

Determination 2023/036

**The issuing of a certificate of acceptance for building work
in the roof space of a house**

114 Tipahi Street, Nelson

Summary

This determination considers an authority's decision to issue a certificate of acceptance for building work in the roof space of a house. The determination considers whether building consent was required for the building work, as well as how the provisions relating to certificates of acceptance apply.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents and guidance is available at www.building.govt.nz

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor 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 the determination are:
 - 1.2.1. H Perkin, the owner of the property (“the owner”), who applied for the determination
 - 1.2.2. Nelson City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined² is the authority’s decision to issue a certificate of acceptance for building work that was carried out without a building consent. In making this determination, I have considered whether building consent was required for the building work, as well as how the provisions relating to certificates of acceptance apply. I have not assessed whether the building work complies with the Building Code.

2. Background and building work

- 2.1. Sometime in or prior to September 2020³, the owner of the property undertook building work in the roof space of their house. The work involved converting a previously unused section of the attic into three separate spaces, including a bedroom, lobby, and storage space.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² Under section 177(1)(b) and (3)(e)

³ Based on a complaint made to the authority.

- 2.2. The building work included replacement of an under purlin with a framed wall, addition of tongue and groove flooring, and installation of wall and ceiling linings and a set of stairs.
- 2.3. The authority was made aware of unconsented building work and visited the site on 23 September 2020. Photographs taken during the site visit show part of the converted roof space in use as a bedroom.
- 2.4. The owner subsequently engaged the services of a building consultant to assist with an application for a certificate of acceptance. The scope of building work described in the application was “installation of storage space within the roof space and installing access stairs”.
- 2.5. The application for the certificate of acceptance included a report by the building consultant. The report detailed the building work and made comments regarding compliance:
 - 2.5.1. The owner had installed “a couple of skylights and a small window”. There is not enough light from the skylights but ventilation is achieved in the largest of the three rooms created.
 - 2.5.2. The floor is supported on the walls of the house below, joists are undersized to support at 1.5 kPa floor load (140 x 45 installed at 450 centres).
 - 2.5.3. The wall replacing the under purlin would provide more support than there was previously.
 - 2.5.4. The skillion created to the roof does not allow for enough insulation and the required air gap above.
 - 2.5.5. The stairs meet the definition of a “minor private stairway”⁴ but the head clearance at the top of the stairs is too low, and riser heights at the top vary.
 - 2.5.6. The timber framing is all treated to H1.2.
- 2.6. The report noted that to use the rooms for anything more than storage would require demolition and rebuilding, and that the weight of storage must be kept to a minimum in two of the three rooms. The report stated that although the owner had intended to use the space as a bedroom, foyer and storage, it would now only be used for light storage.

⁴ With reference to the definition in the Acceptable Solution for Clause D1 (D1/AS1)

- 2.7. The plans submitted with the application for a certificate of acceptance labelled the space as for “light storage only non-habitable space”.
- 2.8. On 29 March 2021, the authority issued a certificate of acceptance for the building work, described as “roof storage and access stairs”. In identifying the building work that the authority was able to inspect and thus qualifying the certificate⁵, the authority attached a schedule as follows:

Building Codes Applicable

B1 Structure
B2 Durability
C1 Objectives of Clauses C2-C6
D1 Access routes
H1 Energy efficiency

Work included in Certificate of Acceptance

B2.2 H1.2 treated framing timber.

Work excluded from Certificate of Acceptance

B1.2 Floor is over spanned.
Floor structure with over spanned members.
Landing of north-east wall replacing under purlin.
D1.2.1 Stair risers, head clearance and lack of handrail.
Door heights.
H1.2 Unspecified thermal insulation.
Insulation not installed to NZS 4245:2006

- 2.9. The parties continued to correspond, and the owners advised the authority that a lockable door had been fitted to the stairs.
- 2.10. On 25 June 2021 the authority advised that it considered the space was not suitable for “light storage” and requested that the stairs be removed and the access hatch to the attic space to be sealed, or the owners make the space structurally sound for storage.
- 2.11. The owner disagreed with the authority’s assessment and engaged an engineer. On 29 November 2021, the engineer’s comment on the flooring capacity was provided to the authority. The engineer advised:

The shorter span 2.6m is suitable for 1.5kPa (NZS3604 makes allowable for non-load bearing walls). The 4m span can only support 0.58kPa or 58kg/m2 ...

⁵ Section 99(2)

- 2.12. On 10 December 2021, the authority noted that the engineer's report would be an important aspect of any change of use of the roof space, and if the owners wished to use that area for storage, the authority would require information on how the floor complies for storage, how the areas of floor that do not comply would be excluded from storage, and how the access (stairway) complies.
- 2.13. Correspondence continued between the parties, including about whether the use of the roof space for storage constitutes a change of use for the purpose of sections 114 and 115.

3. Submissions

The owner

- 3.1. The owner's position is that the form issued with the certificate of acceptance was too limiting, due to the exclusions in the attached schedule.
- 3.2. The owner has also queried whether the authority was correct in accepting and issuing the certificate if there was building work that did not comply with the Building Code.

The authority

- 3.3. The authority provided photographs from a site visit carried out after the building work was completed and confirmed its views concerning the use of the roof space under Schedule 2 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.
- 3.4. The authority raised a query about exclusions from certificates of acceptance and whether a certificate of acceptance can be issued when there is non-compliant building work.

4. Discussion

- 4.1. The circumstances under which an authority may issue a certificate of acceptance are set out in section 96 of the Act. Section 96(1)(a)(ii) refers to situations where a building consent was required for the work but not obtained. To determine this matter, I must consider whether consent was required for the building work. If the building work is exempt from the requirement to obtain building consent, such as

that specified in Schedule 1 of the Building Act, then a building consent is not required and the provisions for a certificate of acceptance do not apply.⁶

- 4.2. Additions and alterations to existing buildings that are exempt from the requirement to obtain a building consent are limited to those set out in clauses 8 to 19 of Schedule 1. Regarding the building work in this case, I note:
 - 4.2.1. With reference to clause 11, the internal walls created in the roof space are not specified as load bearing or bracing elements. However, with the removal of the under purlin, this would render one of new walls in the roof space load bearing.
 - 4.2.2. Internal linings and finishes of the walls, ceiling and floor are exempt under clause 12.
 - 4.2.3. The work to construct the stairs was not exempt under Schedule 1.
- 4.3. Apart from the internal linings and finishes, the building work was not exempt under Schedule 1 and the certificate of acceptance provisions apply.
- 4.4. Section 96(2) provides for the issue of a certificate of acceptance by a territorial authority “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.” [my emphasis]
- 4.5. This requires an authority to assess any relevant information supplied to it for the purpose of considering the compliance of the building work – meaning an authority is not limited in its consideration to only the evidence obtained through inspections.
- 4.6. However, where the building work that is the subject of the application for a certificate of acceptance does not comply with the Building Code, then the application must be refused, and the authority must give the applicant written notice of the refusal and reasons for it.⁷
- 4.7. It is apparent from the correspondence and the schedule attached to the certificate that the authority had reached the view that at least some aspects of the building work included in the application did not comply with the Building Code for the stated intended use. For this reason, I conclude the test in section 96(2) had not

⁶ Section 41(1)(b) and 42A

⁷ Section 99A

been met for the building work covered by the application for certificate of acceptance.

- 4.8. Section 99(2) and Form 9⁸ provide for the authority to qualify the certificate to the effect that only parts of the building work were able to be inspected, and section 99(3) limits the authority's liability for the issue of the certificate of acceptance to the same extent that it was able to inspect the building work.
- 4.9. This is because the extent to which an authority has been able to 'inspect' work will usually be less than the extent to which it has been able to 'ascertain' whether building work complies with the Building Code. In ascertaining, the authority considers all the relevant evidence available, such as plans and specifications, producer statements, the builder's records, the owner's records, any expert reports, and the authority's own experience and knowledge of the builders and designers involved in the work.
- 4.10. In issuing a certificate of acceptance, the following types of building work can be differentiated:
- Building work that the authority **has been able to ascertain**, on reasonable grounds, complies with the Building Code, based on inspections, judgement, and/or supporting information and documentation.
 - Building work that the authority **has not been able to ascertain** complies with the Building Code, because the authority has not been able to inspect the building work and there is no other supporting information or documentation.
 - Building work that the authority **has been able to inspect**, for the purposes of limiting the authority's liability.
- 4.11. The fact that compliance cannot be ascertained for some elements of building work is not the same as an authority determining the building work is not compliant; rather there are not reasonable grounds on which to form a view one way or the other.
- 4.12. Determination 2012/076 took the approach that the certificate of acceptance should identify those items the authority has not been able to ascertain comply, in

⁸ Building (Forms) Regulations 2004: Form 9 Certificate of Acceptance.

terms of the scope of work to which the certificate is being issued, and I agree with that approach. However, this is not a means to address building work, within the scope of work for which the certificate has been applied, that is not compliant with the Building Code. A certificate of acceptance cannot be issued if the building work within that scope does not comply with the Building Code.

- 4.13. In this case, the certificate of acceptance was issued for the building work associated with the internal storage in the roof space and the stairs, but “excluded” elements of the building work within that scope that the authority considered do not comply with the Building Code.
- 4.14. In addition, clause B2 was listed on the certificate as an “applicable code clause”. This clause concerns the durability periods for which building elements must continue to satisfy the performance requirements of the Building Code. The limits on application for clause B2.3.1, are expressed in terms of the durability periods that commence “from the time a code compliance certificate is issued”. It follows that B2 does not apply to the issuing of a certificate of acceptance.
- 4.15. In conclusion, I am of the view the authority erred in issuing the certificate when it had identified the requirements of s96(2) had not been met and including in the certificate clause B2.
- 4.16. I note that section 17 of the Act provides “All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work”. I leave the matter of addressing any building work that does not comply for the parties to resolve in due course.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I reverse the authority’s decision to issue the certificate of acceptance on 29 March 2021.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 November 2023.

Andrew Eames
Principal Advisor Determinations