

Determination 2005/153

Certificate of acceptance and notice to fix in respect of sheds at 6 Bridge Street, Southbridge

1. The matters 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, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. In this determination, unless otherwise stated, references to sections and to schedules are to those of the Act.
- 1.2 The applicants are Mr and Mrs R A Ramage, the owners of the two sheds with an associated veranda at 6 Bridge Street, Southbridge, acting through a firm of solicitors (“the owners”). The other parties are the Selwyn District Council (“the territorial authority”) and the owners of two neighbouring properties, Mr and Mrs R C Jones and Mr R J Breen (collectively “the neighbours”).
- 1.3 The application arises from a notice to fix under section 164 issued to the owners by the territorial authority as a result of complaints received from the neighbours to the effect that the sheds had been erected without a building consent and did not comply with the Building Code (the First Schedule to the Building Regulations 1992). In subsequent correspondence the territorial authority said that it would not issue a certificate of acceptance under section 96.
- 1.4 The owners originally applied for this determination on the basis that the territorial authority should waive the need for a building consent under paragraph (k) of Schedule 1 (see paragraph 5.1.1). However, the owners subsequently asked me to consider the territorial authority’s refusal to issue a certificate of acceptance. The owners did not specifically ask me to consider the notice to fix, but I take the view that it is so closely connected to the other matters that I must take it into account.
- 1.5 The owners did not dispute that the sheds were erected without a building consent.

1.6 Accordingly, I take the view that I must determine the territorial authority's decisions to:

- (a) Refuse to issue a certificate of acceptance, and
- (b) Issue the notice to fix.

2. The sheds

2.1 The sheds were erected in 1998. The territorial authority describes them as "metal prefabricated garden sheds". They have a total floor area, including the veranda, of about 40 m². Their walls and roofs are clad with corrugated steel and they have concrete floors. One shed is 300 mm or less from one neighbour's boundary, the other shed is about 200 mm from the other neighbour's boundary. There are no gutters or downpipes, so that at least one of the sheds discharges rainwater onto or over the boundary.

3. The legislation

3.1 The relevant provisions of the Act are:

- (a) As to compliance with the Building Code, section 17 says:
"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."
- (b) As to the need for a building consent:
Section 40 provides that people "must not carry out building work except in accordance with a building consent" subject to certain exceptions listed in section 41 and Schedule 1. Under paragraph (k) of Schedule 1 the territorial authority in effect has the power to waive the need for a building consent for building work that:
 - "(i) is unlikely to be carried out otherwise than in accordance with the Building Code; or
 - "(ii) if carried out otherwise than in accordance with the Building Code, is unlikely to endanger people or any building, whether on the same land or on other property."
- (c) Section 44 provides that an owner must apply for a building consent "before the building work begins".
- (d) As to notices to fix, section 164 provides that a territorial authority must issue a notice to fix if it considers on reasonable grounds that the owner of a building

“is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)”. Such a notice must require the owner “to remedy the contravention of, or to comply with” the Act.

(e) As to certificates of acceptance, the relevant provisions of section 96 are:

“(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 . . .

“(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.”

(f) As to the status of the neighbours in respect of this determination, section 176 provides that the parties to a determination include:

“(e) if the matter for determination relates to—

“(i) a provision in the Building Code that has the purpose of protecting other property, the owner of the other property.”

(g) The term “other property” is defined in section 7 as including any land not held under the same ownership, so that each of the neighbours’ properties is “other property” in relation to the sheds.

3.2 The provisions of the Building Code that have the purpose of protecting the neighbours’ properties include:

“C3.3.5 External walls and roofs shall have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of . . . other property.

“E1.3.1 . . . surface water [which includes rainwater] resulting from an event having a 10 percent probability of occurring annually and which is collected or concentrated by buildings . . . shall be disposed of in a way that avoids the likelihood of damage or nuisance to other property.”

3.3 One, but not the only, means of complying with clause C3.3.5 is given in acceptable solution C/AS1. Paragraph 7.10.5 of C/AS1 (as amended from 1 October 2005) requires a fire resistance rating of not less than 30/30/30 for any external wall less

than 1.0 m from the relevant boundary. I consider that minimum fire resistance rating to be appropriate for the sheds.

- 3.4 One, but not the only, means of complying with clause E1.3.1 is to provide roof gutters and downpipes discharging into a surface water disposal system all in accordance with acceptable solution E1/AS1.

4. The submissions

4.1 The parties made extensive submissions, including drawings and photographs of the sheds together with previous correspondence. The following account gives only an outline of the submissions. Various matters that were mentioned in submissions are not discussed below because after full consideration of all the circumstances those matters did not affect my decision.

4.2 The owners submitted that “it would . . . be right and proper and in the interests of justice for the Territorial Authority to . . . waive the . . . requirement of obtaining a building consent” for the construction of the sheds because (amongst other things):

- (a) “The . . . sheds were erected . . . in 1998 and have not caused any neighbours any bother. . . . A previous neighbour . . . approved the sheds being put up and never had a problem with them.”
- (b) “There is no fire risk or other assorted risk associated with their usage.”

4.3 The territorial authority responded that:

- (a) “The [sheds have] been erected without a Building Consent and without being exempted under the Building Act [and] it is therefore immaterial whether or not it has been acceptable to previous neighbours.”
- (b) “The Council has no control in what is stored in the sheds and therefore cannot accept a statement that its use will not cause a fire risk. . . .”

4.4 The territorial authority stated that its position was that:

- “1 The Council can not issue a Certificate of Acceptance for a building that is clearly non-complying . . . with the Building Code. That is being within one metre of the boundary without a fire wall.
- “2. The Council has asked for a Building Consent application for the building to be relocated to a complying position. . . .
- “3 At the present time the building is in contravention of the Building Act as per the particulars set out on the Notice to Fix dated 25/5/2005.”

4.5 The notice to fix stated:

“Contrary to Section 40(1) of the Building Act 2004, building work has been carried out without a Building Consent.

“To remedy the contravention or non-compliance you must: Make application for a Building Consent. . . .”

4.6 The neighbours made various points including:

- (a) That one of the sheds was within 127 mm of a boundary rather than the 300 stated by the owner.
- (b) “When it rains all the storm water runs off [the sheds’] roof area straight into our property.”
- (c) “[The sheds] decrease the value of our property . . .”
- (d) “We strongly object to these buildings being attached to our boundary fence . . .”
- (e) “[The sheds] are powered by electricity, our understanding is that the electrical work was not carried out by a registered electrician.”

4.7 I prepared a draft for this determination and sent it to the parties on 31 October 2005 with a note to the effect that if all parties accepted it (subject to non-controversial corrections) then it would be issued as a final determination, but otherwise there would be a formal hearing of the matter.

4.8 The owners accepted the draft but reiterated the points they had made in their earlier submissions. They also suggested that the determination should be in respect of the sheds not the veranda. I do not accept that because the sheds and the veranda are attached to form a single building. The owners also pointed out that they had found the relevant survey pegs and were able to determine where the boundary was. That would assist them when they applied for a building consent to move the sheds more than 1 m from both adjoining properties.

4.9 The territorial authority accepted the draft and said that before the notice to fix was issued, the owner had agreed that the best option was to move the sheds to 1 m from both adjoining properties.

4.10 Mr and Mrs Jones accepted the draft. As at 15 November 2005 I had not received a response from Mr Breen, but nevertheless decided to issue this determination.

5. Discussion

5.1 General

- 5.1.1 As mentioned in paragraph 1.4, the owners originally applied for this determination on the basis that the territorial authority should waive the need for a building consent under paragraph (k) of Schedule 1. I take the view that under section 177 I do not have the jurisdiction to determine that matter.
- 5.1.2 As mentioned in paragraph 1.6, I take the view that this determination must be confined to the territorial authority's decisions in respect of the certificate of acceptance and the notice to fix. However, the territorial authority and the neighbours raised various other matters, including the effect of the sheds on property values, the effect of the sheds being on or close to the boundary, and so on. In respect of such submissions, I observe that:
- (a) The owners are entitled to build the sheds anywhere on their allotment subject to compliance with the Building Code and with the district plan under the Resource Management Act 1991.
 - (b) Under section 43 of the Act, energy work (including prescribed electrical work) does not require a building consent (subject to certain exceptions that do not apply in this case). Requirements for prescribed electrical work, including requirements for energy work certificates, are laid down in the Electricity Act 1992, but under section 92(4) of the Act there is no requirement for such a certificate to accompany an application for a code compliance certificate unless that energy work was specified in the corresponding building consent.
- 5.1.3 I have carefully studied all of the submissions, but have not discussed those that I do not consider relevant to the territorial authority's decisions in respect of the certificate of acceptance and the notice to fix.
- 5.1.4 Similarly, I have limited this determination to clauses C and E1 of the Building Code and have not discussed, and make no decision in respect of, other relevant clauses such as B1 Structure and B2 Durability.

5.2 Certificate of acceptance

- 5.2.1 Under section 96(2), the 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".
- 5.2.2 I am satisfied that the sheds do not comply with clauses C and E1 of the Building Code. I therefore conclude that the territorial authority cannot issue a certificate of acceptance unless and until the owner does such building work as is necessary to bring the sheds to compliance with the Building Code, at least to the extent contemplated by section 96. It will be necessary for the owner to apply for a building consent in respect of such work.
- 5.2.3 Accordingly, I conclude that the territorial authority's decision to refuse to issue a certificate of acceptance was correct.

5.3 Notice to fix

- 5.3.1 Under section 164, a territorial authority “must” (not “may”) issue a notice to fix if it considers on reasonable grounds that the owner of a building “is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent)”.
- 5.3.2 It is not disputed that the owners failed to comply with section 40 of the Act when they erected the sheds without a building consent. Accordingly, I conclude that the territorial authority correctly decided to issue the notice to fix.
- 5.3.3 However, I take the view that the notice itself was defective in that it merely required the owner to apply for a building consent. The territorial authority’s submissions make it clear that its intention was that the building consent must cover the work of moving the sheds to at least 1 m from the neighbours’ boundaries.
- 5.3.4 I take the view that a notice to fix should not usually specify exactly what building work is to be done but rather what must be achieved. In this case, there are several possible ways of bringing the sheds to compliance with clause C3.3.5 of the Building Code. One way is to move them further from the boundaries. Another is to alter them so that the external walls along the boundaries have a 30/30/30 fire resistance rating. Similarly, there are several ways of bringing the sheds to compliance with clause E1.3.1.
- 5.3.5 Accordingly, I conclude that the territorial authority’s decision to issue the notice to fix was correct, but that the wording of the notice should be modified so as to allow the owners to choose how they will bring the sheds to compliance with the Building Code.

6. Decision

- 6.1 In accordance with section 188 of the Act, I hereby:
- (a) Confirm the territorial authority’s decision to refuse to issue a certificate of acceptance; and
 - (b) Modify the territorial authority’s decision to issue the notice to fix by amending the notice by deleting the particulars of contravention or non-compliance and substituting the following:

“You failed to obtain a building consent for the construction of certain sheds contrary to section 40(1) of the Building Act 2004 and in constructing those sheds you failed to comply with the Building Code contrary to section 17 of the Building Act 2004.

“To remedy those contraventions you must:

- “1 Apply for a building consent to do building work that will bring the sheds to compliance with the Building Code, including but not limited to Clauses C3.3.5 and E1.3.1; and
- “2 Complete that work and obtain a code compliance certificate in respect of it.

“This notice must be complied with by applying for the building consent within two months of the date of this determination and by properly completing the work under that consent within two years of the date of the building consent or such longer period as the territorial authority may allow.”

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 November 2005.

John Gardiner
Determinations Manager