

# ADVISORY NOTICE

## BUILDING

08/14

supersedes  
27/03

Advisory Notices are issued to assist in the interpretation of the *Development Act 1993*

May 2014

## PROFESSIONAL:

### Issuing of building rules consents

This notice provides advice on the responsibilities of a private certifier or council when issuing building rules consents under the *Development Act 1993* (the Act) and the *Development Regulations 2008* (the regulations). It supersedes Advisory Notice 27/03, which has been withdrawn.

#### Appointment of a private certifier to issue building rules consent

A private certifier may be engaged to assess a proposed development against the Building Rules and to certify that it complies with the Building Rules by issuing a building rules consent. When making decisions associated with this work the private certifier is acting as a relevant authority under the Act and has the same statutory functions and level of responsibility as a council. Accordingly a private certifier has to put the public interest above that of themselves or their clients. All decisions must be made independently and without bias or undue influence. If a council or private certifier has been involved in the design or documentation process for a development, they cannot then be involved in undertaking a building rules assessment and deciding whether it should be approved or not. They must be careful to avoid any conflict of interest situations that could compromise, or be seen to compromise, their ability to impartially assess a proposal.

While private certifiers and council staff are free to offer advice and assist applicants through the development approval process, they cannot become involved in making design decisions for an applicant if there is any likelihood that they will be assessing the proposal later for building rules consent. The duty of persons engaged as private certifiers to avoid a conflict of interest is clearly stated in section 92 of the Act and it is also inherent in the duties of public officers who exercise statutory functions in councils.

So, while a private certifier can act as a 'post office' for the purposes of forwarding an application for development plan consent to the council, they should never operate as the applicant's agent to resolve technical, planning and design issues because to do so would compromise their ability to impartially assess the work for building rules consent.

#### Acceptance of decisions made by private certifiers

The head power for private certifiers to certify compliance with the Building Rules and issue building rules consents is established under Section 89 of the Act. The same section makes it clear that a council incurs no liability for any matter within the ambit of a consent given by a private certifier on which it has relied. This is further reinforced in section 36(4) of the Act, which makes it clear that the council must accept that proposed building work complies if it has been certified by a private certifier.

Despite this, council is still entitled under section 93(b) to request the supply of further information or documentation that has not been forwarded by the certifier with the consent documentation, if it is



necessary for the issuing of the development approval.

For instance, a council may request-

- Evidence that the Construction Industry Training Fund (CITF) levy has been paid.
- Evidence of a building indemnity insurance certificate for the proposed work (as required under the *Building Work Contractors Act 1995*) if the building work contractor is known.
- Evidence that all documents forming part of the building rules consent have been adequately stamped and endorsed with the building rules consent.

If a council receives building rules consent documentation from a private certifier without any of the above, it should promptly request the additional information or action from the private certifier to enable the development approval to be issued.

Conditions applied by the certifier to the building rules consent regarding the supply of further information on these or other technical matters are an indication that the assessment is incomplete and that the consent may therefore be invalid. In these cases, council should not issue a development approval until it is satisfied that the information has been received, forwarded and dealt with by the certifier.

If a council becomes aware of a technical matter (that could impact on the building rules consent received from a private certifier) before the development approval is issued the council may take the following action-

- Advise the private certifier by telephone of the matter;
- Accept the building rules consent and rely on it for issuing the development approval within the prescribed 5 day period; and
- If necessary, confirm in writing that the matter has been brought to the attention of the private certifier and that the certified building rules consent has been relied on (pursuant to section 36(4) of the Act) when issuing the development approval.

#### **Endorsement of building rules consent documentation**

When a private certifier makes a decision to issue a building rules consent, they are required by the Act to notify the council and provide such information or documentation as the regulations require or that the council may require.

In relation to this, regulation 92(2)(a) requires the certifier to stamp or endorse two copies of the plans, drawings, specifications and other documents lodged by the applicant and approved by the certifier with the certifier's consent. It has generally been accepted that where such documentation is bound into a set that cannot be separated (such as a bound specification or set of drawings), then only the front page needs to be stamped and signed in a manner that identifies the private certifier's consent. However, this practice has on occasion not been accepted by some councils and the building rules documents have been returned to the certifier for further individual document endorsement.

When issuing the development approval, councils are also required to stamp the set of approved plans issued to the applicant with the decision notification. They therefore need to ensure that all documents



relevant to the approval can be clearly identified.

In order to do this, some councils are requiring private certifiers to **individually endorse each page or document forming part of the building rules consent documentation** before they will issue the development approval. In some cases, development approval has been delayed while documents are returned to the certifier for further endorsement. Since private certifiers can be requested by councils to provide such information or documentation when issuing a building rules consent, such requests will need to be complied with.

It is therefore advisable that private certifiers take care to ensure that their endorsed building rules documents meet the particular requirements of the relevant council and that all documents forming part of building rules consent are clearly identified on the decision notification form. This will also reduce the likelihood of confusion arising should the documents get separated later with the risk that, they may not be adhered to during construction.

### **Consistency with the planning consent**

Private certifiers are obligated to confirm that the building rules consents that they issue are consistent with the development plan consent issued by the relevant local council. A separate Advisory Notice provides further advice on this aspect of the development approval process.

### **Applying conditions**

Conditions should only be placed on building rules consents to resolve minor issues of compliance.

Conditions that would require further on-site assessment of the work against the provisions of the Building Rules in order to ensure compliance should not be applied to a building rules consent. For instance, a condition that *'the unisex sanitary facility is to be constructed in accordance with AS 1428.1'*, when no details have been provided for checking and approving in the application, indicates that this element has not yet been assessed and approved by the certifier. There is a strong legal view that such conditions are not valid as they indicate that a full assessment of the proposed work has not been undertaken. The onus would then be on the building surveyor who undertook the assessment to demonstrate how they were able to assess and approve the application when necessary information was missing. It could also be argued that by applying such conditions, the assessing building surveyor is entering into the design of the work in contravention of section 92 of the Act.

If information or details are not provided in the application, the applicant should be requested to provide them and update the documents so that a proper assessment can be carried out. Another option would be for the applicant to seek a staged consent so that the matter can be assessed at a later date.

### **Requiring upgrading of an existing building as a condition of consent**

When alterations or additions are being made to an existing building, section 53A gives private certifiers and councils the power to require, as a condition of granting a building rules consent, that the work includes the upgrading of the existing building if they consider that it is (or will be following completion of the proposed building work) unsafe, structurally unsound or in an unhealthy condition. Private certifiers and councils therefore have a responsibility when assessing an application to identify what impact a



proposed development will have on the existing building.

The extent of building work that can be required by a private certifier or council is only what may be considered reasonably necessary to make the building safe and ensure that it conforms to proper structural and health standards. Any new work resulting from the need to upgrade an element or part of a building to make it safe or healthy, must of course comply with the Building Rules. However, it is not the intent of the Act that this power should be used to require buildings that are NOT considered to be unsafe, structurally unsound or in an unhealthy condition to be brought into full compliance with current Building Code requirements.

A blanket condition placed on a building rules consent that the whole of the existing building is to be brought into compliance with the provisions of the Building Code is not acceptable as it indicates that the private certifier or council has not adequately identified the risks, not given the applicant the opportunity to provide details of how those risks will be ameliorated, and has not assessed and approved the applicant's proposals before issuing the building rules consent.

If a council or private certifier has identified that there are safety or health issues to be addressed, then the building rules consent for the new work cannot be issued until appropriate upgrading work been included in the application and it has been assessed and approved.

### Further information

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