



Determination 2013/030

Regarding the authority's exercise of its powers of decision in respect of a refusal to amend a building consent for Restricted Building Work carried out to a relocated house at Talbot Road, Fairlie

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 and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are

- the owners of the property, G and P Heslip ("the applicants")
- P Nickalls, the Licensed Building Practitioner who supervised the building work ("the LBP")
- Mackenzie District Council, carrying out its duties and functions as a territorial authority or building consent authority ("the authority").

1.3 The determination arises from the authority's refusal to apply an owner-builder exemption² to all the work contained in a building consent, in circumstances where the consented work was underway and the foundations had already been supervised by the LBP. The owner-builder exemption was sought by the applicants as an amendment to the building consent ("the exemption amendment"). The refusal of the exemption arose because the authority is of the view that a Record of Work in respect of the foundations must be supplied by the LBP.

1.4 I therefore consider the matter to be determined³ is whether the authority correctly exercised its powers of decision in refusing to amend the building consent. In considering this matter, I must consider the grounds on which the refusal was made.

1.5 In making my decision I have considered the submissions of the parties and the other evidence in this matter. I emphasise that each determination is considered on a case-by-case basis.

1.6 Relevant sections of the Act referred to in this determination are set out in Appendix A.

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

² As set out in section 90D of the Act

³ Under sections 177(1)(b) and 177(2)(a) of the Act

2. The background

- 2.1 The detached three bedroom house has an area of 72m² and was originally constructed in the 1980s. It was relocated to the Talbot Road site in August 2012.
- 2.2 The work to relocate the building on the site was detailed in building consent No. 120150 issued by the authority on 6 August 2012. The consent included a drainage plan, foundation plan and sections, and a PS1 from an engineer. The consent was in respect of
- Completion of a concrete pad for placement of garage and pad
Housing – detached
- 2.3 The consented building work related to the construction of the pile foundations and the placement of the house onto these foundations and is Restricted Building Work⁴. I have not seen any information that advised the authority that the LBP would be carrying out the restricted building work; though I note the LBP produced an invoice for the ‘supply [of] LBP number for building consent’. From the information provided it appears the removal company was to undertake the consented work under the supervision of the LBP.
- 2.4 The first inspection carried out by the authority, covering the pre-pour construction of the pile holes, was carried out on 26 September 2012. The authority noted that the building work had been completed as per the consent and the Building Code, and the work was ‘approved to progress’.
- 2.5 On 1 October 2012, the LBP invoiced the applicants; the description of work was ‘to supply LBP number for building consent’.
- 2.6 On 17 October 2012, the applicants emailed the authority
- to request that the LBP’s name and registration number be removed from all consent documentation
 - voicing their concerns that the LBP had conducted only one site visit, at the same time as the authority’s inspection, to sight the pile holes and that the LBP was paid directly by the removal company for this task
 - stating that they had no prior knowledge that they would have to pay to have the LBP’s details on the consent documentation and that their contract with the removal company covered the whole process of placing the house on the site, including all piling work.
- 2.7 The applicants requested a meeting with the authority and this was held on 24 October 2012. During this meeting, the applicants reiterated their views and offered to sign a waiver stating that they took full responsibility for all building work to date and requesting that the LBP’s name ‘be removed from the consent’. The authority declined the request.

⁴ As defined in the Building (Definition of Restricted Building Work) Order 2011

- 2.8 A pre-pour slab inspection was carried out on 7 November 2012. The following notes were made on the Inspection Notification
- the work was approved to progress once the engineer's drawings were received for the link alteration
 - the house bearers were approved
 - the garage may be relocated
 - the work had been completed as per the building consent.
- 2.9 The applicants and LBP on 14 November 2012. The applicants responded to the LBP's email on 17 November 2012 disputing the payment noting the agreement the applicants believed they had with the removal company to carry out the consented work.
- 2.10 On 27 November 2012, the applicants emailed an officer of the Ministry to ask for advice on how to proceed with their building consent. The applicants stated that they would complete the appropriate amendment form to declare their owner-builder status. The email summarised the background information and asked the officer of the Ministry if it was possible for the building consent to be amended to remove all references to the LBP.
- 2.11 The officer of the Ministry responded to the applicant on 29 November 2012, stating that any Restricted Building Work that had been completed must be accompanied by a Record of Work from an LBP.
- 2.12 On 29 November 2012 the applicants applied for an amendment to the building consent to 'continue project as per building consent under the "owner-builder" status'.
- 2.13 The applicants emailed the authority on 13 December 2012, asking for confirmation that the amendment to the consent (applying the owner-builder exemption) had been approved, and whether the applicants could continue with the project under the owner-builder exemption.
- 2.14 The authority responded on 17 December 2012, stating that no further Restricted Building Work (work on the pile foundations or the house) could commence until a Record of Work had been supplied for the completed work.
- 2.15 The authority also advised that building work that was not Restricted Building Work (the construction of the garage and car port) could continue; however, as there had been some changes to the consented plans the applicants would need to apply for an amendment to include these new structural changes before this work could proceed.
- 2.16 The Ministry received the application for determination on 8 February 2013.

3. The submissions

- 3.1 The applicants made a submission in an email accompanying the application for determination. The submission set out the background to the dispute and the

applicants' view on the matter. The applicants noted that they felt that they had informed the authority of the situation throughout, and that the authority was being inflexible by refusing to allow the project to continue under the owner-builder exemption until the Record of Work for the Restricted Building Work completed by the LBP was supplied.

3.2 The applicants provided copies of

- the building consent application and supporting documentation
- correspondence between the parties
- an application form for a code compliance certificate relating to the consent.

3.3 The authority acknowledged the application for determination and responded on 11 February 2013, submitting the following (in summary):

- The consent was 'issued under the LBP scheme'. The authority carried out a pre-pour inspection of the pile holes while the 'supervising LBP was on site'. Whether an owner-builder exemption was considered appropriate was considered 'but it was eventually agreed that it was able to proceed under exemption with the required declarations received'.
- The applicants asked the authority to consider the whole project under the exemption, including the pile foundations which had already been constructed under the supervision of the LBP.
- As the LBP was employed for his services, rather than an unpaid friend or family member as required under an exemption, the authority considered that this part of the building work could not be included in the exemption. The authority requested that all work associated with the piles (including the provision of a Record of Work from the LBP) be completed, and then the rest of the project could then be completed under the exemption.
- The applicants asked the authority to let them take responsibility for the whole project, including the work completed before the exemption was in place.
- The plans for the garage and car port are significantly different from what was consented, and the applicants were asked to submit an application for amendment.
- The authority believes that the Record of Work has not been issued due to a contractual dispute. The authority does not consider this to be a good reason for a Record of Work to not be issued by the LBP.
- The authority stands by its decision to 'not proceed the job until an amended plan has been received', and the authority will not issue a Code Compliance Certificate until the Record of Work has been received.
- In summary, the authority believes there are two separate issues, being:
 - the LBP must supply a Record of Work for the part of the project that was completed before the owner-builder exemption was confirmed.
 - the applicants must submit an application for amendment to the building consent before work can continue on the garage and car port.

- 3.4 On 26 February 2013 the applicants provided further information about the consent application and supplied copies of the following:
- Building consent No. 120150
 - Drainage Plan, foundations plans and sections, and a Producer Statement (PS1) Design from a civil engineering firm
 - Inspection notices 2325 dated 26 September 2012 and 2386 dated 7 November 2012
 - An invoice from the LBP
 - Application for amendment to building consent to continue project under owner-builder exemption
- 3.5 A draft determination was issued to the parties for comment on 11 April 2013.
- 3.6 The authority and the applicants both accepted the draft without further comment in responses received on 29 and 30 April respectively. No response was received from the LBP.

4. Discussion

4.1 The matter for determination is whether the authority correctly exercised its powers of decision when it refused the exemption amendment. In considering this matter, I must consider the provisions relating to Restricted Building Work, and the relationship between Restricted Building Work and the provisions of the Act that prescribe the establishment of code-compliance.

4.2 Restricted Building Work

- 4.2.1 Restricted Building Work includes the design, construction or alteration of the primary structure or external moisture management system of a house or a small-to-medium apartment building, including the design, construction or alteration of foundations work.
- 4.2.2 If the application for a building consent involves Restricted Building Work it should state the name of the LBP who will be involved in carrying out or supervising that Restricted Building Work.
- 4.2.3 The building work related to the construction of the pile foundations for the house, and the placement of the house onto these foundations, is Restricted Building Work. Section 84 of the Act states that all Restricted Building Work must be carried out or supervised by an LBP who is licensed to carry out or supervise the work. Before Restricted Building Work is carried out, an owner is required to advise a building consent authority of the name of every LBP who is engaged to carry out or supervise the Restricted Building Work, and must advise if the LBP ceases to be engaged or another LBP is engaged (section 87).
- 4.2.4 As noted in paragraph 2.3 I have not been provided with any information that established that the Restricted Building Work was to be undertaken by the LBP.

- 4.2.5 Section 90 of the Act states that the purpose of an owner-builder exemption is to enable homeowners to build and alter their own homes. A person who is an owner-builder in relation to Restricted Building Work may carry out that Restricted Building Work without being supervised by a Licensed Building Practitioner.
- 4.2.6 Section 86 of the Act states that if an owner-builder exemption is in place, the owner may engage unpaid family members or friends to help carry out the Restricted Building Work.
- 4.2.7 If an owner-builder carries out Restricted Building Work under the owner-builder exemption, section 87A of the Act applies. This requires that a statutory declaration as to the owner-builder status be submitted with the building consent application, or the owner-builder must give a notice to the authority that they intend to carry out the Restricted Building Work themselves. This notice must be given before the building work begins. The owner must also give the authority notice as soon as is practicable if the owner-builder who is carrying out the Restricted Building Work changes, or if the owner-builder ceases to carry out the Restricted Building Work.
- 4.2.8 Section 88 of the Act requires that each LBP who carries out (other than as an owner-builder) or supervises Restricted Building Work under a building consent must provide, on completion of the work, the owner and the relevant territorial authority with a Record of Work stating what Restricted Building Work the LBP has carried out or supervised.
- 4.3 **The Issue of a code compliance certificate**
- 4.3.1 Section 92 of the Act states that the owner must include with a code compliance certificate application, any Records of Work provided by the LBP.
- 4.3.2 Section 94 of the Act outlines the matters which the building consent authority must consider in deciding to issue a code compliance certificate. A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 4.3.3 Section 94 lists a number of other matters that a building consent authority must have regard to before issuing a code compliance certificate. The absence of a Record of Work is not one of them. Further, the Record of Work simply records the name of the LBP who carried out or supervised the Restricted Building Work and thus supports the licensing and Restricted Building Work provisions of the Act that aim to ensure construction work that is critical to the integrity of a residential building is only carried out or supervised by people who have been independently assessed as competent to carry out that work. The Record of Work has nothing to do with the code-compliance of the work and whether the work that has been carried out complies with the building consent.
- 4.3.4 I note that the Ministry's Guide to Restricted Building Work⁵ is a guidance document for Building Officials. It advises that a lack of Restricted Building Work documentation does not play any part in whether the building consent authority is satisfied on reasonable grounds that the building work complies with the building

⁵ *Guide to Restricted Building Work (RBW)* published by the then Department of Building and Housing, January 2012.

consent. Therefore a lack of the required Record(s) of Work is not grounds to refuse a code compliance certificate.

4.3.5 I also note that the authority advised the applicant on 17 December 2012 that no further Restricted Building Work could be carried out until a Record of Work had been supplied for the completed work. The authority was wrong to issue such an instruction. Restricted Building Work that is covered by a building consent and carried out or supervised by an LBP or an owner under an owner-builder exemption may be carried out and a building consent authority has no basis for preventing such work being carried out unless, of course, the building work is contrary to the building consent.

4.4 **The refusal to include completed work in the owner-builder exemption**

4.4.1 Applications for building consent (including amendments under section 45(4)(b)) are to be considered under section 49(1) which states:

A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

4.4.2 The building work related to the construction of foundations and connecting the relocated house to the foundations is Restricted Building Work. This is not disputed.

4.4.3 The authority granted the amendment to the building consent in allowing the project to continue under the owner-builder exemption. The authority refused to amend the consent retrospectively by removing the LBP's name from all records and allowing the owner-builder exemption to be effective from the date of the original consent. In my view, the authority was correct to refuse to amend the building consent retrospectively to apply the owner-builder exemption to Restricted Building Work that had already been carried out.

4.4.4 An owner who carries out Restricted Building Work in the absence of an owner-builder exemption contravenes a number of provisions of the Act and such contraventions should not be the subject of a subsequent retrospective exemption as that would defeat the purpose of requiring the exemption to be obtained before the work is carried out.

4.4.5 The authority has also stated that work may continue on the parts of the project that are not Restricted Building Work; however there have been significant changes made to the consented garage and carport design and the authority has therefore requested that the applicants lodge another application for amendment to the consent to take these structural changes into account. The authority has stated that building work on the carport and garage cannot proceed until this is addressed.

4.4.6 I consider the authority was correct in its decision to refuse to amend the building consent to apply the owner-builder exemption retrospectively to Restricted Building Work that had already been carried out.

5. What happens next?

- 5.1 Taking account of the findings of this determination, the applicants should request a Record of Work from the LBP, covering the construction of the pile foundations for the house and any other Restricted Building Work that the LBP carried out or supervised.
- 5.2 If a Record of Work is not forthcoming from the LBP then that will not be a reason for the authority to refuse to issue a code compliance certificate. I consider the failure of the LBP to provide a Record of Work would be grounds for a complaint to the LBP Board about the conduct of the LBP.
- 5.3 The authority cannot prevent the applicants from continuing with the Restricted Building Work required to complete the foundations and the house under the owner-builder exemption, regardless of whether a Record of Work has been supplied by the LBP.
- 5.4 Similarly, a lack of a Record of Work from the LBP is not reason refusing to issue a code compliance certificate.
- 5.5 According to the authority's submission, the applicants had altered the plans for the garage and concrete pad after the consent was issued. It appears that an amendment to the consent is necessary to take these changes into account. It is recommended that the applicants submit an application for such an amendment to the authority so that building work can continue.

6. Decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the authority correctly exercised its power of decision when it refused to amend the building consent retrospectively to apply the owner-builder exemption to all the work contained in the original consent, and I confirm that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 May 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant legislation

Restricted building work must be carried out or supervised by licensed building practitioners

84 Licensed building practitioner must carry out or supervise restricted building work

All restricted building work must be carried out or supervised by a licensed building practitioner who is licensed to carry out or supervise the work.

86 Offence to engage another person to carry out or supervise restricted building work if person is not licensed building practitioner

...

- (1B) This section does not apply in the case of any unpaid friend or family member of an owner-builder who is engaged to assist the owner-builder in carrying out restricted building work.

87A Notices to building consent authority when owner-builder carries out restricted building work

- (1) This section applies when, under the owner-builder exemption, an owner-builder carries out restricted building work under a building consent.
- (2) If the building consent application was not accompanied by a statutory declaration as to owner-builder status, the owner must give the building consent authority a notice that the owner-builder is to carry out restricted building work.
- (3) The owner must give the building consent authority a notice—
- (a) if there is a change in the owner-builder carrying out the restricted building work; or
 - (b) when the owner-builder ceases to carry out the restricted building work.
- (4) A notice under this section must—
- (a) be in the prescribed form; and
 - (b) if it is a notice required under subsection (2) or (3)(a), be accompanied by a statutory declaration as to owner-builder status; and
 - (c) be given—
 - (i) before the building work begins, if it is a notice required by subsection (2);
 - (ii) as soon as practicable, if it is a notice required by subsection (3).

...

88 Licensed building practitioner to provide record of work in respect of restricted building work

- (1) Each licensed building practitioner who carries out (other than as an owner-builder) or supervises restricted building work under a building consent must, on completion of the restricted building work, provide the persons specified in subsection (2) with a record of work, in the prescribed form, stating what restricted building work the licensed building practitioner carried out or supervised.
- (2) The persons are—
- (a) the owner; and
 - (b) the territorial authority for the district in which the restricted building work is situated.

...

Subpart 4 – Restricted building work carried out by owner-builders

90A Purpose of this subpart

The purpose of this subpart is to enable homeowners to build and alter their own homes.

90D Owner-builder exemption

- (1) A person who is an owner-builder in relation to restricted building work may carry out that restricted building work without being supervised by a licensed building practitioner.
- (2) Subsection (1) does not apply if the restricted building work in question is low-risk building work under a low-risk building consent, simple residential building work under a simple residential building consent, or commercial building work under a commercial building consent

92 Application for code compliance certificate

- (1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.

...

- (2A) If applicable, the owner must include with the application any memoranda provided by licensed building practitioners under section 88(1)(a).

...

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
 - (a) that the building work complies with the building consent; and

...