

Determination 2007/115

Determination concerning two notices to fix issued in respect of building work carried out prior to the Building Act 1991 at 10/2 Graham Street, Petone

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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 that Department. The applicant is the owner, Mr Powers, (“the applicant”) and the other party is the Hutt City Council (“the territorial authority”). At their request and under section 27(1) of the New Zealand Bill of Rights Act 1990, I have provided the owners of 10/1 Graham Street, K Kennedy and M Monaghan, (“the neighbours”) with documentation and given them the opportunity to comment because I consider that their rights, obligations or interests might be affected by the determination.
- 1.2 The matter for determination is the territorial authority’s decision to issue a notice to fix for building work carried out prior to the Building Act 1991 coming into force.
- 1.3 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 work consists of a garage and room built on a flat site adjacent to an existing house, refer figure 1.

3. Background

- 3.1 The evidence supplied to me indicates that a building permit was probably issued for the building work in 1987, although I have not been supplied with a copy of the permit.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

- 3.2 On 17 March 2007 the territorial authority wrote a letter to the owner enclosing a notice to fix dated 17 April 2007. Under the heading “Particulars of contravention or non-compliance” the notice to fix said,

Failure to obtain a Building Consent to convert a carport into a room, and the construction of a garage. As required under section 40 Building Act 2004.

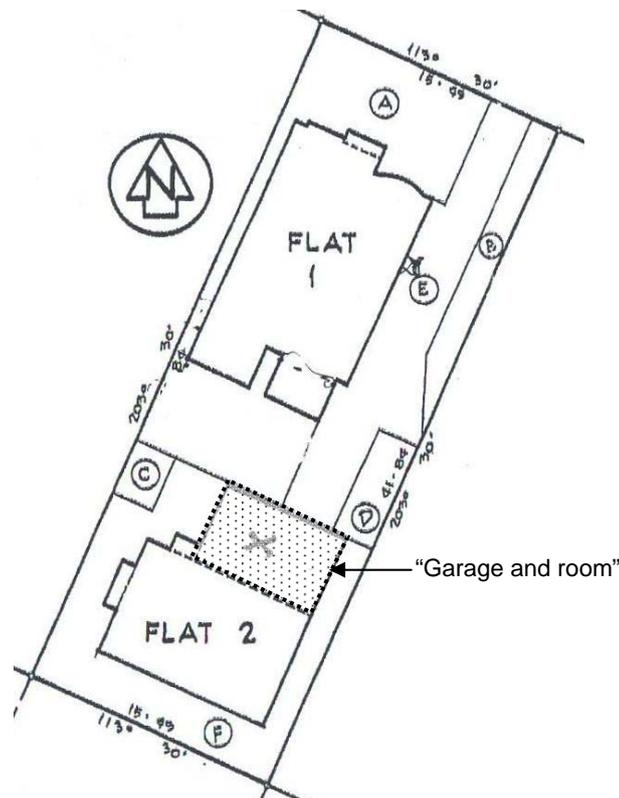


Figure 1: Site plan taken from the Deposited Plan 64706

- 3.3 Under the heading “Required remedial action” the notice said,
- Room to be removed and carport to be reinstated. Garage to be removed. Please contact (the territorial authority) in regard to time frame needed to comply to (sic) this notice.
- 3.4 On 26 April the territorial authority wrote again to the applicant, reporting on a meeting between the applicant and officials of the territorial authority, held on 24 April 2007 in the territorial authority’s office. According to the letter the applicant had agreed to remove the walls of the carport to restore it “to its original state being a carport”. The letter enclosed a further notice to fix dated 26 April 2007. In this new notice the “Particulars of contravention or non-compliance” were identical to those in the earlier notice to fix, but the “Required remedial action” was changed to say,
- As agreed at meeting held at (the territorial authority’s office).-The walls are to be removed and the work reinstated back (sic) to its original state being a carport.
- 3.5 On 27 April 2007 the applicant wrote to the territorial authority to say,
- Some confusion abounds in regard to carport/garage. May I again point out that there was never a carport, the builder immediately constructed a garage, despite the fact of not having changed the permit which gave permission for a carport . . .

3.6 A further exchange of letters occurred between the territorial authority and the applicant before the applicant's lawyer wrote to the territorial authority on 9 May 2007. The lawyer enclosed:

- a copy of a plan showing what the lawyer described as "the Garage and Room", entitled "Amended Plan for Carport" and apparently stamped as approved by the territorial authority on 28 August 1987. The lawyer evidently considered the stamp and signature on the plan to be evidence that the signatory had inspected the constructed works and not merely approved them for building permit purposes.
- a copy of a Deposited Plan 64706 bearing a note that indicated that construction of the applicant's house commenced on or after 1 April 1979, and that all necessary permits had been obtained. The plan showed the house and the "Garage and Room".

3.7 On 15 May 2007 the Department received an application for determination.

4. The submissions

4.1 With his application the applicant provided me with copies of:

- the correspondence he had had with the territorial authority
- a plan stamped with the territorial authority's stamp dated 20 August 1987
- a plan stamped with the territorial authority's stamp dated 28 August 1987
- the notices to fix dated 17 April 2007 and 26 April 2007
- the cross-lease plan for the site that includes the relevant buildings
- photographs that the applicant said were evidence that the building work was carried out in 1987.

4.2 On 14 June 2007 the territorial authority wrote to me and enclosed a copy of a plan stamped with the territorial stamp dated 28 August 1987.

4.3 This plan is apparently the only plan held by the territorial authority in respect of the building work that is the subject of this determination. In its letter the territorial authority said,

The Territorial Authority's stance on this matter is simply that the amended plan was for the repositioning of the carport and did not include authorisation for the garage or developed habitable space.

The garage and associated work shown on the plans provided by Mr Powers was simply a future proposal discussed between Mr Powers and his building contractor.

4.4 The draft determination was sent to the parties for comment on 28 June 2007 and to the neighbours on 4 July 2007. The applicant and the territorial authority accepted the draft.

4.5 The neighbours accepted the draft subject to the inclusion of certain additional information that was described as "non-contentious". That information all related to events that occurred before 1991. In light of the view I take as to my powers to make a determination, see 5 below, that information is not relevant and has therefore

not been included. That is not to say that it will necessarily be irrelevant if those concerned take their disputes before some other forum.

5. Discussion

5.1 The evidence I have received from the parties leads me to conclude that the building work that is the subject of this determination was completed in or about 1987, and certainly before the Building Act 1991 or the Building Act 2004 came into force.

5.2 In my view, the Act does not authorize a territorial authority to take any action in respect of an existing building unless:

- (a) the owner decides to alter (section 112) the building, to change its use (section 115), to change the length of its limited life (section.116), or to subdivide the allotment in a way that affects the building (section 116A), or
- (b) the building is dangerous (section 121), earthquake-prone (section 122), or insanitary (section 123).

5.2.1 In particular, I take the view that the territorial authority has no power to issue a notice to fix under section 164 unless a builder or a building owner is contravening or failing to comply with the Act or the regulations made under it. In this case, there may well have been a contravention of the local building bylaws in force in 1987, but there does not appear to have been any contravention or failure to comply with the Act.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I determine that the decision of the territorial authority to issue the notices to fix dated 17 April 2007 and 24 April 2007 is hereby reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 1 October 2007.

John Gardiner
Manager Determinations