



Determination 2011/014

The District Court's referral of Determination 2009/15 to the Department, in respect of the issue of a building consent for a 16-year old house at 154 Rangihaeata Road, Takaka, Golden Bay

1. The matters 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 the Department.

1.2 Determination 2009/15 was appealed to the District Court under section 208(1)(a) of the Act. The appeal was partially successful and the District Court referred the following matters back to the Department:²

1. The identification of the flaws in the consent and the extent of their connection with the current issues of concern. If the Department considers that the connection is significant then, as I have said, the consents should be reversed.
2. Whether the shortcomings in the consent meant that the house could never have become code-compliant, in which case, again, the consent should be reversed.

1.3 The parties to the determination and Determination 2009/15 are:

- the owner of the house Mr R S Cooper (“the applicant”)
- the Tasman District Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² *Cooper v Tasman District Council* 21/7/10, Judge Broadmore, DC Nelson CIV-2009-042-000116.

- 1.4 I therefore take the view that the matter for determination³ is whether the authority was correct to issue the building consents for the house and additions, and therefore whether the decisions to issue the building consents should be confirmed or reversed.

2. The background

2.1 Determination 2009/15:

- determined that the house did not comply with Clauses B1, B2, E2, E3, F2, G12 and H1 of the Building Code;
- determined that the roofing over the decks and garage did not comply with Clauses E2 of the Building Code;
- confirmed the authority's decision to issue the building consent for the house;
- reversed the authority's decision to issue code compliance certificates for the garage and decks;
- confirmed the authority's decision under section 124 that the building was not insanitary;

2.2 Determination 2009/15 reached the conclusion there was no jurisdiction to consider the issue of whether the authority should have issued a notice to fix.

2.3 The District Court upheld the findings of Determination 2009/15 with the exception of the confirmation of the authority's decision to issue the building consent for the house, and referred this matter back to the Department for further consideration.

3. The submissions

3.1 I invited the parties to provide me with submissions following the District Court decision.

3.2 I received a submission dated 22 October 2010 from the applicant's legal advisors which stated that the building consent applications lacked critical details regarding how certain elements of the building should be constructed and that this was therefore sufficient to warrant a reversal of the building consents in accordance with the District Court decision. The applicant's legal advisors submitted:

There is a significant connection between the flaws in the consent and the defects in the construction of the house. The application for consent lacked critical details of how the foundations, exterior cladding and roof of the house should be constructed, so the [authority] contravened section 34(3) of the Building Act 1991 when it issued the consent. The construction of these elements of the house suffers from defects that are so extensive that it is not possible to remediate these elements: they must be removed and replaced.

Accordingly (at the time the consent was issued) the [authority] could not have been satisfied, on reasonable grounds, that these elements would comply with the Building Code if constructed in accordance with the plans and specifications included with the application for consent. There must therefore be a reversal of the consent.

³ In terms of sections 177(2)(a) and 211(1)(b)

[A report provided for Determination 2009/15 by consultants to the applicant] states that a number of crucial details were omitted from the plans and specification submitted with the application for the consent, namely:

- (a) The only reference to the roof cladding or the construction of the roof was the notation [the pre-finished corrugated steel] on one of the elevation plans and the reference to [the pre-finished corrugated steel] in the specification. The specification alludes to a roof structure that was to be pitched in position rather than one that uses roof trusses. Further it refers to battens being installed at 400mm centres which indicates tiles rather than [the pre-finished corrugated steel].
- (b) The plans make no reference to the windows and doors, while the specification refers to both aluminium and timber joinery. Neither the plans nor the specification included details and/or information showing how the joinery units were to be installed to provide a weathertight junction with the exterior wall cladding.
- (c) The only reference on the plans to the type of cladding to be used was horizontal lines on two elevations that seemingly depict weatherboards. Despite this lack of information on the plans, the specification provided that wall areas were to be covered with exterior lining as shown on the drawings. The technical literature relating to [the cladding] was not included in the application for consent; and
- (d) The plans make no reference to the floor of the foundations. The specification covers both concrete and timber floors.

The [report] records that the construction of the elements of the house about which there are a lack of sufficient information in the application for the consent (namely the foundations, exterior cladding and the roof), was defective.

The construction of the foundations suffered from the following defects ...:

- (a) Vegetation had not been removed prior to the laying of the foundations and it was not possible to remove the vegetation after the foundation had been laid because the foundation walls were boxed with the steel already in place
- (b) The water table in the ground beside the dwelling is within 350mm of the surface and there is water right up to the underside of the concrete floor slab
- (c) The floor slab was not adequately tied to the foundation wall and foundations;
- (d) D10 starters were either not provided along the foundation wall or were spaced further than 600mm apart; and
- (e) The reinforcing mesh was not raised 50mm above the underside of the floor slab but rather was sitting on the upper surface of the foundation wall, and the mesh was not tied to the starters

The [report] records that the exterior cladding suffered from the following defects:

- (a) The soakers to the joints of the weatherboards were not correctly installed ... ;
- (b) The weatherboards were not set out correctly, the cover of the boards was not equal and the prescribed 3mm of cover was not provided for every board ... ;
- (c) Some of the studs were at centres exceeding 600mm and the frame was not nailed in accordance with NZS 3604 ... ; and
- (d) The bottom plates at the location of the braces were not adequately fixed into position, many framing members were cut short, only 50mm thick lintels were used even though the house is in a high wind loading zone, the wall plates were not straightened horizontally and the studs were not straightened vertically

A number of defects in the construction of the roof are recorded in the [report], namely:

- (a) All of the struts were cut out from both ends of the gable end trusses ... ; and
- (b) No lintels had been provided over the opening in the end walls

3.3 A copy of the District Court judgment was attached to the applicant's submission.

3.4 In a letter to the Department dated 22 October 2010, the authority considered that it was reasonable to have issued the building consents. This decision had been based on the relatively simple design of the house in question and the reputation of the building company that was to construct the house. Accordingly, the authority stated:

A review of the information, including the amount of technical detail submitted with the application for building consent, was considered reasonable to allow the territorial authority the exercise of its powers with regard to sections 30 to 46 of the Building Act 1991.

Given the single level and regular shape of the buildings floor plan, type of construction and materials proposed it was considered that the building consent application processors were dealing with familiar and accepted materials and design practice of the day.

Also the building company associated with the design, was known nationally and produced generic type buildings, generally limited to rural, garage and small residential dwellings which in turn appealed to the lower end of the construction cost cycle.

Given the above the territorial authority was satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was completed in accordance with the plans and specifications submitted with the building consent application.

3.5 I issued a draft determination to the parties for comment on 26 November 2010. In the draft determination, I concluded that it was appropriate to reverse the decision of the authority to issue the building consent.

3.6 The applicant accepted the draft determination in a response dated 9 December 2010 without comment.

3.7 The authority did not accept the draft determination in a response dated 10 December 2010. The authority's legal advisors set out its position as follows:

It is submitted that there is no substantial connection between any of the flaws in the building consent documentation and the defects and areas of non-compliance in the building work at the property.

In the applicant's submission dated 22 October 2010 ... the applicant refers to defects in the construction work at the property relating to the foundations, the exterior cladding and the roof. All of these defects to the extent that they might exist as defects in the construction work itself that occurred after the building consent was issued. They are not linked to the information that was provided in the plans and specification provided to the [authority] when the building consent application was made.

The evidence is that the defects that exist at the property are defects that emerged during the course of construction and not as a result of the processing of the building consent application. Some defects were picked up during construction, others were the subject of debate as to how significant they are and in any event no code compliance certificate was ever issued.

The applicant goes on to say that there was an absence of information in the plans and specifications and that is sufficient to justify the reversal of the building consent. The [authority] disagrees.

The evidence from [the expert] contained in the independent report provided to the [Department] [dated 16 November 2008 (during the course of Determination 2009/15)] was as follows:

... A review of the application documentation shows that the specifications were not specific to the job. In addition the plans lacked relevant detail and appeared "off the shelf" standard set of plans. It appears that the [authority], while processing the consent, identified those aspects they thought would be relevant to the project (the specifications held by the [authority] has ticks next to specific items). It appears from the application that the dwelling was originally intended to be placed on a timber pile and ring foundation rather than a slab.

At the time it was not uncommon for territorial authorities to grant consents with the intention of sorting out the details during the inspections. In addition, it was common for building officials to rely on the builder and designer, to, in part, achieve a compliant building.

[The independent expert's evidence (engaged by the Department during the course of Determination 2009/15)] was that while the plans and specifications lacked some detail, those deficiencies were often remedied during construction. This view is reinforced by the decision of Body Corporate No 189855 and Anor v North Shore City Council and Ors (25/7/08, Venning J, HC Auckland CIV-2005-404-005561). In that decision there were findings that the plans and specifications lacked detail, as is the case here. However the [territorial authority] was found not to have fallen below a reasonable standard of care when approving the consent. As is illustrated in the applicant's submissions ... the defects in the property relate to the construction work itself and do not have their genesis in the processing of the building consent application. It is also relevant that the type of construction was not complex and was to be carried out by a recognised competent builder.

...

Lastly, [the authority] submits that the wishes of the applicant in seeking that the consent be reversed and his knowledge of any consequences flowing from the reversal of the consent should not, with respect, be matters that the Department should give any significant weight to when coming to its view on whether the building consent should be reversed.

3.8 In response to the authority's submission, in a submission dated 20 December 2010, the applicant's legal advisors submitted:

[The authority] suggests that the flaws in the construction of the applicant's home do not need to be considered and that the Department should focus only on the plans and specifications submitted to the [authority]. This would be contrary to paragraph 44 of [the judgment] in which His Honour specifically directed that there be an assessment of the connection between the flaws in the consent and the issues of current concern (namely the defects in the construction of the applicant's home).

...

In Body Corporate 189855 v North Shore City Council and Ors [the judge] examined whether a territorial authority should be held liable in negligence in relation to the issue of a building consent. This is a wider issue than the question which is currently before the Department: namely, whether the [authority] complied with [section 34(3)] of the Building Act 1991 at the time the consents were issued. Whether the consents should be reversed, and whether the Council is liable in negligence in relation to the issue of the consents, are distinct questions.

Further, unlike in *Body Corporate 189855 v North Shore City Council* and *Ors* there is a clear connection between the deficiencies in the consents and the flaws in the construction of the applicant's home.

...

Nor is it relevant that the construction of the applicant's home was to be carried out by a "recognised competent builder": that has no bearing on whether the Council complied with the Building Act 1991 in issuing the consents.

... The [Building Act 1991] was in force at the time the building consent was issued so the Council had to comply with [section 34(3)] of the Act in deciding whether to issue the consent. Section 34(3) provides that the criterion for the issue of a building consent is satisfaction on reasonable grounds that the proposed building work will comply with the Building Code. The expert evidence presented by the applicant illustrates that the [authority] failed to meet this standard when issuing the consent.

- 3.9 I have carefully considered the submissions from the parties and I have taken account of the information in preparing the second draft determination.

4. Discussion

- 4.1 The matters referred back to the Department for determination by the District Court are set out in paragraph 1.2 above. In the District Court appeal decision Judge Broadmore discussed the adequacy of the plans and specifications accompanying the application for the building consent in the following way:

[29] As demonstrated in the report of December 2008 of [the building consultants engaged by the applicant], the plans and specifications supplied with the application for building consent were inadequate in a number of respects. They were generic to a particular proprietary building, they used language and contained references appropriate to superseded legislation and standards, and did not contain such basic information as the design of or material to be used in the exterior cladding. In paragraph 3.8 of the [report of the building consultants engaged by the applicant], the author says this:

The plans that form this building consent application consist of a floor plan and two elevations only, being the end elevation containing the garage door and the rear side elevation with the two single back doors. There is no site plan so the positioning of the dwelling on the site in reference to due north was simply not possible ... this is the full extent of the plans that the Council used to assess compliance with the building code against. There are no elevation drawings of the other two elevations ... there are no roof framing plans, no cross-sectional drawings showing key construction and compliance items, no drainage plans, no site plan and ... plans or references ... to the foundations and concrete floor slab.

[30] Accepting that the house was and was known to be a proprietary standard building, the matters identified in this paragraph remain matters which require to be addressed by the Territorial Authority on an individual basis. The [authority's] "Guide to Consents under the Building Act 1991" ... expressly identifies bracing schedules, drainage disposal plans, site plans, and cross sections as required "in order for processing [of applications for building consents] to commence". I consider it requires no expertise ... to realise that a site plan, roof framing plan, drainage plans and plans for the foundations and floor slab, and quite possibly others ... are essential to an authority's consideration of an application for building consent.

...

- [38] ... Further, it seems to me that the Department wrongly failed to take account of the manifold shortcomings in the plans and specifications as discussed earlier in this section.
- [39] However there may be other reasons for declining to reverse the consent.
- [40] First, the deficiencies in the material accompanying the application for consent may not be relevant to the current issues of concern. Why should the consent be reversed if its flaws are now immaterial? For example, the specifications attached to and forming part of the building consent issued on 13 August 1993 refer in some detail to both lintels and trusses, including the need for bracing of gable end trusses, and yet it is the asserted deficiencies in these items that is a major element of complaint.
- [41] I do not know what flaws the Department identified in the consent. I certainly lack the expertise to identify them from the many reports put before me, or to evaluate their current relevance; and I have received no submissions which would assist me to do so. But unless the flaws are significantly connected with the current issues of concern, then in my view the consent should not be reversed.
- [42] Secondly, speaking generally, it might be a fair assumption that the process of inspections during construction and the process of considering the issue of a Code Compliance Certificate at the end would ensure that, no matter what shortcomings there might have been in the original consent, the building would in fact end up code-compliant. Again, in those circumstances, it is not easy to see why the consent should be reversed in respect of a code-compliant building.
- [43] Thirdly, on the other hand, if the shortcomings in a consent meant that a house built in accordance with it could never be code-compliant, then to reverse the consent would seem to be the appropriate, if not the only, remedy. Whether that is the situation with this house is again not a question which I am in a position to resolve.

4.2 I reviewed the building consent documentation from a technical point of view in order to consider these matters. The specification was fairly typical for a simple building and includes generic information and various construction options. However, the drawings are of a poor standard and are generic. This theme of generic information and the failure to provide information about this particular site and building run throughout the building consent documentation as:

- there is no site specific information
- there is no site plan
- the information references some relevant standards such as NZS 3604, NZSS 1900:1965 (Chapter 9.3A)⁴, NZS 3102:1983⁵, but does not specify the parts that apply and does not include all relevant standards such as NZS 4610:1982⁶ for the effluent disposal system.

⁴ NZSS 1900:1965 New Zealand Standard Model Building By-Law

⁵ NZS 3102:1983 Concrete masonry units

⁶ NZS 4610:1982 Specification for household septic tank systems

4.3 There are also significant omissions in the building consent documentation, as there is no information in respect of the following:

- there is no information about the foundations, other than the reference to 'concrete foundation' on one of the elevations, and the generic reference to construction to comply with NZS 3604 (which assumes good ground)
- there is an absence of information about elements such as insulation
- there are no cross sections
- there is no bracing information or schedule, although some diagonal bracing is indicated on the drawings

4.4 Section 34(3) of the former Act stated:

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.

4.5 The authority has stated that the building consent documentation was appropriate given the simple and common nature of the construction and the simplicity of the design. The building company associated with the design was well known and established and produced generic type buildings, and the work would be carried out by a recognised competent builder. Further that:

A review of the information, including the amount of technical detail submitted with the application for building consent, was considered reasonable to allow the territorial authority the exercise of its powers with regard to sections 30 to 46 of the Building Act 1991.

4.6 In respect of the nature of the design, I observe that the conditions of the building consent include reference to NZS 3604. NZS 3604: 1990 was the code of practice for light timber frame buildings not requiring specific design. While I observe that NZS 3604:1990 was deemed to be an acceptable solution for Clause B1 of the Building Code at the time, the standard includes various construction options for different elements of the building, which required design choices to be made and specified. In this respect, NZS 3604: 1990 states:

2.7.1 Together with every application for a building consent in accordance with the Building Act 1991 for a building purporting to comply with this Standard shall be included:

- (a) A floor plan of each floor level;
- (b) An elevation of each external wall;
- (c) The type and location of each foundation element (for example: reinforced masonry foundation wall, anchor pile, cantilevered pile and so on);
- (d) Adequate information on all subfloor, floor, wall and roof framing including the type and location of each subfloor brace, diagonal brace, and wall bracing element and the number of bracing units assigned to each bracing element;
- (e) The type and location of cladding, sheathing and lining.

- 4.7 The building consent documentation included a floor plan and plans showing the four elevations of the external walls as described by (a) and (b) of NZS 3604:1990 (refer to paragraph 4.6). However, the building consent documentation lacks basic information about fundamental aspects of the design, as it does not include in any detail any of the requirements for the type and location of building elements described in paragraph (c) to (e) of the paragraph 4.6 above, of NZS 3604:1990. The only detail on the two plans showing the elevations are:
- some wall bracing units indicated
 - a reference to a ‘concrete foundation’ on one of the elevations
 - vents indicated to a bathroom and a kitchen windows
 - the products noted for the roofing material and external cladding.
- 4.8 There are generic references to the various building elements in the specification accompanying the building consent application. This could be acceptable if the plans provided more information about the type and location of building elements required. As this is not the case, there is no information about which building elements are relevant to the building work, nor the requirements of NZS 3604:1990 that were intended to apply i.e. the standard includes various construction options for different elements of the building.
- 4.9 Determination 2009/15 also referred to the decision in a previous Court case⁷ in relation to a building consent issued under the former Act. The Court found that the authority was not required to receive detailed drawings before issuing a building consent under the former Act and stated that the territorial authority ‘was entitled to issue the consent if the plans and specifications (with the documents they incorporated) showed a building that a competent tradesman would complete in such a way that it would be in compliance with the code’. However, the judgment noted that there was an expectancy that the standard of inspections undertaken by an authority would require to be of a high standard where detail may be lacking in the consented documentation.
- 4.10 I do not consider that the lack of basic information about fundamental aspects of the design in this case is in the category where some detail may be lacking in the consented documentation.
- 4.11 I note the authority has referred to its knowledge of the competency of the designer, builder and tradespeople, and the nature of the proprietary system. I am of the view that this information could assist in informing an authority’s reasonable grounds decision under section 34(3) of the former Act, however, I do not consider that it is sufficient to make up for a lack of basic information about fundamental aspects of the design. The authority is entitled to take into account information about the designer, the builder and the proprietary system being used but not to the extent that it can ignore the fundamental requirement in section 34 of the Act that the building consent documentation must be sufficient to provide the authority with reasonable grounds to satisfy itself that the provisions of the building code would be met if the building work was properly completed in accordance with the documentation.

⁷ Body Corporate No 189855 and Anor v North Shore City Council and Ors 25/7/08, Venning J, HC Auckland, CIV2005-404-005561

- 4.12 In respect of the defects that exist at the property, I observe that there is evidence that quite a few defects emerged during the course of construction. I acknowledge the point of the authority that this is not as a result of the processing of the building consent application, and furthermore, no code compliance certificate was ever issued. In this respect, I observe that there are faults evident, such as the site preparation (in that the compacted fill beneath the floor slab included a top soil layer containing top soil and vegetation) which does not comply with the building consent itself. I note the specification included a requirement for site preparation.
- 4.13 However, there is a lack of basic information about fundamental aspects of the design, and there are defects to the building elements in these same aspects in terms of the construction including:
- the style of foundations and building elements and the type of ground
 - the configuration of the various framing elements of the structure, their type and their location
 - the arrangement for the products to form the external envelope
 - the absence of information about such items as the insulation to be provided and the installation of the solid fuel heater.

Conclusion

- 4.14 I have considered the matters that the Judge required me to address and I note:
- the design information that accompanied the application for the building consent complies with the requirements of the Building Code but there are significant omissions and much of the information that is included is generic when it should have been developed and applied to this particular site and building
 - some of the defects in the construction of the house and areas of non compliance with the Building Code occurred during construction and contravene the building consent – these defects are unrelated to the adequacy or otherwise of the building consent documentation
 - the majority of the defects in the construction of the house and areas of non compliance with the Building Code are in relation to building elements for which there was a lack of basic information in the building consent, only generic options were provided, or no specific detail provided at all
 - there is a lack of basic information about fundamental aspects of the design, such as foundations and framing elements, in the building consent documentation (refer paragraphs 4.2 above).
- 4.15 I do not consider that the building consent documentation was sufficient to provide the authority with 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 in terms of section 34(3) of the former Act.

- 4.16 I do not consider it to be the case that nature of the building consent documentation meant that the building could have never been built to be Building Code compliant, however, it is my view that the majority of the defects evident are in relation to building elements for which there was a lack of basic information in the building consent about fundamental aspects of the design. The absence of this information in the building consent documentation directly contributed to a significant range of the defects in the building.
- 4.17 Taking these factors together, I therefore conclude it is appropriate to reverse the decisions of the authority to issue the building consents in this case.
- 4.18 I note that in respect of this particular decision the implications of reversing the building consent were canvassed by the Judge with the applicant (refer to paragraph 37 of the judgment). The applicant affirmed his desire to seek the reversal of the building consent and indicated that he understood the consequences of this proposed course of action.
- 4.19 The prejudice to an owner that is likely to occur when a building consent is reversed is usually a matter that I would give careful consideration to when deciding whether to exercise my discretion to reverse a building consent. However, in this determination that is not a matter that I am required to consider. The only matters that have been referred by the Court for determination concern the consistency of the building consent documentation with the requirements of the Act.
- 4.20 The authority is required to record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.
- 4.21 However, to assist other owners in a similar situation to that of the applicant I have set out below the consequences associated with reversing a building consent or confirming a building consent.

Where a building consent is reversed

- 4.22 Where there is building work that does not comply with the building code and a building consent is reversed:
- a notice to fix will need to be issued as there will be building work that does not comply with the building code and building work that has been undertaken without a building consent (refer section 164(2) of the Act that requires a notice to fix to be issued in such circumstances);
 - a notice to fix will broadly require any building work that does not comply with the building code to be remedied or removed, and a building consent may be required in order to carry out that remediation or removal work;
 - the owner may be required to apply for a certificate of acceptance in respect of the existing building work that is no longer the subject of a building consent;
 - the owner will never be able to obtain a code compliance certificate for the existing building work that is no longer the subject of a building consent.

Where a building consent is confirmed

- 4.23 Where there is building work that does not comply with the building code and a building consent is confirmed:
- a notice to fix will need to be issued as there will be building work that does not comply with the building code (refer section 164(2) of the Act that requires a notice to fix to be issued in such circumstances);
 - a notice to fix will broadly require any building work that does not comply with the building code to be remedied or removed, and a building consent may be required in order to carry out that remediation or removal work;
 - the owner may be able to obtain a code compliance certificate for the existing building work if the authority is satisfied the building work complies with the building consent.

5. The decision

- 5.1 In accordance with section 188 of the Act, I determine that the authority's decisions to grant the building consents for the house and the additions are reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 25 February 2011.

John Gardiner
Manager Determinations