS”) report dated 11 January 2011 which sets out the building work and dates, and the other evidence in this matter.

2. The building work

2.1 The building is a single-storey detached pole framed structure house which is one of two buildings on the property (the other being a proprietary garage). The timber posts are set in isolated concrete footings and the floor of the building is concrete. There is a carport/porch on the east elevation with a part height masonry wall dividing the porch and carport areas.

2.2 The exterior walls are clad in corrugated steel with aluminium windows and the roof is clad in proprietary trough section steel sheet. The interior is framed and lined to form a two bedroom dwelling.

3. The background

3.1 The original building consent application form described the building work as “garage” and the intended use as “storage”.

3.2 On 11 December 1998 the authority issued building consent No. 980392 under the Building Act 1991 (“the former Act”). The project description on the consent was for ‘Alterations, repairs or extensions being stage 1 of an intended 1 stages Erect a garage with bathroom’.

3.3 The authority carried out the following inspections during the building work:

- 18 December 1998 – pre-pour for shed poles
- 23 December 1998 – drainage
- 11 November 1999 – preline

3.4 It appears that an amendment was made to the consent in 2001 which approved:

- the construction of a separate double garage
- the addition of a carport/porch structure to be added to the existing building which was described as a ‘batch’
- the building to be lined and insulated.

3.5 The authority carried out the following inspections in respect of the additional building work:

- 19 March 2001 – preline living area
- 11 April 2001 – footings for carport
- 27 July 2002 – two items to address (fixings to purlins, flashing at entry)
- 5 September 2003 – inspection of two items as above, noted as final.

⁴ Under sections 177(1)(b) and 177(2)(a) of the Act

- 3.6 The completed building included a shower, toilet, and a wood burner had been installed⁵. I have received no evidence that a kitchen was installed at that time.
- 3.7 The authority issued a code compliance certificate on 5 September 2003 in which the project description was ‘Other outbuildings eg shed, workshop, sleepout Being stage 1 of an intended 1 stages Erect a garage with bathroom’.
- 3.8 The applicant leased the property in October 2002, and on 20 October 2003 purchased the property.
- 3.9 At some stage the building suffered from moisture ingress and a claim was filed under the WHRS Act 2006. A WHRS assessor’s report was completed on 15 December 2010, recommending targeted repairs be carried out.
- 3.10 On 11 March 2013 the applicant applied for a certificate of acceptance for “unauthorised work” which the applicant described as ‘previous owner completed more work on consent 9800392 than was permissible’. On the same date the applicant applied for a building consent to ‘repair leaks to current building’. I have not seen copies of documentation provided in support of either application and it is unclear the extent of the building work for which the certificate of acceptance was being sought.
- 3.11 By letter dated 9 April 2013 the authority required further information to support the application for a certificate of acceptance. The authority referenced the letter as a ‘change use of garage to a dwelling & carport’ and listed 17 items of information required. The letter concluded by saying that the consent application would remain on hold until the information was provided.
- 3.12 In a separate letter of the same date the authority required further information in regards to the proposed repairs. The authority referred to the application for a certificate of acceptance and stated that:
- ... I have to advise you that if the COA is not accepted as meeting an habitable space it may not be worth the cost to remediate the works proposed in your [building consent] application.
- 3.13 The Ministry received an application for a determination on 28 August 2013.

4. The submissions and the draft determination

- 4.1 The applicant did not make a submission with the application, but provided copies of the following:
- The applications for the certificate of acceptance and the building consent, but with no supporting documentation.
 - The correspondence from the authority dated 9 April 2013.
- 4.2 The authority made no submission in response to the application.
- 4.3 On 31 July 2014 I sought clarification from the authority in regards to its view that there had been a change of use. The authority responded on the same day, noting that the consented ‘shed with bathroom’ was later ‘converted into a dwelling without consent (illegal building work was carried out)’ and that ‘[the authority] has not issued a consent for any dwelling on this site.’

⁵ Details of the woodburner as installed are noted on a ‘Field inspection sheet’ completed by the authority.

- 4.4 In its response the authority submitted that the original use of the building was Intermittent Low (IA) based on the fact that it was consented as a garage, and was not used for sleeping. For the same reasons the authority did not consider that it fell within the use Sleeping Single Home (SH) and was not part of a household unit.
- 4.5 A draft determination was issued to the parties for comment on 14 August 2014.
- 4.6 The applicant accepted the draft determination without comment on 17 August 2014.
- 4.7 The authority did not accept the draft determination and in a submission dated 8 September 2014 noted the following in summary:
- The original building consent was ‘for a garage (use category IA) as no house existed on the property’. The building has undergone a change of use to SH; the applicant has not applied for a change of use nor been granted building consent for a change of use. The building is not a dwelling ‘as no kitchen ... has been consented’.
 - A note on an inspectors report does not ‘automatically change the use of a building’ and the use of the term ‘sleep out’ was made in error. If the authority is not notified of a change of use then the use remains non-residential.
 - ‘The definition of a Habitable space in the building code handbook is “A space used for activities normally associated with domestic living, but excludes any bathroom...”⁶, as the consent was approved as a shed with bathroom both uses are not deemed habitable.’
 - Reliance was placed on the High Court decision *Body Corporate 85978 v Wellington City Council*⁷ to support the view that the intended use of a building at the work was consented and build that was important. If the authority was not notified of a change of use ‘then [it was] arguable the use was always non-residential’.
 - Should a notice to fix be issued ‘for the change of use or the completion of work that required consent eg the installation of a kitchen and/or should it issue a notice to fix for non-complying building work that did not require consent eg the installation of most the doors and windows’
- 4.8 I have taken account of the authority’s submissions as appropriate.

5. Discussion

5.1 The certificate of acceptance

- 5.1.1 It is not clear to me on what basis the applicant has chosen to apply for the certificate of acceptance nor has the scope of work encompassed in the application been provided to me. However, I note that many of the items on the list included in the letters of 9 April 2013 from the authority refer to building elements that were constructed under consent No. 980392 and for which a code compliance certificate has been issued. A certificate of acceptance cannot be sought for building work that was covered by the consent No. 980392 and for which a code compliance certificate has been issued.

⁶ The definition is the same as that given in Building Code Clause A2 Interpretation (Building Regulations 1992, Schedule 1)

⁷ *Body Corporate 85978 v Wellington City Council* CIV-2013-485-719 [2013] NZHC 2852

- 5.1.2 That being the case, the application for a certificate of acceptance is likely to be limited to work undertaken without consent, which I understand may include only the kitchen fit out.

5.2 The 'change of use'

- 5.2.1 The authority holds the view that the building has undergone a change of use. The authority considers that as there was no established dwelling on the site at the time of the original consent being issued, the building fell under use IA as it is described in the Regulations⁸ (refer Appendix A.2). The building was then 'converted' to a dwelling and the authority considers the use has changed to SH.
- 5.2.2 The original consent issued in 1998 was for a "garage with a bathroom"; however, the consent was later amended to include lining and insulating of the walls and the authority's 'field check sheet' indicates a wood burner had been installed prior to the code compliance certificate being issued.
- 5.2.3 I consider therefore that the building's use as a habitable space would have been clear to the authority at the time of its final inspection and when it issued the code compliance certificate. As such the building fell within use SH and consideration of the compliance of the building work within that use was required prior to the issue of the code compliance certificate.
- 5.2.4 A code compliance certificate has been issued for the consented work thus the authority must have been satisfied the building work complied with the building consent as it was amended. The project description included "sleep out". In my view while the original consent was for use IA, the amended consent appears to be for use SH, therefore no change of use has occurred subsequently.
- 5.2.5 By concluding that no change of use has occurred, the requirements for the applicant to provide written notification of a change of use under section 115 of the Act does not apply.
- 5.2.6 I note the authority has referred to the decision from *Body Corporate 85978 v Wellington City Council* to support its position that the intended use of a building when the work was consented and built that was important. That decision was in respect of the WHRS Act 2006, and in my view care must be taken when relying upon a ruling from a different jurisdiction to that of the Act. The arguments relating to a 'dwellinghouse' in the decision are in respect of section 8 of the WHRS Act and not the Building Act 2004 and are stated for a different context. I also note the ruling states at paragraph [55]:
- It appears to be common ground that the plans submitted to Council for building consent purposes, and on which the construction proceeded, reflected apartments intended for residential use
- 5.2.7 In my view it is the consented plans and the construction in this instance show the intended use of a building as a habitable space, and this would have been clear to the authority before it issued the code compliance certificate.
- 5.2.8 The authority has quoted from the definition for "habitable space" being:
- A space used for activities normally associated with domestic living, but excludes any bathroom...
- 5.2.9 The authority contends that the building consent was for a shed with a bathroom and both uses are not deemed habitable. In my view the authority has used the definition

⁸ Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

of habitable space in a very narrow sense. Bathrooms are excluded from the definition of a habitable space because it is not expected that a person would live in a bathroom, but bathrooms are ancillary to spaces that are habitable. The presence of a non-habitable space in a building does not determine the use of the building as a whole is not habitable. It is usual for SH buildings to contain habitable and non-habitable spaces.

5.3 The building consent

- 5.3.1 It is my understanding that the proposed building work for which the applicant is seeking consent involves repairs to the existing building. As there is no change of use, section 112 of the Act applies in respect of the proposed work to the building.
- 5.3.2 In order to grant the building consent for the repairs under section 112(1)(b), the authority must be satisfied that after the repairs:
- (b) the building will,—
 - (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or
 - (ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply
- 5.3.3 The granting of the consent for repairs does not require that the existing building as a whole be brought into compliance with the Building Code.
- 5.3.4 I acknowledge that some instances may arise where compliance of one building element relies on another building element that has been constructed under a separate consent. In such instances sufficient information on the details and interrelationships between the existing and proposed work should be provided to the authority to inform its decision on compliance of the proposed work.

6. What is to happen now?

- 6.1 The authority has asked for guidance regarding issuing a notice to fix for:
- The change of use
 - The completion of work that required consent
 - Non-complying building work that did not require consent e.g. the installation of most of the doors and windows
- 6.2 I have established in paragraph 5.2.4 that no change of use has occurred.
- 6.3 In reference to the completion of building work that required consent, a certificate of acceptance is only likely to apply to the work associated with the kitchen fitout (refer paragraph 5.1.2).
- 6.4 In relation to non-complying building work that did not require consent; I refer to the discussion at paragraph 5.4.6 of Determination 2011/041⁹. Where possible non-compliance with the Building Code is brought to the attention of the authority, it is entitled to inspect the building work under section 222 of the Act, and if it finds non-

⁹ Determination 2011/041 Whether internal alterations to an attached garage is exempt from the need for a building consent under Schedule 1 of the Building Act at paragraph 5.4.6

compliance with the Building Code it can issue a notice to fix, but only if the work in question has been undertaken by the current owner.

- 6.5 However, as discussed in Determination 2014/035¹⁰ an authority can only issue a notice to fix to an owner if that person also undertook the building work that is in contravention of the Building Code. However, the authority may decide to identify the building work that that was undertaken by the former owner that does not comply with the Building Code, advise the current owner that the building work should be brought into compliance with the Building Code, and place a copy of that advice on the LIM.
- 6.6 In relation to other matters, and excepting the possible application for a certificate of acceptance for the kitchen fitout, an authority is unable to take any regulatory action in relation to an existing building except where it considers a building to be dangerous or insanitary, or where it has undergone a change of use (the latter not applicable in this instance). I have seen no evidence to suggest the building is dangerous or insanitary.
- 6.7 In relation to the standard of the unconsented work to install windows and doors, etc, (5th bullet point, paragraph 4.7) it is reasonable to assume that the consent for the proposed remedial work will bring the building envelope in compliance with Clause B2 and E2.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision by proposing to refuse to grant a building consent based on the condition that a certificate of acceptance was required because the building had undergone a change of use. Accordingly I modify the Authority's decision removing that requirement.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 October 2014.

John Gardiner
Manager Determinations and Assurance

¹⁰ Determination 2014/035 The issue of a notice to fix for weathertightness remedial work carried out by a previous owner

Appendix A

A.1 The relevant parts of the Act include:

49 Grant of building consent

(1) A building consent authority must grant a building consent if it is 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 plans and specifications that accompanied the application.

96 Territorial authority may issue certificate of acceptance in certain circumstances

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(i) the work was done by the owner or any predecessor in title of the owner; and

(ii) a building consent was required for the work but not obtained; or

(b) if section 42 (which relates to building work that had to be carried out urgently) applies; or

(c) if subsections (3) and (4) of section 91 (which apply if a building consent authority that is not a territorial authority or a regional authority is unable or refuses to issue a code compliance certificate in relation to building work for which it granted a building consent) apply; or

(d) if—

(i) the work affects premises to which section 362A applies; and

(ii) a building consent for the work was obtained before 31 March 2005; and

(iii) the territorial authority is unable or refuses to issue a code compliance certificate for the work; and

(iv) the application for the certificate of acceptance was made before 31 March 2010.

(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.

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,—

(a) the building will 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) the building will,—

(i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply

A.2 The relevant parts of the Building (Specified Systems, Change the Use and Earthquake-prone Buildings) Regulations 2005 are Clause 6 and Schedule 2.

6 Uses of buildings for purposes of regulation 5

(1) For the purposes of regulation 5, every building or part of a building has a use specified in the table in Schedule 2.

Schedule 2: Uses of all or parts of buildings

Uses related to sleeping activities		
Use	Spaces of dwellings	Examples
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance
IA (Intermittent Low)	spaces for intermittent occupation or providing intermittently used support functions—low fire load ¹	car parks, garages, carports, enclosed corridors, ... toilets and amenities ...