

**Policy for the Review of  
Unconsented Building Work  
Certificate of Acceptance  
Building Condition Report  
for Building Control**

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## **Commencement and Review**

Date Approved: \_\_\_\_\_

Date Policy takes effect: \_\_\_\_\_

Date of the next Review: \_\_\_\_\_

Approved by: \_\_\_\_\_

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Position: \_\_\_\_\_

## **1.0 Introduction**

The framework for building control is provided by the Building Act 2004 and the supporting Building Regulations.

The Building Act requires, except for exempt building work, that the owner of a property makes an application for a building consent prior to under taking any building work.

While it is not an offence to issue a retrospective building consent under the Building Act 2004, this process, if used, could potentially encourage further breaches of the Act.

This policy and the associated procedure provides a process that certifies compliance with the Building Code for work constructed under urgency or illegally. The Building Act allows for such work to be issued with a Certificate of Acceptance (COA). This process is not available for building work undertaken prior to the 1<sup>st</sup> July 1992 or building work that is the subject of a building consent.

For building constructed prior to the Building Act 1991 coming into force on 1st July 1992, Council will accept what is termed a “Safe and Sanitary Report”. For building work constructed without a building consent on or after 1st July 1992, Council will also accept a Building Condition Report (BCR) to be placed on the property file.

Council accepts no liability for the content of “Safe and Sanitary Reports” or “Building Condition Reports”; it is up to any prospective owner to satisfy themselves as to the level of consumer protection these reports provide.

In the majority of cases both COAs and BCRs relate to building work constructed illegally. This Council may still prosecute the offending party even if it has granted a COA or accepted a BCR.

The buildings that are covered by this policy generally fall into the following categories:-

**a) Buildings or Works Constructed prior to 1<sup>st</sup> July 1992 (The commencement of the 1991 Act)**

Existing older buildings for which there are no records, or for which records have been lodged or work that was the subject of a building permit but which was not issued with a completion certificate.

**b) Illegal Works Prior to 1<sup>st</sup> July 1992 (The commencement of the 1991 Act)**

Works constructed without a building permit.

**c) Illegal Works Carried out on or after 1<sup>st</sup> July 1992**

Works constructed without a building consent.

The building work in category a) may be the subject of what are known as, “Safe and Sanitary Reports”. These reports are prepared by recognised professionals who provide a report with a conclusion that states that, in the opinion of the professional person, the building is not unsafe and not unsanitary. The requirements for a Safe and Sanitary Report are specified in this policy.

Safe and Sanitary Reports should cover the requirements in the Building Code that deal with structural safety, safety in terms electrical and gas reticulation, safe water supply and those factors that impact on health. The minimum standards of these reports is set paragraph 11 of this policy.

For building work in category b), an owner or prospective owner may wish to apply for a COA or place on file a Building Condition Report (BCR) that describes and provides an independent assessment of any work carried out without a building consent or permit or a report in respect to a permit which appears not to have been completed. Council will accept such a report if it meets a minimum standard in respect to content and is prepared by an approved professional.

An approved professional could be a professional or chartered engineer or a registered Building Surveyor. These professionals must demonstrate to the satisfaction of the Building Compliance Manager, as part of each report, that they are competent to report on, the subject matter in the reports. Meeting the minimum requirement in paragraph 11 of this report would be part of the competency assessment.

These reports, if accepted by Council, will be placed on the electronic property file and, if necessary, linked to the illegal work notice (unauthorised work).

A certificate of acceptance (COA) may be issued by Council, upon application by the building owner, to certify building work in certain circumstances as detailed in section 96 of the Building Act 2004.

This policy has been prepared to provide guidance, clarity and consistency to building owners, designers, builders, and building control officials on how to deal with unconsented work.

This policy has been prepared to ensure that decisions made in relation to COAs are fair and reasonable.

Any reference to files or documents in this policy is deemed to include either electronic or hard-copy versions, or both.

## **2.0 Scope**

This policy sets out how unconsented building work will be processed and the conditions on which COAs may be issued, or BCRs and Safe and Sanitary reports may be accepted. This policy applies to building work that may be subject to a COA as defined in section 96 of the Building Act 2004.

## **3.0 Policy Principles**

The following principles underpin this policy:

1. The policy shall provide a process that enables unconsented building work to be processed.
2. The Council, in performing the functions of both a BCA and TA, is committed to taking responsible courses of action that will ensure that its requirements under the Act are met.

## **4.0 Statute Reference**

Sections 96 – 99 of the Building Act 2004 detail the provisions in relation to issuing certificates of acceptance.

## **5.0 Content**

### Illegal Building Work

Illegal building work may come to Council's attention in a number of ways such as;

- a result of inspections
- advice from the owner, or
- complaints

Council will deal with notification of illegal building work and the request to place a report on the individual's electronic property file held by Council, as two separate and distinct processes.

In the first process, Council will record the presence of illegal building activity on the individual's electronic property file. The second process includes the investigation and, if necessary, includes consideration of enforcement action and the outcome of a COA or BCR application.

Council has a legislative duty to:

1. Enforce the Building Act.
2. Ensure buildings meet the minimum standards of the New Zealand Building Code.
3. Ensure that buildings are safe and sanitary.

Council has a range of educative and enforcement methods by which it can promote and ensure that minimum standards are maintained. Council needs to be proactive in this area as, otherwise, it could be seen to be negligent and liable for sub-standard work and to have avoided its statutory duty.

Turning a blind eye, in other words, is not an option, Council's enforcement options include:

- Prosecution in the event of significant breaches of the Act.
- Instant fines for breaches of the of the Building Act 2004 after the promulgation of appropriate regulations
- Issue "Notices to Fix" for work that was carried out illegally and does not meet the minimum required standards.
- Issue "Notices to Fix" in the event that a dwelling that is found to be unsafe or unsanitary.

Underlying every prosecution/enforcement model are the Solicitor-General's Guidelines of March 1992. These guidelines set out the requirements for the public prosecution / enforcement process. Whilst the Rodney District Council is not a Crown agency, it is still a public body and the Solicitor-General, through statute and convention, maintains oversight. Therefore, every effective enforcement/prosecution model should include the following key features:

- Demonstrable independence;
- Transparency of process;
- Successful outcomes; and
- Fairness.

Therefore, the Council processes are to include:

- ✓ An analysis of the situation and the extent of the illegal work.
- ✓ Are there issues that require a Notice to Fix?

- ✓ Are the circumstances sufficiently significant that the matter warrants prosecution and can the offending party be identified?
- ✓ Should the unconsented work be removed?
- ✓ Does the development contravene other legislation?

Paramount to the above processes is the maintenance of public safety. The issue of proceeding to a prosecution will be discussed at the Building Department Management meeting before a discussion with the Customer Services Director. When it has been agreed to proceed towards prosecution, a report will be prepared and presented to the Regulatory Committee for a decision.

#### Unauthorised Building Work – Building Consent

The only deterrent currently is to seek a prosecution or, in the near future, to issue an infringement notice. The building consent process should not concern itself with whether or not building work has occurred illegally. A building consent is issued on the information provided. If, during the consenting process, it is discovered that building work is under way, a Building Field Officer should visit the building site and issue a Notice to Fix, requiring building work to stop. The BFO should ascertain the extent to which compliance with a building consent is able to be determined and if a specialist report is required, in order to determine full compliance. (Note that there is no provision in the Building Act to cancel a consent or an application for consent).

Building work that has not been inspected will require Producer Statements from approved building professionals (refer to the policy on the Use & Acceptance of Producer Statements BCP109), together with a detailed report of how they have checked or determined compliance with the Building Code.

The building file is noted that the consent will not be issued, that a Notice to Fix has been issued to stop work and that inspections will not occur until the above reports have been received.

In the event that the unconsented work is minor, and if compliance can be easily verified by inspection, a retrospective building consent or amendment application may be processed by Council.

The decision whether or not to process a retrospective building consent or amendment shall be made by the Building Compliance Manager. Such a decision will consider;

1. The seriousness of the breach

2. The culpability of the owner
3. The impact on the owner of not granting retrospective approval

Depending on the seriousness of the extent of unconsented work, the Notice to Fix may also require a COA application for that part of the completed work prior to the issue of the building consent.

The decision whether or not the Notice to Fix to stop work should include the requirement for a COA is the responsibility of the Building Compliance Manager. If a COA is required, the building consent applicant will need to delete that part of the building work from the building consent by way of an amended application.

If building work is carried out without the required inspections, the remedy is to issue an infringement notice and to require Producer Statements, together with detailed investigation reports, as part of a Notice to Fix to stop building work (infringement notices are not currently available).

Similar action is required when unconsented changes occur to building work that is the subject of a building consent.

This process, because it is related to a current consent, is managed by the Building Inspection Team as part of their management of the building consent file. This process does not include the option of a COA or BCR. In the event that the building work is so major that it is, for all intent and purposes, not able to be considered as part of or a stage of the consented work, the unconsented building work will be discussed with the Building Compliance Manager. The Building Compliance Manager will decide if the unconsented building work requires a requirement for a COA as part of any Notice to Fix.

#### Unauthorised Building Work – No Consent

Unauthorised building work unrelated to a building consent is to be investigated initially by the Building Consent Inspection Team who will then pass the file to the Building Compliance Manager.

The Building Compliance Team will correspond and/or discuss with the property owners the options to deal with the unconsented building work. The options may include;

1. A Safe and Sanitary Report for building work carried out before 1 July 1992
2. A Building Condition Report for building work carried out on or after the 1 July 1992

3. An application for a COA for building work carried out after 1 July 1992.

Council may issue a COA for building work done without a building consent or for which a Code Compliance Certificate has been refused by another building consent authority (or building certifier) within Council's district.

A COA is not equivalent to a Code Compliance Certificate. It provides a limited assurance that Council has inspected the completed building work and found no obvious defects to the work listed and/or not excluded on the COA. However, the plans and specifications for that work may not have been checked, and Council may not have made any inspections during the course of construction.

When Council is responding to an application for a COA, Council's first concerns should be whether the building concerned breaches section 27 of the Building Act 2004 or is dangerous, earthquake-prone or unsanitary in terms of sections 121, 122, and 123.

Frequently, it will be necessary to subject a particular part of a building to a number of different inspections and tests to determine whether it complies with each and all of the relevant provisions of the Building Code. Where compliance can not be fully ascertained, the COA must be noted to limit Council's liability.

In the absence of case law, it is suggested that the term "only parts of the building work were able to be inspected" should be interpreted as requiring only such inspections or tests, as to the best of the Council's knowledge and belief, it is reasonable to make.

Applying for and obtaining a COA does not provide a defence against a charge, under section 40 of the Building Act 2004, of carrying out the building work concerned otherwise than in accordance with a current building consent.

Where the building work involves a building open to the public, or with specified safety features, the COA must be accompanied by any corresponding compliance schedule. A Certificate of Public Use (CPU) cannot be issued in conjunction with a COA. The COA application process must determine that the building is safe for its occupants and the public. If this is not the case, the application for a COA must be refused.

## **6.0 Application for Certificate of Acceptance**

An owner may apply for a Certificate of Acceptance (COA) when any of the following situations occur:

- Where an owner (or predecessor in title) carried out building work for which a building consent was required but was not obtained under either the Building Acts 1991 or 2004.
- Where a building consent authority that is not a territorial or regional authority is unable, or refuses, to issue a Code Compliance Certificate in respect of the building work for which it granted a building consent.
- Where a building certifier was unable or refused to issue a Code Compliance Certificate or building certificate.
- Where building work, which affects public premises, has started or was consented before 31 March 2005.

An owner must apply for a COA for building work carried out urgently in terms of section 42 of the Building Act 2004.

The fact that a COA can be issued, does not relieve a person from the requirement to obtain a building consent for any future building work in relation to the building in question. Council still has the ability to issue a notice to fix and to prosecute.

An application for a COA must be on the prescribed form (Form 8 of the Building (Forms) Regulations 2004). It must include the generic information as well as the following:

- Current lawfully established use, including number of occupants per level and per use (if more than one).
- Whether the use was changed by the building work the application relates to. State the previous use.
- Total floor area affected by the building work.
- People undertaking the building work.
- Reason why the COA is required.
- Reason why a building consent was not applied for.

The Building Act 2004 requires this form to be accompanied by:

- The plans and specifications that are required by regulations or, if there are no requirements in the regulations, as required by Council.
- Any other information that Council reasonably requires.
- The charge fixed by Council.
- Any fees, charges or levies that would have been payable had the owner (or the owner's predecessor in title) applied for a building consent before carrying out the building work, where the application relates to work done without a consent where one was required.

- A project information memorandum, if one has been issued.
- if a compliance schedule or an amended compliance schedule is required as a result of the building work, a list of all the specified systems for the building and those that are being altered, added to or removed from the building in the course of the building work..

## **7.0 Processing an Application for a COA**

Council has 20 working days from the date the COA application is received to decide whether to grant or refuse the application. Council may request more information about the application within the 20 working days from the date the application was received. When such a request is made, the 20-working-day period is suspended until Council receives the requested information. Matters to consider when processing an application for a COA may include but are not limited to:

- Is the application lawful?
- Has all the relevant documentation been provided?
- What, if any, authorisations have been previously issued for the building work in question?
- Site inspection to determine:
  - What inspections or tests, as to the best of the Council's knowledge and belief, it is reasonable to make.
  - The degree of compliance with all provisions of the Building Code.
  - What exclusions need to be entered on the COA.
  - If the building is dangerous, earthquake prone, or unsanitary.
  - If a compliance schedule is required or an amendment will be required to an existing compliance schedule.
  - If any product, system or method has been used subject to any warning or ban in terms of section 27 of the Building Act 2004.

## **8.0 Refusal to Issue a Certificate of Acceptance**

A certificate of acceptance cannot be issued if:

- Building work was carried out prior to 1 July 1992 (when the building consent provisions of the Building Act 1991 came into force).
- A building consent was ever obtained for the work concerned. An exception will be the situation where a building certifier or building consent authority that is not a territorial or regional authority is unable, or refuses, to issue a code compliance certificate or if building work that was started or consented before 31 March 2005 affects public premises.

If the building is deemed dangerous, earthquake prone, or unsanitary, alternative steps under the relevant legislation should be considered.

## **9.0 Issue of Certificate of Acceptance**

Council should issue a COA only if it is satisfied that, to the best of its knowledge and belief and on reasonable grounds insofar as it can ascertain, the building work, subject to exclusions, complies with all the provisions of the Building Code.

The COA must be issued on the prescribed form (Form 9 of the Building (Forms) Regulations 2004). It must include the generic information as well as the following:

- Details of building work covered by the Certificate of Acceptance.
- List of exclusions
- Details of work inspected.

The Building Act 2004 requires this form to be accompanied by the compliance schedule for the building (if there is one).

Council's liability is limited to the extent Council was able to inspect the building work.

## **10.0 Recording of Inspections and Decisions**

All decisions in relation to COAs shall be recorded against the applicable property. The decision, along with the basis for the decision, shall be recorded. The date of the decision and the officer's name shall also be recorded. In addition to the final decision being recorded, any decisions or notes taken during the consideration process shall also be recorded.

Any exclusions placed on the COA shall be recorded on file, in addition to being recorded on the COA.

Council should include the following details in the inspection record:

- A description of the building work that has been inspected.
- A description of the building work that cannot be seen and inspected.
- Building work that does comply with the Building Code.
- Any building work that does not comply with the Building Code.
- Whether the information, drawings and specifications accurately reflect what is built, and whether there is any variation between the documents provided with the application and what is observed on site.

- Whether more information (than can practicably be obtained) is required.
- Whether durability requirements can be met.
- Whether the building is dangerous, unsanitary, or earthquake-prone.

Note: Photographs can provide a useful record of the inspection.

If the application is for complex building work, or if there is a significant uncertainty, the processing officer may seek a peer review before issuing or refusing to issue a COA.

## **11.0 Request to Place a Building Condition Report (BCR) on File**

From time to time Council receives requests to place reports on Council's property filing system. Requests range from property inspection reports, reports in relation to repairs, Safe and Sanitary Reports relating to building permits prior to the coming into force of the 1991 Building Act (1 July 1992), and requests to place on file records of building works or alterations constructed without obtaining a Building Consent.

Stand alone "Safe and Sanitary Reports" are only acceptable in respect of for building work carried out pursuant to legislation prior to the Building Act 1991(as from the 1 July 1992). For building work subject to the Building Act 1991 and the Building Act 2004, the report must provide an assessment as to the level of compliance with the New Zealand Building Code.

### Minimum Standards for Reports (BCR) Placed on Council Files

With respect to information agreed to be placed on Council's files, Council does not intend to check the validity of the information contained in these reports. Council does, however, seek to ensure the quality of these reports by only allowing approved persons to place such information on Council's files if the report addresses the requirements as set out below, where relevant.

Approved persons shall be competent building professionals, being a member of an approved professional organization.

In respect to illegal work or the subject of building permits, Council will require that these reports comply with the following:

1. It must provide clear and professional drawings of the extent of the illegal work. The standard of drawing must be prepared in a professional manner.
2. In respect to illegal building work, it must report on the extent of compliance or non compliance with the New Zealand Building Code and if the building is Safe and Sanitary.

3. For building work for which a building permit was issued, the report can be limited to the Safe and Sanitary report.
4. The 'Safe and Sanitary' part of the report must comment on, but not be limited to, the following matters and, if relevant, the effect of the illegal work on the modified building:
  - a) The structural integrity of the building.
  - b) Whether the building is weather proof.
  - c) Whether any ground water or moisture is able to enter the building, e.g.:
    - retaining wall sealed
    - moisture barrier installed in the required places
  - d) Surface water drains away from the dwelling.
  - e) The dwelling is appropriately insulated.
  - f) Living rooms are provided with the required windows and ventilation.
  - g) The safety of stairs and barriers including those around swimming pools.
  - h) The building and building extensions are placed on a stable and flood-free building platform, including overland flow-paths if applicable.
  - i) The likelihood of damp or mould occurring in the building.
  - j) Spread of fire and fire safety requirements, if any.
  - k) Electrical and gas reticulation in a building.
  - l) The seismic restraint of the hot water cylinder and fire places if any.
  - m) Sanitary facilities and food preparation areas

## **12.0 Matters of Doubt or Dispute**

A party, in terms of section 176 of the Building Act 2004, may apply to the DBH for a Determination in relation to 1 or more of the following matters:

- The refusal of Council to issue a COA.
- The exclusions listed on the COA.

Should there be any doubt or dispute that cannot be resolved by negotiation between the parties, either of the parties involved, provided they are a party in terms of section 176 of the Building Act 2004, may apply to the DBH for a Determination in terms of section 177 of the Building Act 2004.

Application for a Determination must be made in writing on the prescribed form, contain the prescribed information (if any) and be accompanied by the prescribed fee.

### **13.0 Decisions Made Under This Policy**

All decisions made under this policy are made on the individual merits of the specific situation and shall not be construed as setting any type of precedence for any future decisions.