Determination 2008/98

17 October 2008

The issuing of a notice to fix concerning dangerous and insanitary aspects of a motel unit at 407 Great South Road, Papakura, Auckland

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, John Gardiner, Manager Determinations, Department of Building and Housing ("the Department"), for and on behalf of the Chief Executive of the Department. The applicant is the owner of the building, the Kang Family Trust ("the applicant") acting through an agent, and the other party is the Papakura District Council carrying out its functions and duties as a territorial authority or a building consent authority ("the authority").

1.2 The application for a determination arises from a notice to fix issued by the authority in respect of a single free-standing motel unit ("the unit").

1.3 I take the view that the matter for determination, in terms of section 177(e), is the authority's exercise of its powers under section 124 of the Act. In order to determine this matter I must answer the following questions:

- Is the building unsafe or insanitary in terms of section 123?

- Was the authority's decision to issue a notice to fix correct?

1.4 In making my decision I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter. However, I have not considered any other aspects of the Act.

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

2 The building

2.1 The building in question is a single-storey freestanding unit that forms part of a motel complex. The unit in its present form is 6000mm x 6000mm in size and contains a living room, a bedroom, and a bathroom. The building is of timber framed construction with a timber floor, a low-pitched roof and combination of weatherboard wall and fibre-cement external claddings.

3 Background

3.1 Early in 2006, in accordance with section 131 of the Act, the authority adopted a policy on dangerous, earthquake-prone, and insanitary buildings. This policy included the requirement for the authority to keep a register of all dangerous or insanitary buildings that it had identified within its area of jurisdiction.

3.2 The following description of the relevant background is taken from the applicant's application for a determination:

- The unit was originally constructed in the 1950's as an outbuilding subject to a building permit. The outbuilding was subsequently converted into a motel unit in the 1980's and planning approval was obtained for the conversion. However, I have not received any evidence that a building permit was obtained for this subsequent building work or whether one was actually required..
- The applicant purchased the motel complex in 2005 but was not aware that a permit may not have been obtained for this work. The applicant stated that it wished to "register the unauthorised work on the unit" with the authority.
- The applicant's agent discussed with the authority whether the authority required any remedial work to be carried out in order for the unauthorised work to be registered with the authority.

3.3 The applicant engaged a firm of building consultants ("the consultants") to provide a "safe and sanitary" report in order to clarify matters with the authority relating to unconsented work. The consultants inspected the unit and prepared a report that was dated 14 April 2008. The report set out the relevant legislation and described the building background. The consultants were of the opinion that the building was neither dangerous nor insanitary. The report did, however, list some maintenance items that would "future proof" the watertightness of the building envelope and structure. The report concluded that once the maintenance items had been

completed, the report, together with the as-built drawings could be submitted to the authority.

3.4 On 21 April 2008, the authority wrote to the applicant noting that illegal work had been carried out on the unit. The authority listed 14 items that it identified as requiring to be addressed. The authority was of the opinion that the unit was insanitary as there was water entering it. This was due to insufficient flashings, lack of ventilation to the sub-floor space and incorrect ground levels. The building was considered to be dangerous as there was a strong possibility that the sub-floor structure had been weakened by the ingress of water and there was rotten flooring at the entrance way. As the building had been subject to a change of use, it was required (according to the authority's letter) to be "compliant". The authority was of the opinion that the report prepared by the consultants did not cover all the concerns expressed by the authority nor did it provide sufficient rectification detail. The authority was now prepared to issue a notice to fix that would outline the options available to the applicant.

3.5 The authority issued a notice to fix dated 21 April 2008 noting that the garage had been converted into a "motel unit" without building consent approval and a building consent must be lodged for any work remedying the "damaged and insanitary" aspects of the unit. The notice also required the consent to show compliance with Clauses B1, B2, D1, E1, E2, G1, G2, G4, G5, G7, G12 G13 and H1.

3.6 The applicant responded to the notice to fix in an email sent to the authority on 22 April 2008. The applicant noted that it had not been informed as to what parts of the unit were dangerous or insanitary. The applicant understood that this would be a requirement before a notice to fix was issued.

3.7 The authority issued a second notice to fix dated 20 May 2008, that replicated all the details set out in the first notice to fix except that the reference to the work being done "without building consent approval" was amended to read "without building permit approval". The authority has noted that this notice was only issued because the applicant insisted on this course of action.

3.8 The application for a determination was received by the Department on 19 May 2008.

4 The submissions

4.1 A covering submission made on behalf of the applicant, set out the background to the matters to be considered and listed some relevant legislation. In summary I list the other matters raised by the applicant.

- All the building work was completed prior to the enactment of either the Building Act 1991 or the Building Act 2004. The current owner had not changed, and was unlikely to change the use of the unit. Accordingly, the only power that the authority had was in regard to the building being dangerous or insanitary.

- Currently, the unit was neither dangerous or insanitary in terms of sections 121 and 123. If the authority is of a differing opinion, then it should state which parts of the two sections the applicant is breaching.
- The work listed by the authority on its notice to fix is too stringent and it is unreasonable to upgrade the building "in accordance with the current Building Code".

The submission then set out arguments to support its position in the context of the three major issues it had raised.

4.2 The applicant forwarded copies of:

- the notice to fix
- the consultants' report
- the authority's "Dangerous and Insanitary Buildings Policy 2006"
- two as-built drawings
- the correspondence with the authority
- two determinations previously issued by the Department
- a set of photographs depicting the unit.

4.3 In a submission dated 19 May 2008, the authority repeated most of its arguments described in its letter to the applicant dated 21 April 2008 and again listed the items that were identified as requiring attention following a site visit to inspect the unit. I set out these items as being:

- The pitch of the roof is 5 degrees, should be 8 degrees.
- There is no floor insulation, no ventilation and no crawl space.
- Insulation in the ceiling is dangerous as the batts are in contact with the electrical wiring of the down lights.
- Exterior ground clearance is too high.
- Flashings to doors and windows are inadequate.
- Downpipes are not connected to any discharge points.
- Weatherboards are not patched/sealed.
- Flooring to entrance is damaged due to water ingress.
- Sanitary Sewer details are unclear.
- Both the electrical and plumbing work are of insufficient quality and both will require producer statements.
- The overall stability of the structure is unclear in so far as it was designed as Garage/outbuilding not a motel unit.
- Disabled access is required as this building is used by members of the public.
- The pergola construction is unsafe.

- It is unclear as to whether building paper has been applied to the walls and ceiling areas.

5 The Legislation

5.1 The relevant provisions of the Building Act 1991are:

> **8. Existing buildings not required to be upgraded**
>
> Except as specifically provided to the contrary in this Act, nothing in this Act shall be read as requiring any building, the construction of which was completed or commenced before the coming into force of Part VI of this Act, to meet the requirements of the building code.

5.2 The relevant provisions of the Building Act 2004 are:

> **121 Meaning of dangerous building**
>
> (1) A building is dangerous for the purposes of this Act if,—
>
> (a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—
>
> (i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or
>
> (ii) damage to other property; or . . .
>
> **123 Meaning of insanitary building**
>
> A building is insanitary for the purposes of this Act if the building—
>
> (a) is offensive or likely to be injurious to health because—
>
> (i) of how it is situated or constructed; or
>
> (ii) it is in a state of disrepair; or
>
> (b) has insufficient or defective provisions against moisture penetration so as to cause dampness in the building or in any adjoining building; or
>
> (c) does not have a supply of potable water that is adequate for its intended use; or
>
> (d) does not have sanitary facilities that are adequate for its intended use.
>
> **124 Powers of territorial authorities in respect of dangerous, earthquake-prone, or insanitary buildings**
>
> (1) If a territorial authority is satisfied that a building is dangerous, earthquake prone, or insanitary, the territorial authority may—
>
> (a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:
>
> (b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:
>
> (c) give written notice requiring work to be carried out on the building, within a time stated in the notice (which must not be less than 10 days after the notice is given under section 125), to—
>
> (i) reduce or remove the danger; or
>
> (ii) prevent the building from remaining insanitary.
>
> (2) This section does not limit the powers of a territorial authority under this Part.

> **128 Prohibition on using dangerous, earthquake-prone, or insanitary building**
>
> (1) If a territorial authority has put up a hoarding or fence in relation to a building or attached a notice warning people not to approach a building under section 124(1), no person may—
>
> (a) use or occupy the building; or
>
> (b) permit another person to use or occupy the building. . . .

6 The expert's report

6.1 As mentioned in paragraph 1.4, I engaged an independent expert, who has a National Diploma in Construction Management, to provide an assessment of the current condition of the unit.

6.2 The expert carried out a visual inspection of the unit on 4 July 2008, together with a second expert experienced in carrying out moisture readings. The expert furnished a report that was dated 14 July 2008, which described the unit and noted that, while the unit lacked sub-floor ventilation, apart from the area at the entrance, there was no evidence of moisture damage to the flooring. While the moisture readings were higher than would be expected, with one reading being 27%, these were attributed to a lack of maintenance and the shading caused by the adjoining foliage. The expert could see no evidence that "there was any immediate likelihood that the pergola structure could fail".

6.3 In the expert's opinion, there were no issues relating to the unit that made it dangerous or insanitary in terms of the Act. However, there was a risk that if there was a continuing lack of maintenance, the unit could deteriorate to a level where it could become insanitary.

6.4 The authority responded to the expert's report in a letter to the Department dated 26 August 2008. The submission queried the qualifications of the report's author, a matter that I have addressed in paragraph 6.1. The authority was still of the opinion that the building displayed some insanitary and dangerous aspects and that the building had "been converted to a Motel Unit without a consent". In this respect, I reiterate that the alteration to the building took place before the implementation of the Building Act 1991, which makes reference to the need for a consent in this context redundant.

7 The draft determinations

7.1 Copies of a draft determination were forwarded to the parties on 4 August 2008.

7.2 The applicant accepted the draft determination and in a covering letter to the Department dated 25 August 2008, confirmed that the exterior cladding to the building is a combination of timber weatherboard and fibre-cement. The applicant stated that it was not notified by the authority as to what aspects of the building were dangerous and insanitary. Also queried, was the authority's statement that it might "pursue other means to gain compliance" to ensure that the structure was rendered fit for its purpose. The applicant was of the opinion that the authority wanted the

building to be fixed mainly because a LIM or a property report was not obtained at the time the applicant purchased the motel. The applicant concluded with a request for the Department to advise whether the authority had powers outside those set out in sections 121 and 123 to force a owner to upgrade a building to the standards required by the authority.

7.3 The authority did not accept the draft determination and set out its reasons in a covering letter to the Department dated 14 August 2008. The authority stated that the weatherboards were steel rather than timber. The authority was of the opinion that the applicant had been clearly informed as to the dangerous and insanitary aspects of the building. The second notice to fix was issued merely to amend the words "building permit" to "building consent". It was considered that the building in its current condition was not suitable for motel accommodation. The authority noted that the building had not been inadequately maintained and had been converted without the proper "consents". The authority would place a specific note on the property file stating that no consent had been applied for the conversion of the garage into a motel unit.

7.4 I carefully considered the above submissions and forwarded an appropriately amended second draft determination to the parties on 9 September 2008 and the applicant accepted the draft determination without further comment.

7.5 The authority did not accept the second draft determination and in a submission to the Department dated 24 September 2008 noted the following:

- The building was not fit for purpose as it was converted without the necessary permits.
- Work such as the drainage would require a building consent.
- There were issues requiring clarification regarding the resource consent.
- The second notice to fix was issued only on the insistence of the applicant.
- A notice will be put on the property file and if the authority has to accept the determination it will request an updated report from the applicant regarding rectification of any building work.

7.6 I have carefully considered the above submission and have accordingly amended this determination as I deem to be appropriate.

8 Discussion

8.1 General

8.1.1 This determination is essentially about whether the unit in question is dangerous and/or insanitary. The argument put forward by the authority is that the unit is both dangerous and insanitary and, in effect, requires the applicant to bring the building into line with the requirements of the Building Code.

8.1.2 The applicants have queried the upgrading requirements and are uncertain as to why the unit is considered to be dangerous and insanitary.

8.2 The application of the legislation to the building work

8.2.1 The applicant points out that the unit was built and its use changed prior to the introduction of the Building Act 1991. I have not received any evidence that the authority disagrees with this contention.

8.2.2 In Determination 2008/5, I took the view that with regard to building work completed before the Building Act 1991 or the Building Act 2004 came into effect, a territorial authority

> has no power to take any action unless:
>
> - the owner decides to alter the building, or change its use, or change its intended life, or subdivide the allotment in a way that affects the building, or
> - the building is dangerous, or is earthquake-prone, or is insanitary

8.2.3 I still hold to that view, and in this case, while there may well have been a contravention of the local building bylaws in force prior to the Building Act 1991 coming into force, there does not appear to have been any contravention of, or failure to comply with, the Act as regards the initial construction and change of use.

8.2.4 I note that in its submission on the draft determination, the authority makes several references to the fact that proper "consents" were not obtained and going so far as to say that a specific note would be placed on the property file stating that "there was no consent applied for converting the garage into a motel unit". Again, I point out that, as I have been informed, the building was converted from a garage to a motel building some 8 years before the Building Act 1991 came into force. I also refer to section 8 of the 1991 Act that did not require existing buildings to be upgraded. Therefore, the terms "consent" and "change of use" that are defined in that legislation have no relevance in terms of the motel. Accordingly, I consider the authority may need to carefully review the legal basis of its future actions in this respect.

8.3 The notice to fix

8.3.1 As described in paragraph 3.5, the authority has issued a notice to fix. The notice states that the contravention or non-compliance relates to a garage being "converted into a motel unit without Building Consent approval". Also that the "Building Consent must be lodged for remedial work to the "damaged and insanitary" aspects of the modified garage structure". The consent also had to show compliance with a number of Building Code clauses.

8.3.2 As set out in paragraph 8.2.2, I do not accept that a building owner is required to bring the building into line with the Building Code unless there was a proposal to alter the building, to change its use or if the building is dangerous or insanitary. As I have found in paragraph 8.2.3 that there has been no contravention of or failure to

comply with the Act, I am of the view that only the matters relating to the building being dangerous or insanitary are relevant.

8.3.3 In addition, I do not believe that a notice to fix is the correct document to use to establish that a building is dangerous or insanitary. If an authority believes a building is dangerous or insanitary sections 124 to 130 set out the relevant powers of an authority. A notice to fix can only be issued under section 164(1)(a) for a contravention or failure to comply with the Act or regulations. A dangerous or insanitary building does not in itself contravene the Act, and a notice to fix cannot be issued in respect of such a building unless there has been some contravention or failure to comply with the Act. For example, the use of a dangerous or insanitary building may contravene section 116B, or where an authority has taken action under section 124(1) the use of a building or failure to comply with the authority's notice may be a contravention of the Act under sections 128 or 124(3).

8.4 Is the unit dangerous?

8.4.1 The building was considered by the authority to be dangerous as there was a strong possibility that the sub-floor structure had been weakened by the ingress of water and there was rotten flooring at the entrance way. The expert's and the consultant's reports (paragraphs 3.3 and 6.3), while raising some concerns about the state of the unit at present, did not find the motel unit to be either dangerous or insanitary.

8.4.2 Section 121(1)(a) establishes that a building is dangerous if, in the ordinary course of events, (excluding earthquakes) the building is "likely" to cause injury or death or damage to other property. I note that the term "likely" was considered in Determination 2006/119 in respect of section 121. The relevant paragraph in that determination was:

> 5.2.1 The word "likely" in the context of section 64 of the Building Act 1991 ("the former Act"), now section 121, has been interpreted as follows:
>
> "likely" does not mean "probable", as that puts the test too high. On the other hand, a mere possibility is not enough. What is required is "a reasonable consequence or [something which] could well happen". *Auckland CC v Weldon Properties Ltd* 7/8/96, Judge Boshier, DC Auckland NP2627/95, [1996] DCR 635.
>
> I find that the words 'likely to cause injury or death' in [s 64(1)(a) of the former Act, now s 121(a)] mean that the reasonable probabilities are that the building will cause injury or death unless it gets timeous attention. *Rotorua DC v Rua Developments Lt*d 3/3/98, Judge McGuire, DC Rotorua NP966/97.
>
> 'Likely', as used in [s 64(1)(a) BA91, now s 121(a)], means that there is a reasonable probability (see *Dowling v South Canterbury Electric Power Board* [1966] NZLR 676, 678); or that having regard to the circumstances of the case it could well happen (see *Browne v Partridge* [1992] 1 NZLR 220, 226). *Rotorua DC v Rua Developments Ltd* 17/12/99, Judge McGuire, DC Rotorua NP1327/97
>
> I take the view that those decisions are good law in respect of the word "likely" in section 121.

8.4.3 Applying these interpretations to the motel in question, and taking into account the expert's report, I am not convinced that the building is "likely" to cause injury or death or damage to other property. The structural concerns advanced by the authority, while they may require rectification, do not to my mind pose an immediate danger in terms of section 121.

8.4.4 I therefore do not accept the authority's contention that the building in its current state is dangerous.

8.5 Is the building insanitary?

8.5.1 The authority has stated that the unit was insanitary as there was water entering it. This was due to insufficient flashings, lack of ventilation to the floor space and incorrect ground levels. As set out in paragraph 7.4.1, the consultants do not consider the motel unit is insanitary.

8.5.2 There is evidence, such as the rotting floor at the entrance, that moisture is, or has, entered the building. However like section 121, section 122(b) refers to the "likelihood" that a building will be injurious to health if moisture is penetrating that building. While I accept that in the case of the motel there is water penetrating the structure, this does not necessarily mean that this in itself is "likely' to be injurious to health.

8.5.3 Taking into account my reasoning in paragraph 8.5.2, and my acceptance of the evidence provide in the expert's report, I am of the opinion that the unit is not insanitary.

8.6 Would a building consent be required should any rectification work be required?

8.6.1 The authority has stated that any work to remedy damaged and insanitary aspects of the unit required a building consent. While I have found that the building is neither dangerous nor insanitary, I consider that it would be prudent for the authority and the owner to discuss this matter, as a lack of maintenance could result in the unit becoming insanitary. Whether a building consent will be required for any repairs depends on whether the proposed repair work falls within one of the exceptions of Schedule 1 of the Act, which sets out the circumstances when a building consent is not required for building work.

8.7 Conclusion

8.7.1 For the reasons that I have given, I consider that the unit is neither dangerous nor insanitary. However, if adequate maintenance is not carried out, there is likelihood that the unit will become insanitary in the future. Effective maintenance of buildings is important to ensure ongoing compliance with the requirements of the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements (for example, Determination 2007/60).

8.7.2 The authority in its submission regarding the second draft determination is of the opinion that the building is not fit for its purpose because a permit was not obtained for its conversion. I cannot see how the authority reaches this conclusion, as the non-issue of a permit in my opinion does not relate to the current state of the building. As I have previously stated, this determination falls outside any actions of the parties prior to the introduction of the Building Acts. Likewise, I cannot consider

matters relating to resource consents, although I do note that the Resourse Management Act 1991 came into force after the conversion work was carried out.

8.7.3 The applicant has stated that it wishes to "register the unauthorised work on the unit" with the authority. As I do not believe that is a requirement under the Act or the authority's "Dangerous and Insanitary Buildings Policy 2006", I make no comment on this procedure. I also note that "safe and sanitary" reports are a means by which building owners can notify territorial authorities about the status of work undertaken where a building consent may not have been obtained. While territorial authorities may accept such reports at their discretion, the reports are not covered in terms of the Act, nor are they matters that can be determined by the Chief Executive.

8.7.4 The applicant has requested advice as to whether the authority can explore other avenues to force the owner to comply with the authority's upgrading requirements. I have discussed the matters at issue in terms of the Building Acts but am unable to comment on matters that may arise outside of those enactments.

9 Decision

9.1 In accordance with section 20 of the Act, I hereby determine that:

(a) the unit in its present state is not unsafe and insanitary, and

(b) the decision by the authority to issue a notice to fix is reversed

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 October 2008.

John Gardiner
Manager Determinations