



Determination 2021/005

Regarding the refusal to issue a building consent for building work associated with a relocated cabin at 48 Billah Street, Tokoroa



Summary

This determination concerns a refusal to issue a building consent for the construction of foundations for a relocated cabin and associated fixings and connections. The determination considers the reasons given for the refusal, which relate to establishing the Building Code compliance of the cabin itself. The determination also provides comment on the provisions relating to certificates of acceptance.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, National Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2 The parties to this determination are:
 - J and T Nexus, the owners of the property that the relocated cabin is on (“the applicants”)
 - South Waikato District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

¹ The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry, is available at www.building.govt.nz.

- 1.3 The determination arises from the authority's refusal to grant a building consent for construction of foundations and associated connections for the applicants' relocated cabin. The authority's reasons for this refusal include its view that the cabin must itself be assessed for compliance with the Building Code.
- 1.4 The matter to be determined² is whether the authority was correct to refuse to grant the building consent for the reasons given in its letter of 9 March 2020 to the applicants.
- 1.5 The authority also refused to process the applicants' application for a certificate of acceptance, saying the cabin was constructed in another district and the application must be considered by the territorial authority responsible for that district. While this did not form part of the reasons given by the authority in its refusal to grant the building consent and is outside the matter to be determined, I have offered comment on this general aspect of assessing building work carried out in another district.
- 1.6 I have not considered whether the work carried out by the manufacturer to construct the cabin was building work carried out without building consent when building consent was required. That issue is outside the matter for determination.
- 1.7 In making my decision I have considered the parties' submissions and the other evidence in this matter.
- 1.8 In this determination references to clauses are to clauses of the Building Code, and references to sections are to sections of the Act.

2. The building work and background

2.1 The relocated cabin

- 2.1.1 The applicants' property is located at 48 Billah Street in Tokoroa. It is a large, flat section, accessed down a right of way, and has an existing house in one corner.
- 2.1.2 In 2019 the applicants purchased a one-bedroom cabin from a manufacturing firm in a neighbouring district ("the manufacturer") and moved this onsite, where they planned to use it for rental accommodation.
- 2.1.3 The cabin came with documentation including a "manufacturer's report" dated 20 February 2019, which described it as a one-bedroom structure with bathroom/laundry and lounge/kitchen areas that was 12m by 3m in total and was "towable on a galvanised chassis with removable draw bar and axles".
- 2.1.4 The manufacturer's report also listed other construction details, features and fittings including the use of 90mm steel framing, aluminium joinery, double glazing, metal cladding and long run roofing; fibreglass insulation (R2.6)³ to the walls and ceiling; and thermal building wrap to the walls, ceiling and underfloor. The manufacturer's report also stated that plumbing was certified to the cabin's exterior ready for connection, the electrical work had a certificate of compliance (also ready for connection), and there were "2x changeover regulator[s] for gas bottles (certified)".
- 2.1.5 Documentation supplied with the cabin included an electrical certificate of compliance and electrical safety certificate dated 22 February 2019, which covered the cabin's electrical fixtures and fittings, and a gas certificate of compliance dated 21 February 2019 for a continuous flow water heater.

² Under section 177(1)(b) and 177(2)(a) of the Act.

³ The thermal resistance rating or R-Value is the measure used most commonly in the building and construction industry to determine a material's ability to resist the transfer of heat.

2.2 Application for building consent for foundations and connections

2.2.1 In late 2019 the applicants' designer, a licensed building practitioner (LBP) licence class Design 3⁴ ("the designer"), applied to the authority on the applicants' behalf for building consent to permanently found the cabin and connect it to services.

Supporting information with the consent application included:

- the manufacturer's report for the cabin, the electrical and plumbing certificates described above, and photographs of the cabin during construction and on completion
- the manufacturer's plans for the cabin including a floor plan and details of the wall framing, the panels, roof and floor
- the designer's plans and specifications for the proposed building work including location and site plans, elevations, a site services plan, a foundation plan, and details of the piles (ordinary piles 400mm in diameter and 450mm deep footing with "H5 125 senton pile cast in with 100 bottom cover, 20mpa concrete"⁵ and anchor piles with 1000mm deep footing and otherwise similar details) to be connected to the cabin's steel subfloor.

2.2.2 On 6 January 2020 the authority made a request for information which contained three items. The authority later marked two of these as resolved: "Bracing detail in accordance with the nominated design solution, NZS 3604⁶" (the designer sent further bracing details on 27 February 2020) and "Evidence of ownership" (resolved by providing a certificate of title).

2.2.3 The third item was "Engineer verification or [code compliance certificate] for the completed construction of the proposed transportable building". In response, the designer provided a "relocatable building review" dated 27 February 2020 ("the designer's review"), which listed the cabin's general specifications and various extras, and described the sub-floor framing, wall framing, roofing and joinery. The review concluded:

The cabin has been built to the specifications provided, construction pictures show the building is new construction. All materials are in excellent condition ... all materials will satisfy the [Building Code] durability requirements for the building to last 50 years.

With the additional R1.3 underfloor insulation installed to achieve [Clause] H1 compliance, the building will satisfy the requirements of [the Building Code] and NZS 3604.

2.3 The authority's refusal letter and subsequent correspondence

2.3.1 On 9 March 2020 the authority sent the applicants a refusal letter relating to the building consent application. The authority stated the reasons for this refusal were:

The proposed portable cabin never had a Building Consent to construct in accordance with section 40 of the New Zealand Building Act 2004⁷.

As you propose to connect services and foundations, the cabin itself must comply with Building Code requirements, section 17 of the New Zealand Building Act 2004⁸ which we cannot determine.

⁴ Design 3 means assessed as competent to design all three categories of building (Category 1, 2 and 3 buildings are defined in the Building (Designation of Building Work Licensing Classes) Order 2010).

⁵ Hazard class **H5** is a level of timber treatment used for timber that is in contact with ground or concrete. Megapascals (**mpa**) is a measure for strength capacity of concrete.

⁶ NZS 3604:2011 Timber-framed buildings.

⁷ Section 40: Buildings not to be constructed, altered, demolished, or removed without consent.

2.3.2 The authority said the applicants could apply to the Ministry for a determination if they disagreed with the authority's decision, and also said if the applicants wanted to proceed with their project they would need to submit a new building consent application.

2.3.3 Communications between the parties from 11 to 19 March 2020 included the following:

- The authority advised the applicants that any new building consent application must be supported by a certificate of acceptance [for the cabin] “from the ... Authority in which the building work/construction was undertaken”; and it also said it considered the cabin was built as a vehicle and the proposed new use was as a building.
- The applicants then asked if the authority could process their application for a certificate of acceptance given the other authority had not had any communication or involvement in the project and because of “the complications that the current location could face”.
- The authority replied that it could not consider the application for a certificate of acceptance unless there was evidence the other authority refused to accept such an application, since the other authority's district was where “the building work was undertaken without first obtaining building consent”.
- The applicants advised the authority that the authority in the other district would decline a certificate of acceptance application because the cabin was now in the authority's district.
- The applicants provided supporting documents with an application for a certificate of acceptance, including relevant plans and specifications, construction images and a copy of the manufacturer's report.
- The authority advised the applicants that their application for a certificate of acceptance would not be processed for the following reasons:

... the proposed portable cabin was built as a vehicle and never had a Building Consent to construct in accordance with section 40 of the New Zealand Building Act 2004, we agreed that the proposed new use would be that of a building and again as you propose to connect services and foundations, the cabin itself must comply with Building Code requirements (see Section 17 of the New Zealand Building Act 2004) which we cannot determine. ...

2.3.4 The application for determination was received on 14 April 2020.

⁸ Section 17: All building work must comply with building code.

3. Submissions

3.1 The applicants

- 3.1.1 The applicants provided copies of the building consent and certificate of acceptance documentation, including plans and specifications and the designer’s review, and photographs. They also provided relevant correspondence, including the authority’s refusal letter for the building consent and its email declining to process the certificate of acceptance application.
- 3.1.2 The applicants said their “intention and requirement” was to obtain a building consent to connect the cabin to the proposed foundations “and [we] obviously required the consent for this to happen”.
- 3.1.3 The applicants said they thought they had supplied all the information required including LBP “sign-off” (the designer’s review). However, the authority had rejected the designer’s review and assurance that the cabin met the requirements of the Building Code. The authority had also rejected their offer to remove internal linings to validate the cabin’s bracing and construction, and as a result the applicants had no avenue to resolve the issue.
- 3.1.4 The applicants also submitted:
- They had not constructed the cabin but relocated it, and now intended to use it as a rental property – hence applying for a building consent to “permanently pile and connect to council services as is required by [the authority]”.
 - They considered that the cabin, which was just over a year old, had “all the requirements of a new build” including full insulation and double glazing; said “in comparison to other buildings relocated for the same purpose the standards the [cabin] meets are potentially far superior and ticks all the boxes for a rentable dwelling”; and also said it was “built in line with the current building code practices to make it a healthy and safe permanent dwelling”.
 - In response to the authority’s view that the cabin was originally a storage container (see paragraph 3.2.2), the applicants considered the construction photographs proved it was purpose-built as a transportable cabin and said they had not been asked to provide “any certification of a conversion”.
 - Since the authority had advised that the cabin should have been built under a building consent the applicants had been trying to arrange an inspection and apply for a certificate of acceptance. However, they had been refused a certificate of acceptance by the authority, and the authority’s grounds were confusing given the reason for applying for a certificate of acceptance is that the cabin does not have a code compliance certificate and a certificate of acceptance is the only way to obtain certification.

3.2 The authority

- 3.2.1 The authority provided copies of the building consent and certificate of acceptance documentation, relevant photographs and correspondence, an initial submission, and a later submission containing background and comments from the authority’s processing officer.
- 3.2.2 The authority said it had not inspected the cabin and that “no certification has been produced for the conversion from what was a storage container to a portable cabin”. It had been unable to ascertain compliance “due to the portable cabin being built on a

trailer out of our district and now it is proposed to be used as an importance level 2 SH building without the necessary certification of building work being undertaken as required by section 40”⁹.

3.2.3 The response from the authority’s processing officer included:

- The cabin was constructed as a vehicle, so the officer could not be satisfied that the cabin ever complied or complies with the Building Code, and the designer’s review “would be insufficient to satisfy us of its compliance”.
- The officer had considered previous determinations and judgments regarding the distinction between a vehicle and a building, and concluded that the proposed connection to foundations and services made the cabin a building “which requires strict compliance”. However, the authority could not be satisfied of this compliance and was not in a position to issue a certificate of acceptance, which it considered should be sought in the district where the work was carried out.

3.3 A draft of this determination was issued to the parties on 5 August 2020. The applicants and the authority both accepted the draft without further comment.

4. Discussion

4.1 General

4.1.1 The matter to be determined is whether the authority was correct to refuse to grant the building consent to connect the applicants’ cabin to foundations and services for the reasons given in its letter of 9 March 2020; ie that the cabin itself must be confirmed as being compliant with the Building Code before the authority can grant a building consent for the foundations and services.

4.1.2 In subsequent correspondence with the applicants the authority said any new application for building consent must be accompanied by a certificate of acceptance. However, the authority would not itself accept an application for a certificate of acceptance because the cabin was constructed in another authority’s district.

4.1.3 The applicants have now reached an impasse, as the other authority has also declined to accept an application for a certificate of acceptance and the authority has not reconsidered its position.

4.1.4 In the following paragraphs I consider the authority’s refusal to grant the building consent. I have also offered comment on the authority’s views regarding its ability to process a certificate of acceptance where construction has been undertaken in another district.

4.2 Building consent for the foundations and connections

4.2.1 With respect to building consents the Act states:

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.

⁹ Importance Levels are defined in Clause A3 for the purpose of the fire safety clauses of the Building Code, and “SH” is a use category that appears in Schedule 2 of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* and as a Risk Group in the Acceptable Solution for Building Code Clauses C1 – C6.

- 4.2.2 The scope of building work covered by the applicants' building consent application is the foundations, associated connections to the cabin's structure, and connections to services. This scope was made clear in the plans, specifications and other information submitted to the authority as part of the consenting process.
- 4.2.3 Further, there was no other building work proposed onsite or that I am aware of which should have been included in this application. As established in previous determinations¹⁰, relocating the cabin – either onto or within the site – does not constitute building work.
- 4.2.4 It is the building work described in the specifications and plans that requires assessment for the purpose of granting a building consent, and it is not appropriate for the authority's assessment to extend to the compliance of the cabin, aside from:
- considering whether the foundations are suitable for the intended load, and
 - assessing the fixings and connections to the structure,
 - assessing the adequacy of plumbing and drainage systems and water supply system in respect of the sanitary fixtures, sanitary appliances installed in the cabin
 - assessing whether the requirements of section 112 have been met.
- 4.2.5 Section 112 governs situations where the building work relates to an alteration to an existing building. In essence, this provision sets out the degree of compliance required from an existing building after alterations. With respect to certain provisions (relating to means of escape from fire, and access and facilities for people with disabilities), altered buildings must comply "as nearly as is reasonably practicable" with the Building Code. In all other respects, the altered building must continue to comply with the Building Code to the same extent that it did before the alterations. That is, the alterations cannot diminish the existing building's compliance.
- 4.2.6 This determination does not consider whether the construction of the cabin undertaken by the manufacturer was the construction of a building or, as suggested by the authority, a vehicle that was not a building¹¹. However, in my view section 112 applies in respect of this application for building consent regardless of the status of the cabin at the time it arrived on site. The applicants' proposal is to fix the cabin to foundations, and in so doing the cabin would no longer be a vehicle (if it ever was, and I make no determination on that matter).
- 4.2.7 As discussed in Determination 2017/030¹², the significance of considering the status of the cabin is in relation to the application of sections 17 and 112. The proposed alterations (the foundations and connections to services in this case) are new building work and as such must comply fully with the Building Code. Whereas under section 112 the cabin must continue to comply to the same extent as it did before the alterations occur.
- 4.2.8 What this means for the authority's assessment with respect to the applicants' building consent application is that the authority is only required to be satisfied that the new building work will comply and the proposed alterations would not reduce any level of code-compliance that the cabin already has.

¹⁰ See for example Determination 2014/030 Regarding the issue of a notice to fix for the placement of two shipping containers on a property (22 July 2014).

¹¹ Refer section 8(1)(b)(iii).

¹² Determination 2017/030 Regarding two notices to fix issued in relation to a relocated house and shed (15 May 2017).

4.2.9 Accordingly, I consider that the authority was incorrect to refuse the applicants' building consent application for foundations and connections to the cabin for the reasons given in its refusal letter of 9 March 2020. In my view:

- whether or not the cabin was constructed without a building consent and whether one was required is a separate issue to the assessment required by the authority for this building consent application
- the cabin does not have to be assessed for code-compliance before services and foundations can be connected to it; the authority need only be satisfied that the proposed building work itself complies and that it does not reduce the cabin's current level of compliance in any way
- the authority is able to determine the effect of the proposed building work on the cabin's current level of compliance; to assist with this assessment a reasonable amount of information has already been provided and the cabin is also available for inspection if needed.

4.3 Certificate of acceptance for the cabin

4.3.1 As noted above, the compliance of the cabin is not required for the purpose of granting the building consent, beyond the assessment required for section 112.

4.3.2 As noted previously, I have not considered whether the work carried out by the manufacturer to construct the cabin was building work carried out without building consent when building consent was required.

4.3.3 That said, the authority has refused to accept the application for a certificate of acceptance on the grounds that the cabin was constructed in another district, and I offer the following comments on this general issue.

4.3.4 Section 96 provides for a certificate of acceptance to be granted in circumstances where a building consent was required but not obtained:

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; ...

(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.

4.3.5 The Ministry's website offers guidance on the processing of building consents in situations where building work is proposed to be carried out off-site¹³. The guidance states that "consent is usually best granted by the [authority] in the area where the final building site is located". However, inspections during construction will need to be carried out in the district where construction is occurring, and the guidance notes that these "can be undertaken through a third party or by engaging [officers of the authority] from the region where the construction is taking place".

¹³ See <https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/off-site-construction/>

- 4.3.6 In circumstances where consent has not been obtained for construction and the building is subsequently relocated, there is nothing in the Act to prevent the authority in the district where it is relocated to from assessing the building for a certificate of acceptance if one is applied for. The factors that will be relevant when deciding which authority is best placed to issue a certificate of acceptance include which authority can most easily inspect the building work and which authority is best placed to issue a building consent if any additional building work is needed to remediate non-compliance (if that building work requires a building consent).
- 4.3.7 The authority also appears concerned about its ability to assess the cabin's compliance with the Building Code because the building work associated with the cabin (not the foundations and services) is complete. Although, as I note earlier, a certificate of acceptance is not required for the cabin in order to enable the authority to process the building consent application, it is useful for me to provide general comment on this concern.
- 4.3.8 As discussed in Determination 2009/113¹⁴ the Act's provisions for certificates of acceptance recognise that it will likely be more difficult to inspect already completed building work and ascertain its code-compliance than for building work carried out under a building consent. In particular, the Act allows an authority to limit the scope of the certificate of acceptance if some of the building work is inaccessible, and the authority's liability is then limited accordingly.
- 4.3.9 Section 96(2) is silent on work that cannot be inspected and for which there is no evidence available to determine its code-compliance. However, under section 99:
- (2) A certificate of acceptance may, if a territorial authority inspected the building work, be qualified to the effect that only parts of the building work were able to be inspected.
 - (3) A territorial authority's liability for the issue of a certificate of acceptance is limited to the same extent that the territorial authority was able to inspect the building work in question.
- 4.3.10 Form 9 of the Building (Forms) Regulations 2004 requires an authority to list the building work that complies with the Building Code. I take the same view as in Determination 2009/113, this list provides the basis for an authority to list only the building work that can be ascertained complies with the Building Code.
- 4.3.11 It is also essential that a certificate of acceptance clearly sets out the nature and extent of the work that the certificate does not cover to ensure it is not misleading. This list of building work expressly excluded from the scope of the certificate of acceptance could appear immediately after the list of work that complies with the Building Code.
- 4.3.12 Section 99(2) and Form 9 also provide for a certificate of acceptance to attach a further list of the building work an authority has been able to inspect for the purpose of limiting the authority's liability to that work it has been able to inspect.
- 4.3.13 Any attachment listing the building work inspected will obviously be narrower than the description of work covered by the certificate of acceptance. This is because the extent to which an authority has been able to inspect building work will usually be less than the extent to which an authority has been able to ascertain whether the work is code-compliant. In ascertaining whether the work complies, the authority will take into account all the relevant evidence available, including its knowledge and belief of

¹⁴ Determination 2009/113 The refusal to issue a certificate of acceptance for building work to a relocated house (24 December 2009).

the circumstances surrounding the building work and the builders and designers who undertook the work, and any statements of opinion provided.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004 I hereby determine the authority was incorrect to refuse to grant the applicants' building consent application for foundations and associated connections to their cabin for the reasons given in the authority's letter of 9 March 2020. I reverse the authority's refusal, thus requiring the authority to make a new decision as to whether to grant the building consent taking into account this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 March 2021.

Katie Gordon
National Manager, Determinations