

ADVISORY NOTICE BUILDING

03/16

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

March 2016

PROFESSIONAL: Consistency between planning and building consents

This Advisory Notice updates and supersedes Advisory Notice Building No 09/14 and provides advice relating to matters raised concerning the consistency of building rules consents issued by private certifiers with development plan consents issued by councils.

BACKGROUND

Section 33 (1) of the *Development Act 1993* refers to a development being an approved development only if a relevant authority has assessed the development against the provisions of the appropriate Development Plan and against the provisions of the Building Rules and a consent has been granted for each, as well as any other relevant consents. When all consents have been obtained then the development approval is issued and requires compliance with the consents and any conditions applied to those consents.

DISCUSSION

Development Plan consents

During the assessment of a development application against the Development Plan a number of sensitive issues can be the subject of negotiation with the applicant. These are normally resolved in one of two ways-

- By changes to the drawings
- By conditions placed on the development plan consent

Building Rules consents

Following the granting of development plan consent, the applicant usually arranges for more complete documentation to be prepared detailing the construction for building rules consent and for use on-site.

When the applicant lodges these documents for building rules consent there is clearly a need to make certain that the project designated in those documents is essentially the same project as the one that received development plan consent. To proceed with undertaking a Building Rules assessment without first checking that it is consistent with the development plan consent could result in extensive delays later for the applicant if it results in an invalid building rules consent being issued.

Checking for consistency

To avoid delays and streamline the approval process, a private certifier has an obligation under Regulation 89 (2)(b) of the *Development Regulations 2008* to take into account the development plan consent and any conditions or notes and under Regulation 92 (2)(c) to make certain that the documents submitted for building rules consent are 'consistent' with the development plan consent.

Accordingly it is reasonable to expect that the private certifier has sighted the development plan consent and any conditions or notes and determined that the project defined in the documentation submitted for building rules consent is the same project that received development plan consent and is consistent with it.

In particular, the siting of a building, number of floors, building area, setbacks, building form and uses should all be the same as the development plan consent and there should be a high degree of correlation with other elements. In particular, anything that is specifically identified on the development plan consent drawings with a clear note (such as building levels, dimensions, particular treatments or finishes) should be the same.

Example: Building application documents indicating that buildings have been located in a different position on a site and/or the plans have been reversed after a development plan has been issued, will not be consistent.

There can frequently be slight variations between the drawings that receive development plan consent and those submitted for building rules consent as the design process can result in changes as final construction detailing and design issues are resolved. It is often impossible for a private certifier to know whether all the significant matters relating to the development plan consent have been included in this documentation. In particular where issues have been resolved with council staff for development plan consent they may be indicated by-

Changes to the drawings

A private certifier cannot be expected to know if a particular feature is the result of negotiations for development plan consent or are a decorative feature wanted by the client.

Example: Obscured or decorative glass indicated on upper floor windows in the development plan consent drawings might not have any development plan consent significance and the absence of such glass on the building rules consent drawings could merely be the result of a change of mind regarding the design by the designer or the client.

Similarly, small changes in dimensions and levels are common and a private certifier cannot be expected to know if such changes have any development plan consent significance.

Conditions placed on the development plan consent

Where the documentation submitted for building rules consent have not indicated compliance with a condition on the development plan consent it could be argued that the development plan consent is still an integral part of the Development Approval and there is no need for the

building rules consent documents to contain such detail. However, as the building rules consent drawings are usually those that are used as the basis for construction the private certifier should reiterate the need for compliance with the development plan consent conditions in some way.

Certifying consistency

Under Regulation 92 (2)(c) the private certifier is required to certify consistency with the development plan consent, including any conditions or notes applied by the relevant authority to the consent. Such certification can only be expected to cover the checks described above.

Any development plan consent conditions or notes that seek to pre-empt the building rules assessment are probably invalid (refer to Advisory Notice 20/03) and the private certifier should not be expected to certify consistency with such requirements. Any building rules matters are entirely a matter for the private certifier to decide.

If the relevant authority (council) receives building rules consent documentation from a private certifier that indicates the proposed project is substantially different from the one that received development plan consent in major respects (such as siting, area, number of storeys), then it could be argued that such a building rules consent has been issued for a completely different project and it did not have a valid development plan consent. Since Regulation 89 (2) (b) provides that building rules consent cannot be issued before a development plan consent has been granted (other than for complying development), then the building rules consent would be invalid and the relevant authority can refuse to accept it.

In such cases it is suggested that the relevant authority advise the applicant that the project that received development plan consent has been altered such that it no longer has a valid development plan consent and development approval cannot be granted until such time as the building rules consent and development plan consent are consistent with each other. The applicant could be given the option of amending the development plan consent documentation and seeking a new or amended consent. Meanwhile, the building rules consent documentation should be returned to the private certifier until the matter is resolved.

Similarly, a building rules consent that has been certified by a private certifier **before the date the development plan consent was issued is also not valid**. It should be returned to the private certifier for verifying consistency once the development plan consent has been issued.

Where the building rules consent for a proposed project is essentially the same as the one that received development plan consent, it should be accepted by the relevant authority as being a valid building rules consent. If the private certifier has provided notes on drawings highlighting the need for compliance with development plan consent conditions then these should also be accepted.

If there are small inconsistencies that are still of development plan consent significance, then the relevant authority (council) may seek to have the building rules consent documentation amended to be certain that the documents receiving development approval are complete (for construction

purposes). However, the relevant authority should refer these matters to the applicant for resolution as it is essentially the applicant's problem and not the private certifier's. By referring such matters to the private certifier (who has properly undertaken the certification function) it could be argued that the relevant authority (council) is placing the private certifier in the position of being the applicant's agent, which is not a role that the private certifier can undertake. To resolve such inconsistencies with the development plan consent the applicant may elect to either-

- seek a new development plan consent (as a variation to a previous authorisation, Section 39 (6) &(7)) and risk it being refused; or
- have the building rules consent documentation altered to make it consistent with the development plan consent and get it re-certified by the private certifier.

A relevant authority (council) should deal with any matters concerning the resolution of inconsistencies within 5 days of receiving the building rules consent.

If a relevant authority (council) is unable to issue a development approval because of the significance of any inconsistencies and is unable to resolve the matters with the relevant parties, then it is suggested that the development approval be formally refused so that the parties involved can appeal to the Environment Resource and Development Court for a determination.

This Advisory Notice is for general information only and should not be relied upon as legal advice or an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

Further information

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