



Determination 2011/041

Whether internal alterations to an attached garage is exempt from the need for a building consent under Schedule 1 of the Building Act at 23 Heritage Crescent, Richmond

1. The matter for determination

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 parties to the determination are:

- the owners of the house, Mr and Mrs Macquet (“the applicants”)
- the Tasman District Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

1.2 The application arises from a dispute between the parties about whether a notice to fix can be issued requiring a certificate of acceptance to be sought for building work that was undertaken without a building consent but was exempt under Schedule 1.

1.3 I am therefore of the view that the matter for determination² is whether the proposal of the authority to issue a notice to fix was correct. In deciding this I must also consider whether the building work was exempt under Schedule 1 of the Act and whether the authority was correct to require an application for a certificate of acceptance.

1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

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 In terms of section 177(1)(b) and 177(2)(f) of the Act.

2. The building work

- 2.1 The building work consists of internal alterations to the house to convert an attached garage into a bedroom and office. The garage has a concrete floor and external walls that are lined and insulated. There is internal access to the garage from the house.
- 2.2 The alterations involved constructing a non-load-bearing partition wall to divide the garage into two rooms. The existing external garage door was removed and replaced with a sliding door to the office and a window that opens to the bedroom.
- 2.3 The partition wall is constructed of treated timber framing. The wall is lined and insulated, and has internal doors connecting the office and bedroom.
- 2.4 The existing lintel and framing for the garage door was retained and the new sliding door and window inserted into the existing framed opening, and treated timber framing installed around the new aluminium joinery. The external wall is insulated, lined, and clad with direct-fixed fibre-cement weatherboards.
- 2.5 The new exterior joinery is powder-coated aluminium with the glazed door fitted with safety glass. New insulation was also added in the ceiling to the former garage as part of the alteration work.

3. The background

- 3.1 The existing house was built 2001. The applicants completed the internal alterations to the garage between February and March 2009.
- 3.2 In May 2009, the applicants submitted plans and applied for a building consent for a new carport to be built in front of the new bedroom and office but included the alterations that had already been completed.
- 3.3 Further information was requested by the authority in May and June 2010. The applicants advise this included a requirement for them to obtain resource consent in respect of the carport which was subsequently approved.
- 3.4 On 5 August 2010 the authority granted a building consent (No. 100601) under the Act for the carport and the alterations.
- 3.5 On 9 September 2010, before the consent was issued or uplifted, the authority inspected the applicants' property and discovered that the garage alterations were completed.
- 3.6 On 14 September 2010 the authority wrote to the applicants advising that a building consent could not be issued retrospectively for completed work. The letter advised the applicants that they could either 'reinstate the area back to the original garage use' or apply for a certificate of acceptance for the building work. The letter also advised the applicants that they would have to amend their building consent to 'reflect the proposed work', i.e. remove the alteration work so that the consent was for the new carport only.

- 3.7 On 23 September 2010 the applicants submitted new plans relating only to the carport. On 4 October 2010 an amended building consent No. 100601 was issued to reflect this change. A further amended consent (to include a veranda on the carport) was issued on 27 October 2010. The carport was subsequently built; I note that there is no dispute between the parties relating to the carport.
- 3.8 The applicants chose not to proceed with an application for a certificate of acceptance for the internal alterations.
- 3.9 On 12 October the authority wrote to the applicants advising that, as it had not received the application for a certificate of acceptance, a notice to fix for the unauthorised building work would be issued within 5 working days. The applicants responded in a letter dated 14 October 2010 advising that they were applying for a determination.
- 3.10 The Department received the application for a determination on 26 October 2010.

4. The submissions

- 4.1 In a letter dated 18 October 2010 accompanying their application for a determination the applicants stated that they knew that the building work was exempt from the requirement for a building consent and that this is why the work was carried out without one. The reason that the alterations were subsequently included with the application for a building consent for the carport was because they wanted to ‘formalize all the alterations with [the authority]’.
- 4.2 The applicants further stated that:
- It is our contention that the internal garage/workshop alterations, under Schedule 1 of the Building Act did not require building consent and that the council cannot issue us with a Notice to Fix ...
- At this time [the authority] will not grant consent for the building work and have asked for us to apply for a Certificate of Acceptance or they will issue us with a Notice to Fix. [Schedule 1 of the Building Act 2004] confirms that a home owner can enclose an existing opening as long as the structural integrity of the existing building has not been compromised.
- 4.3 The applicants also provided copies of:
- correspondence between themselves and the authority
 - plans, specifications and certificates of compliance relating to the building work
 - photos of the alterations.
- 4.4 On 18 November 2010, the Department wrote to the authority requesting that it provide a submission on particular matters arising from the application. The authority responded on 8 December 2010, stating that it accepted that the building had not undergone a change of use and that it had not assessed the application for a building consent in terms of sections 114 and 115 of the Act, but rather as an alteration under section 112.

Originally, the applicant sought approval to convert the existing garage into an office and additional bedroom. ... The assessment at that time was that the building works involved the conversion of a non-habitable portion of the building into a habitable portion of the building. The fact that the applicants themselves applied on these terms ... confirms that they wished for this work to be covered under the Building Consent as this would be properly documented on their property file

- 4.5 With respect to the question of whether the alterations were exempt from requiring a building consent under Schedule 1 of the Building Act 2004, the authority stated that:

No application was made asking that the [authority] consider whether the alterations were exempt.

In May 2010 [the applicant] applied for Building Consent to convert the garage ...

The decision to apply for a building consent is the property owner's responsibility and the same situation applies to Schedule 1 – Exempt building work (refer to DBH Publication³ ...)

When it was confirmed that the garage conversion had been completed prior to the grant of Building Consent 100601, we advised [the applicant] that a Certificate of Acceptance could be sought and we that we could issue a Notice to Fix to achieve this.

At no point during this time did [the applicant] state that the alteration work had been deemed by them to fall under Schedule 1.

However, the authority also stated that:

On review however [the authority] accept the works could be covered by the Schedule 1 exemptions.

- 4.6 The applicants responded to the authority's submission in a letter dated 14 January 2011. They confirmed that 'all we wanted to do was have the changes noted on the file so that in the future if we should sell that all is in order'. The applicants also stated that following the authority's letter of 14 September 2010 regarding the unauthorised building work, they had a meeting with an officer of the authority and showed him a copy of Schedule 1 and that 'at no time did [the officer] mention that I could submit plans and specify that they are Schedule 1 exempt'.
- 4.7 A draft determination was issued to the parties for comment on 14 March 2010. In a response received by the Department on 25 March 2010, the applicants accepted the draft without comment.
- 4.8 The authority responded in a letter received by the Department on 20 April 2010, noting that it did not dispute the decision. However, the authority also stated that there was some contention between the parties as to whether the owners were aware that the garage conversion was exempt prior to including it on the building consent but that this was not relevant to the outcome of the determination.

³ Building work that does not require a building consent – A guide to Schedule 1 of the Building Act 2004. dated November 2008

5. Discussion

5.1 General

5.1.1 With respect to building work that is exempt from the need for a building consent I note the following:

- Irrespective of whether building consent is required or not, all building work must comply with the provisions of the Building Code to the extent required by the Act.
- It is an offence under the Act to undertake building work without consent when one is required.
- An application for building consent cannot be made retrospectively.
- An owner can elect to obtain a building consent for exempt work even if one is not required, however, the intent of the legislation is that a consent is not required.
- An owner can ‘regularise’ exempt work by filing drawings and the like with the authority as the office of record under section 216.

5.2 The application of Schedule 1

5.2.1 The applicants have stated that they considered the building work exempt under Schedule 1 of the Act. In its submission, the authority has stated that on review it accepts ‘that the work could be covered by the Schedule 1 exemptions’.

5.2.2 The building work was carried out in February and March 2009. At that stage both paragraph (ae) (relating to the installation, replacement or removal of a window or exterior doorway) and paragraph (ca) (relating to the construction, alteration or removal of an internal wall) of Schedule 1 of the Act were in force. These two paragraphs clearly provide an exemption from the need for a building consent for the disputed alterations.

5.3 The identification of exempt work

5.3.1 I have considered the identification of exempt work in a previous determination (Determination 2010/107). I consider the reasoning that applied in that determination also applies in this case.

5.3.2 The authority is of the opinion that it is an owner’s responsibility to decide whether building work is exempt from the need for a building consent under Schedule 1 of the Act, and to bring this to the authority’s attention. The authority has referred to a Departmental guidance document⁴ to support this position. (I note the document referred to was revised in December 2010 but the advice given, in respect of this situation, remains essentially the same.)

⁴ “Building work that does not require a building consent: A guide to Schedule 1 of the Building Act 2004”, dated November 2004.

5.3.3 The 2010 guidance document states:

Where the owner is unable to determine conclusively for themselves that the building work they wish to undertake is exempt, they should seek advice from an appropriate person or organisation, such as a ...building consent authority ...

5.3.4 In Determination 2010/107, I concluded that:

5.2.5 When considering the building consent application ... the authority should have considered the application of Schedule 1 and advised the applicant that the proposed work could be exempt. The applicant could then have decided whether to proceed with the application or withdraw it. In my view if an authority considers building work exempt it is incumbent on the authority to advise an owner accordingly.

(Determination 2010/107 concerned building work that was wholly exempt and no other building work requiring consent was undertaken, or considered, in conjunction with the exempt work.)

5.3.5 I accept the 2010 guidance places responsibility on an owner to determine the status of any proposed work. However, it does not absolve an authority from the responsibility of advising an owner that work they are proposing may not require a building consent.

5.3.6 In this case the authority should have considered the question of the exemption when it found that the garage alterations had been completed in September 2009, rather than requiring the applicants to either reinstate the garage or apply for a certificate of acceptance.

5.3.7 I accept this situation is unusual in that the work was in two distinct parts. An authority would not normally find itself in a position of being able to exempt work that an owner has completed before it has issued a building consent.

5.4 The certificate of acceptance and notice to fix

5.4.1 The authority has advised the applicants to apply for a certificate of acceptance for the building work and stated that, if the applicants fail to do so, it will issue a notice to fix (refer paragraph 3.9).

5.4.2 Section 96 of the Act sets out the circumstances in which a territorial authority may issue a certificate of acceptance. Section 96(1)(a) covers situations where building work has already been carried out by the owner or any predecessor in title of the owner. In such circumstances, a certificate of acceptance for the work can be applied for and issued only where 'a building consent was required for the work but not obtained' (section 96(1)(a)(ii)).

5.4.3 I have concluded that no building consent was required for the building work because it was exempt under Schedule 1 (see paragraph 5.2.2), therefore the provisions in section 96(1)(a) do not apply, and the authority cannot issue a certificate of acceptance for the building work, nor can it require the applicants to apply for one.

5.4.4 Similarly, section 164(1)(a) of the Act, which relates to notices to fix, states that an authority must issue a notice to fix where it considers on reasonable grounds that ‘a specified person is contravening or failing to comply with this Act or the regulations’. This may arise in circumstances where building work was undertaken without consent when one was required.

5.4.5 In this case, because the building work is exempt from requiring a building consent, the applicants cannot be said to be ‘contravening or failing to comply’ with the Act therefore the authority cannot issue a notice to fix for the building work on the grounds of failing to obtain a building consent.

5.4.6 However, should possible non-compliance with the Building Code be drawn to its attention, the authority is entitled to inspect the works by virtue of its powers under section 222 of the Act. If the authority finds building work that does not comply with the Building Code it can then issue a notice to fix.

5.5 Conclusion

5.5.1 The alterations to the existing garage fall within the exemption for the need for a building consent under paragraphs (ae) and (ca) of Schedule 1.

5.5.2 In this instance I do not believe the applicants were sufficiently clear in their intention to have the work exempt under schedule 1, nor did the authority raise the possibility that such an exemption could be applied. Had either transpired it would have emerged that the building work had already been completed and that the applicants could not apply for, and the authority could not grant, building consent for the work.

5.5.3 Because the work is exempt from the need for building consent, the authority cannot now require the applicants to obtain a certificate of acceptance for the work. Nor can it issue a notice to fix in relation to the work unless, following inspection, it has reasonable grounds to believe that the work contravenes or does not comply with the Act or the Building Code.

5.5.4 I recommend that owners seek advice about work they consider might be exempt from the need for a building consent. If work is considered exempt I also consider it prudent for owners to file documents describing the work with the authority.

6. Decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the building work was exempt under Schedule 1 of the Act and accordingly authority would have been incorrect to issue a notice to fix requiring the applicants to seek a certificate of acceptance.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 May 2011.

John Gardiner
Manager Determinations

Appendix A: The relevant legislation

A1 Schedule 1 - Exempt building work

- 1 A building consent is not required for the following building work:
 - (ae) the installation, replacement, or removal in any existing building of a window (including a roof window) or an exterior doorway if—
 - (i) compliance with the provisions of the building code relating to structural stability is not reduced; and
 - (ii) in the case of replacement, the window or doorway being replaced satisfied the provisions of the building code for durability:
 - (ca) the construction, alteration, or removal of an internal wall (including the construction, alteration, or removal of an internal doorway) in any existing building if—
 - (i) compliance with the provisions of the building code relating to structural stability is not reduced; and
 - (ii) the means of escape from fire provided within the building are not detrimentally affected; and
 - (iii) the wall is not made of units of material (such as brick, burnt clay, concrete, or stone) laid to a bond in and joined together with mortar: