



Determination 2009/60

Refusal to issue a building consent that incorporates the re-use of existing barriers for a house at 2/7 View Road, Campbells Bay, North Shore City



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 Richardson, acting through an agent (“the consultant”), and the other party is North Shore City Council carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).
- 1.2 I take the view that the matter for determination, in terms of sections 177(b)(i) and 188², is whether the decision of the authority to refuse to issue a building consent that allows the re-use of existing balcony barriers in their present form is correct.

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

² 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.

- 1.3 The authority is not satisfied that the barriers when re-fixed in position will achieve compliance with Clause F4 “Safety from falling” of the Building Code³ (First Schedule, Building Regulations 1992).
- 1.4 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 The house itself is two-storied and is predominantly clad with cedar weatherboards. It is moderately complex in shape and form.
- 2.2 The building work consists of recladding a part of the house that has a monolithic cladding, and carrying out remedial work to an adjacent deck (repair and replacement of membrane and substrate). The remedial work will require the removal and reinstatement of a barrier to the deck, and also the barrier to a walkway adjacent to walls being reclad.
- 2.3 Both barriers are 900mm high and are formed of stainless-steel tube top and intermediate rails. The deck also has widely-spaced balusters. No form of infill panel is provided to either barrier.
- 2.4 The barrier rails are fixed to the cladding. The increased thickness of the new cladding, and the work to the deck, will require both barriers to be removed and undergo minor alteration before being replaced in the same location. I note that similar barriers are used through the rest of the house (to other decks and stairs).

3. Background

- 3.1 The house was built in 1990. In recent times problems arose from the ingress of external moisture through certain walls in the house and the proposed remedial work was planned. Prior to an application for a building consent for the remedial work, the consultant corresponded with the authority about the nature and extent of the repair work, including discussion about the impact of the repair work on existing adjacent barriers.
- 3.2 The authority responded by email, on 23 February 2008, stating that it would allow the re-use of the deck barriers in terms of section 112. The authority also suggested that:
- it may be responsible to explain to the owner how the requirements for such barriers, to protect against [...] falling, have changed, and why.
- 3.3 The applicant, through its consultant, applied to the authority for a building consent on 25 February 2009.
- 3.4 On 21 May 2009, the authority emailed the consultant requesting details ‘for improving the safety from falling aspects of the handrails affected by this consent application’.
- 3.5 On 25 May 2009, the consultant wrote to the authority complaining about the delay experienced in the process of issuing a consent for the building work. The consultant also noted that the authority had accepted in principle the re-use of the barriers prior

³ The Building Code is available from the Department’s website at www.dbh.govt.nz.

to the consent application plans being completed. The consultant also referred to the requirements of section 112, which were considered to be relevant in this instance.

- 3.6 On 2 June 2009, the authority wrote to the consultant acknowledging the delays in processing the building consent application. The authority noted that it was now of the opinion that it did have grounds to require that the existing barriers should comply with Clause F4, as section 112 did not apply to the situation where barriers were demounted, and re-erected. The authority contended that as the removal and re-fixing of the barriers was 'building work', the barriers must, once re-erected, comply fully with the requirements of the Building Code.
- 3.7 The authority considered the decision in Determination 2008/4 was also relevant to its position. The authority stated that it was satisfied that the barriers could be reused provided the gaps in the barriers were reduced to a maximum of 100mm.
- 3.8 The Department received an application for determination on 10 June 2009.

4. The submissions

- 4.1 The applicant, through its consultant, provided a submission dated 5 June 2009. The submission set out the background to the dispute and noted that the authority had changed its previous stance as to the re-use of the barriers. The submission posed the following questions:

Is removing an existing deck barrier to carry out building work on the deck, and then putting the stainless steel barrier back "building work" as defined in the act?

Does s112 apply to this solution, even if making small changes to the fixings of the barrier is classified as "building work"?

- 4.2 The submission also asked if it is reasonable for a building consent authority to accept a building consent application and then not initiate any written contact with the applicant until 37 working days later.
- 4.3 The applicant forwarded copies of:
- the correspondence with the authority
 - a set of photographs showing aspects of balcony and its barriers.
- 4.4 The authority wrote to the Department on 11 June 2009 stating that it had reconsidered its earlier acceptance in principle regarding the re-use of the barriers and that it was now of the opinion that section 112 did not apply, as some modifications were being made to the barriers. The work on the barriers should include a modification to reduce the gaps, which would not necessarily include additional stainless steel rails.
- 4.5 The draft determination was sent to the parties for comment on 1 July 2009.
- 4.6 The applicant accepted the draft subject to some matters of clarity. I have amended the determination accordingly.
- 4.7 The authority confirmed its acceptance of the draft determination subject to non-contentious amendment in a letter to the Department dated 15 July 2009. The authority made the following comments:

section 112 ... is commonly regarded as a licence to build to a lower standard than the current code whenever the work is for an alteration or addition.

[An] addition could be very small or it could be larger than the existing building. To build an addition larger than the original building to the standard of the existing building and not to the current building code is untenable.

[An] example is existing buildings that are built of untreated framing. Interpreting section 112 literally means that an alteration or an addition could be built of untreated framing and continue to comply with the other provisions of the building code at least to the same extent as before the alteration.

. . . we consider that as human safety is involved it is reasonable to require a measure of upgrading to reduce the risk of falling.

5. The legislation

5.1 Relevant provisions of the Act are:

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
- (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

5.2 Relevant provisions of the Building Code are:

Clause F4 –Safety from falling

F4.3.4(g) Barriers shall restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.

6. Discussion

General

- 6.1 The existing barriers have openings that do not restrict the passage of children under 6 years of age, nor do they meet the requirements for such barriers described in Acceptable Solution F4/AS1.
- 6.2 The barriers were installed in 1990, and the Building Act and the Building Code did not come into effect until 1992. Therefore, the barriers as built were not subject to the requirements of Clause F4. In addition, as Clause F4.3.4(g) was not introduced until 22 December 1994, the barriers would have met the requirements of Clause F4 up until that date.
- 6.3 The size of the openings to the existing barriers is apparently the authority's only concern. I also note that, based on its correspondence with the consultant, the authority has not expressed any concerns regarding the height of the barriers, nor the remaining barriers in the house.

The application of section 112

- 6.4 The building work, for which the consent is being sought, consists of recladding some walls and the necessary remedial work to a deck. The work also includes minor alterations to two existing barriers that abut this work.
- 6.5 In my view the recladding of the walls and remedial work to the deck must comply fully with the requirements of the Building Code. It would be inappropriate to apply the provisions of section 112 to this work because, if section 112 was applied, it could be argued that the remedial work need only meet the requirements of the Building Code to the same extent as the defective elements being replaced.
- 6.6 The authority's position is that section 112 applies to the remainder of the house. In my view section 112 applies to the whole building as altered. In this instance I consider the barriers do not form part of the new building work and therefore section 112 applies. I am of this opinion for the following reasons:
- The barriers are incidental to the remedial work being undertaken.
 - The barriers themselves are only subject to minor alterations to accommodate the recladding work.
 - The barriers are to be reinstated in exactly the same location as before.
 - The barriers comply with the Building Code to the same extent as before the alteration.

My opinion may have been different had the decks themselves been altered or extended.

- 6.7 The authority has referred to the decision made in Determination 2008/4. I note that the situation arising in that determination concerned barriers that were removed and re-fixed in a new position to accommodate the widening of a bridge. The provision of the bridge barriers were an integral part of the work to the bridge, and in my view, differs from the current situation, where the existing deck and walkway barriers are subject to only minor alteration and are peripheral to the remaining work. Accordingly, I do not consider that the decision reached in Determination 2008/4 is fully relevant to this situation. In that case, I determined that the height of the existing relocated barriers needed to be altered (increased) before they were re-erected in their new location.

The authority's response to the application and the draft determination

- 6.8 I do not accept the authority's position that the application of section 112, in this case, allows a lower standard to be accepted in respect of alterations in the general case. Any new work must comply fully with the provisions of the Building Code, and any existing building work must comply to at least the same extent as before the alteration. I do not believe the authority's interpretation is correct with respect to section 112 allowing, say, untreated timber to be used in an alteration to an existing building.
- 6.9 I accept the authority's concerns about the safety of the barriers and the suggestions it has made to the barriers to improve safety for children under six years of age. While I have found that the barriers can be re-installed in their present form, I strongly suggest that the applicant take steps to improve their safety features in line

with current Building Code requirements. The relevant Compliance Document for Clause F4, F4/AS1 contains solutions that may be useful.

- 6.10 I note section 112 also requires the Building Code provisions with respect to means of escape from fire and access and facilities for persons with disabilities to comply with the provisions of the Building Code 'as near as is reasonably practicable'. As this application relates to work on a detached dwelling (housing), the provisions for means of escape from fire apply, but the provisions for access do not.

Other matters

- 6.11 The consultant has asked me to comment on the perceived delays in the authority's building consent processes (refer paragraph 4.2). However, this is a matter that I consider falls outside my jurisdiction under section 177 of the Act, and I am unable to make any decision in respect of it. I have referred the matter to the section within the Department that deals with such issues.

7. The decision

- 7.1 In accordance with section 188 I hereby determine that the decision of the authority not to issue a building consent is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 4 August 2009.

John Gardiner
Manager Determinations