

## *Determination 2005/34*

# *Car parking areas in a unit-titled apartment building*

### **1 THE MATTER TO BE DETERMINED**

- 1.1 This is a determination under section 17 of the Building Act 1991 (“the Act”), as amended by section 424 of the Building Act 2004, 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.
- 1.2 The matter for determination is a dispute about a territorial authority’s decision to refuse a code compliance certificate for a unit-titled apartment building because of a failure to comply with certain conditions of a waiver of the fire separation requirements of clause C3 Spread of fire of the building code (the First Schedule to the Building Regulations 1992).
- 1.3 I take the view that I am being asked to determine:
- (a) Whether the car parking areas comply with clause C3.3.2(d) of the building code; and if not, whether
  - (b) The conditions of the territorial authority’s waiver of that clause are appropriate in terms of section 34(4)(a) of the Act.
- 1.4 I also take the view that I am being asked, depending on my determinations, to confirm, reverse, or modify, the territorial authority’s decision to refuse to issue the code compliance certificate under section 43(3)(b) of the Act because the disputed conditions have not been satisfied.

### **2 THE PARTIES**

- 2.1 The applicant was the body corporate for the unit-titled building acting through a firm of solicitors. The only other party was the territorial authority.

### **3 THE BUILDING, THE CAR PARKING AREAS, AND THE BUILDING CONSENT**

- 3.1 The building is a four-storey apartment building with a part basement. The ground floor and the basement contain individual marked-out car parks, each of which is an accessory unit under the Unit Titles Act 1972, plus manoeuvring space that is common property.

3.2 The application for building consent was apparently accompanied by a report from a firm of fire engineers, which included the following reasons in support of a request for a waiver in respect of fire separation between car parks:

“a) Because of the restricted width of the car parking area, any wall between the two accessory units (car parking spaces) would mean that it would be impossible to open the car doors . . .

[There is no paragraph b.]

“c) The car-parks are individually owned, however cars and their contents do not constitute “other property” in terms of Building Act definition. The only non-complying area with respect to other property is fire separation between each carpark.

“d) The above mentioned property is covered by the Body Corporate.

“Extensive car parking fire tests in Australia in the late 1980’s confirm that fires in areas such as the above are known to be relatively infrequent and are usually due to arson. They should be even less of a feature in a building managed by Body Corporate.”

3.3 The territorial authority apparently accepted those reasons and issued the building consent subject to the requested waiver but subject to the following conditions (my numbering):

(1) “The park spaces shall be used for the parking of vehicles only, and only in the marked parking bays.”

(2) “No storage shall be permitted in the parking bays.”

(3) “The parking spaces shall be kept fully opened and shall not be enclosed in anyway [*sic*].”

(4) “Combustible materials shall not be stored in storage lockers.”

(5) “The owner shall comply with NZBC requirement [*sic*], if he decides to have any type of alteration works in the proposed carpark spaces in future.”

(6) “The applicants will register against the unit titles for each of the carpark spaces an encumbrance to the [territorial authority]. That encumbrance will:

“a) Record the fact that the [territorial authority] has granted a waiver in accordance with the provisions of Section 34 of the Building Act 1991 from compliance with the provisions of Clause C3.2(c) of the Building Code.

“b) The Body Corporate shall at all times have in place insurance adequate to provide property protection against fire between carpark spaces (ie, if a car catches fire those on either side of it be covered by Body Corporate insurance).

- “c) Provide that the current owners and its [*sic*] successors in title release [the territorial authority] from any liability arising out of or in relation to the granting of such waiver.

“The form, terms and conditions of the encumbrance to be prepared by Council’s solicitor, duly executed and registered by the applicant against each unit title in the development prior to the issue of a Code of [*sic*] Compliance Certificate at the applicant’s cost.”

- 3.4 The building has been completed but conditions 6(a), (b), and (c) have not been satisfied. After correspondence between the parties and their solicitors, the territorial authority refused to issue the code compliance certificate and the body corporate applied for this determination.

## **4 THE ACT AND THE BUILDING CODE**

### **4.1 My jurisdiction**

- 4.1.1 As regards my jurisdiction, the relevant provisions of the Act are:

- (a) Section 17(1):

(1) If any doubt or dispute arises in respect of—

- (a) Whether particular matters comply with the provisions of the building code; or
- (b) The territorial authority’s decision in relation to—
  - (i) The issuing of or the refusal to issue, or the cancellation of, any building consent . . . or
  - (ii) Any condition attached to a building consent . . . or
  - (iii) The granting or refusal of any waivers or modifications under section 34(4) of this Act; or . . .
- (c) The issuing of, or the refusal to issue, a code compliance certificate under section 43 of this Act . . .

any of the parties may apply to the [chief executive] for a determination in respect of the doubt or dispute.

- (b) Section 18:

An application to the [chief executive] under section 17 of this Act shall be limited to whether or not, or to what extent, particular building work or proposed building work (including any actual or proposed demolition) complies with all of the provisions, or with any particular provision, of the building code . . .

- (c) Section 20:

A determination by the [chief executive] in relation to a matter referred to it under section 17 of this Act may incorporate waivers or modifications and conditions that a territorial authority is empowered to grant or impose and shall—

- (a) Confirm, reverse, or modify the disputed decision to which it relates or determine the matter which is in doubt . . .

### **4.2 Compliance with the building code**

- 4.2.1 As regards compliance with the building code, the relevant provisions of the Act are:

(a) The definition of “other property” in section 2:

“Other property” means any land or buildings or part thereof which are—

- (a) Not held under the same allotment; or
  - (b) Not held under the same ownership—
- and includes any road:

(b) The definition of “building” in section 3:

- (1) In this Act, unless the context otherwise requires, the term “building” means any temporary or permanent movable or immovable structure . . .
- (2) For the purposes of . . . a building consent, a code compliance certificate . . . the term “building” also includes—
  - (a) Any part of a building . . .

(c) Section 34:

- (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.
- (4) The territorial authority may grant a building consent subject to—
  - (a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and
  - (b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.
- (5) In formulating any conditions under subsection (4) of this section, the territorial authority shall have due regard to the provisions of the building code and the matters set out in section 47 of this Act.

(d) Section 43:

- (3) . . . the territorial authority shall issue to the applicant . . . a code compliance certificate, if it is satisfied on reasonable grounds that—
  - (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

(e) Section 47:

In the exercise of its powers under sections 30 to 46. . . the territorial authority shall have due regard to the following matters:

- (g) The intended use of the building . . . and
- (i) The reasonable practicality of any work concerned; and
- (k) Any other matter that the territorial authority considers to be relevant.

4.2.2 The relevant provisions of the building code are:

**Clause C3 – SPREAD OF FIRE**

**OBJECTIVE**

**C3.1** The objective of this provision is to:

- (c) Protect adjacent *household units*, other residential units, and *other property* from the effects of fire.

**FUNCTIONAL REQUIREMENT**

**C3.2** *Buildings* shall be provided with safeguards against *fire* spread so that:

- (c) Adjacent *household units*, other residential units, and *other property* are protected from damage

**PERFORMANCE**

**C3.3.2** *Fire separations* shall be provided within *buildings* to avoid the spread of *fire* and smoke to:

- (d) *other property*.

**5 DISCUSSION**

**5.1 General**

5.1.1 The applicant’s detailed contentions are outlined and discussed below. In summary, the applicant said:

“either:

“(a) Clause C3 of the building code has been complied with where applicable; or

“(b) [Condition 6 of the waiver is] inappropriate.

“The Territorial Authority must now issue the Code Compliance Certificate for the building.”

5.1.2 The territorial authority did not submit detailed rebuttals of the applicant’s contentions, but said that:

(a) “. . . the requirement for a fire waiver encumbrance in respect of separate carparks is a well established Council requirement for the reasons set out in [3.2 above]”.

(b) “[The territorial authority] believes that all unit title holders and prospective owners should have the right to know, if Waivers have been issued as part of a Building Consent . . .”

5.1.3 In terms of the matters in dispute as set out in 1.3 above:

**5.2 Do the car parks comply with clause C3?**

5.2.1 The applicant contended that the relevant provision of clause C3 of the building code did not apply to the car parks or had been complied with, arguing that:

“The functional requirement C3.2(c) only applies to adjacent property ie. adjacent household unit, adjacent other residential units, adjacent other property.

“The other property in question here ie. car park units are located within the buildings and are not adjacent.”

5.2.2 I do not accept that contention because:

- (a) Section 3(2) of the Act provides that the term “building” includes any part of a building. Each car park is a particular part of the apartment building and I therefore take the view that clause C3.2(c) applies in respect of other property that is adjacent to that car park.
- (b) Each other car park and all common property has the status of “other property” in relation to any particular car park.
- (c) In any case, I take the view that the relevant mandatory requirement of the building code is clause C3.3.2(d), which requires fire separations within buildings to avoid the spread of fire to other property.

5.2.3 I therefore conclude that the car parks do not comply with clause C3 of the building code.

### **5.3 The waiver**

5.3.1 I consider that in these particular circumstances it was reasonable for the territorial authority to grant a waiver of clause C3.3.2(d) of the building code to the effect that fire separation need not be provided for the car parks subject to certain conditions. The justification for the waiver is apparent from 3.2 above.

5.3.2 However, it must be recognised that by granting the waiver the territorial authority permitted a lower level of fire protection than would have been provided by the fire separations required by the building code. It was therefore appropriate for the territorial authority to impose conditions so as to reduce the risk by increasing the extent to which the building complies with the provisions of the building code.

### **5.4 The conditions of the waiver**

5.4.1 I take the view that I have jurisdiction to determine disputes about conditions of a waiver only in respect of whether the condition concerned relates, in terms of section 18 of the Act, to the extent to which building work complies with the provisions of the building code despite the waiver. I also take the view that I do not have jurisdiction in respect of a condition that does not relate to compliance with the building code.

5.4.2 I consider that a condition which increases the extent to which the building work complies with the relevant provision of the building code is an appropriate condition in terms of section 34(4)(a) of the Act.

### **5.5 Conditions (1) to (5)**

5.5.1 I consider that I have jurisdiction in respect of conditions (1) to (5) because they relate to the extent to which the building complies with the provisions of the building code. They are appropriate conditions because they reduce the likelihood of an outbreak of fire in the car parking areas and the damage to other property resulting from such a fire.

5.5.2 In fact, the applicant does not dispute conditions (1) to (5). Nevertheless, those conditions are relevant to the disputed condition (6)(a), which requires that an encumbrance on each unit title shall record the fact that the territorial authority has

granted the waiver. I assume that the encumbrance is to include the terms of the waiver, including the conditions.

## **5.6 Condition (6)**

### *5.6.1 Registration of an encumbrance*

5.6.1.1 As to the registration of an encumbrance, the applicant's contentions, with my own responses interpolated, were:

“(a) The car parks do not have their own separate title.”

As I understand it, under the Unit Titles Act each car park is an accessory unit to a particular apartment, and each apartment is owned under a separate unit title.

“(c) It is impracticable to register an encumbrance against every separately owned piece of property in a Unit Title development. . . .”

Registering an encumbrance against each unit title might well seem to the applicant to be “impracticable”, but I do not understand the applicant to argue that it is impossible or unlawful.

Presumably, the territorial authority requires a registered encumbrance to ensure that it can legally enforce the terms of the encumbrance against future owners. Presumably also, the territorial authority has obtained such encumbrances in respect of other buildings for which it has granted similar waivers on similar conditions.

5.6.1.2 I take the view that I do not have the jurisdiction to determine the legal question of whether such an encumbrance may lawfully be registered against each unit title.

5.6.1.3 However, I also take the view that if such an encumbrance may be lawfully registered then I do have the jurisdiction to consider the contents of the encumbrance in relation to the extent to which the building complies with the building code. In this case, that means whether conditions (6)(a), (b), and (c) are for the purposes of reducing the likelihood of an outbreak of fire in the car parking areas and the damage to other property resulting from such a fire.

### *5.6.2 Condition (6)(a) – encumbrance to record the waiver*

5.6.2.1 Condition 6(a) requires that the encumbrance shall record the fact that the territorial authority has granted the waiver. I assume that the encumbrance is to include the terms of the waiver, including the conditions.

5.6.2.2 The territorial authority said that it believed “all unit title owners and prospective owners should have the right to know, if Waivers have been issued as part of a building consent . . .”

5.6.2.3 The applicant said:

“[The territorial authority] has the ability to qualify the code compliance certificate in relation to conditions and waivers and anyone in receipt of that certificate, or subsequent Land Information Memoranda will be aware of the situation.”

5.6.2.4 I agree that any waiver or modification of the building code granted by a territorial authority should be evident from the building consent or the code compliance certificate, or both, and should also be recorded on the relevant land information memorandum. However, I do not accept that as preventing it from also being

recorded in an encumbrance on the title if such an encumbrance may be lawfully registered.

5.6.2.5 The encumbrance supports the conditions of the waiver by communicating them directly to the owner and prospective purchasers. It is not disputed that conditions (1) to (5) are for the purposes of reducing the likelihood of an outbreak of fire in the car parking areas and the damage to other property resulting from such a fire.

5.6.2.6 I therefore conclude that condition (6)(a) is appropriate in terms of section 34(4)(a) of the Act.

5.6.3 *Condition (6)(b) -- body corporate to take out insurance*

5.6.3.1 Condition (6)(b) requires the body corporate to take out certain insurance.

5.6.3.2 The applicant said:

“(d) The requirement to have a Body Corporate obtain insurance is inappropriate as the Body Corporate . . . owns no property in the building [and] has no insurable interest in any property in the building.”

“(e) The Territorial Authority has the authority to grant a waiver at its discretion. It is inappropriate for a Territorial Authority to . . . seek third parties to obtain insurance to cover such discretions.”

5.6.3.3 I take the view that condition (6)(b) is for the purpose of indemnifying people against financial loss from fire (although it does not protect the territorial authority against claims that such loss would not have occurred but for the waiver).

5.6.3.4 Thus condition (6)(b) does not relate, in terms of section 18 of the Act, to the extent to which building work complies with the provisions of the building code despite the waiver.

5.6.3.5 Accordingly, I take the view that I do not have the jurisdiction to determine whether condition (6)(b) is appropriate in terms of section 34(4)(a) of the Act.

5.6.3.6 Nevertheless, in case I am wrong about my jurisdiction, I put on record that in my view:

(a) I was not advised as to the territorial authority’s intentions in respect of condition (6)(b) but presume that it was to mitigate any financial loss to the body corporate or the unit title holders arising out of the fire risk.

(b) The extent to which those persons should insure against financial loss is a commercial matter in which the territorial authority has no interest.

(c) Such insurance will be of no benefit to the territorial authority.

(d) Accordingly, I consider that condition 6(b) is not appropriate.

5.6.4 *Condition (6)(c) -- owners to indemnify the territorial authority*

5.6.4.1 Condition (6)(c) in effect requires the owners to indemnify the territorial authority against liability arising out of or in relation to the granting of the waiver.

5.6.4.2 The applicant said:



“(e) The Territorial Authority has the authority to grant a waiver at its discretion. It is inappropriate for a Territorial Authority to seek an indemnity . . . to cover such discretions.”

- 5.6.4.3 Condition (6)(c) does not relate to the extent to which building work complies with the provisions of the building code despite the waiver.
- 5.6.4.4 Accordingly, I take the view that I do not have the jurisdiction to determine whether condition (6)(c) is appropriate in terms of section 34(4)(a) of the Act.
- 5.6.4.5 Nevertheless, in case I am wrong about that, I put on record that in my view:
- (a) The territorial authority does not benefit from the waiver, which it granted at the applicant’s request and to the applicant’s benefit.
  - (b) Condition (6)(c) would protect the territorial authority against claims that it should meet any financial loss to the applicant or others arising out of the increased fire risk permitted by the waiver.
  - (c) Accordingly, I consider that condition (6)(c) is appropriate.

## **6 DECISION**

- 6.1 In accordance with section 20 of the Act, I hereby determine that:
- (a) The car parking areas do not comply with clause C3.3.2(d) of the building code.
  - (b) Conditions (1) to (5) of the territorial authority’s waiver of that clause are appropriate in terms of section 34(4)(a).
  - (c) Condition (6)(a) of the territorial authority’s waiver of that clause is appropriate in terms of section 34(4)(a) of the Act provided that the encumbrance is to include the terms of the waiver, including the conditions.
- 6.2 Accordingly, and in accordance with section 20 of the Act, I hereby confirm the territorial authority’s decision to refuse to issue the code compliance certificate because condition 6(a) has not been satisfied.
- 6.3 I take the view that I do not have jurisdiction in respect of conditions (6)(b) and (6)(c) and therefore make no determination in respect of those conditions and do not confirm, reverse, or modify the territorial authority’s decisions in respect of those conditions.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 March 2005.

John Gardiner  
**Determinations Manager**