



Department of
Building and Housing
Te Tari Kaupapa Whare

A guide to Building Act determinations

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Explanatory notes

When you can't agree with your council about building work, a determination can help you solve the problem. This document explains who can apply for a determination and how the process works.

The law that covers determinations is the Building Act 2004. The Act talks about 'a building consent authority', 'a territorial authority' and 'a regional authority'. In this document, we call them all 'the council'.

If you have any questions, you can contact us on 0800 242 243 or by email to determinations@dbh.govt.nz

The law about determinations is covered in sections 176–190 of the Building Act 2004.

Advice about leaking houses or apartments

If you have a problem with a leaky house or apartment, and the building is less than 10 years old, you may be able to get help from the Weathertight Homes Resolution Service.

We explain a little about the Weathertight Homes Resolution Service and how this differs from a determination later in this document.

What a determination is

A determination is a binding decision made by the Department of Building and Housing. It provides a way of solving disputes or questions about the rules that apply to buildings, how buildings are used, building accessibility, and health and safety.

Most determinations are needed because the person applying for the determination disagrees with the council about decisions the council has made about a building. However, a determination can be applied for by the council itself or a neighbour who is affected by building work.

A determination can be about building work that is planned, partly done or completed.

You may have already asked for an opinion or advice from the Department about the same question. A determination is different in that the Department takes a detailed look at the matter and makes a legally binding decision.

What a determination can be about

We can make a determination about:

- whether a building or building work complies with the Building Code
- a council's decision on a building consent, a notice to fix from the council, a code compliance certificate or a compliance schedule (including time extensions to building consents and code compliance certificates)
- a council's decision to make a waiver to or modify the Building Code
- a council's decision on a certificate of acceptance, a compliance schedule, a notice to fix, or a certificate for public use
- a council's decision on building alterations, a change of building use, subdivision of buildings, and dangerous, earthquake-prone and insanitary buildings
- a council's decision on dams.

Examples of where a determination may be used:

- a council refuses to issue a building consent for a proposed building
- a building owner has been refused a code compliance certificate for a building that appears to be completed
- a building owner disagrees with a council's ruling about a neighbouring property
- a building owner disagrees with the contents of a notice to fix.

Who can ask for or be party to a determination

Those involved in a determination, including the person who applies for it, are called 'parties' to the determination. For example, a building owner may ask for a determination because they disagree with a council decision that also involves a neighbour. In this case the parties to the determination are the building owner, the council and the neighbour. All parties to a determination are treated equally.

You can ask for, or be involved as a party to a determination, if you are:

- the building **owner** or the owner's agent
- the **council** that issued the building consent
- the **owner of other property** when the determination is about the protection of that property (for example, the potential spread of fire from one property to another, surface water run-off or land stability)
- a **government department or Crown agency** that has a statutory duty under the Building Act, such as the New Zealand Fire Service or Occupational Safety and Health
- anyone with a direct interest in the problem or question if it has to do with **access and facilities for people with disabilities**.

The Department can initiate a determination where it believes it is necessary to achieve the aims of the Building Act.

The council will almost always be a party to the determination. We may ask other people or organisations to become involved if necessary.

What a determination can decide

The determination will normally be about an earlier decision made by one of the parties, usually that made by the council. The determination may:

- confirm, reverse or modify the earlier decision (for example, a determination may say that the council was correct in not issuing a building consent)
- make waivers or modifications to the Building Code (for example, a determination may modify the time period for which the building must be durable)
- make conditions that the council may itself grant or impose (for example, a determination may require the council to issue a building consent with certain conditions).

Applying for a determination if you are not the property owner

You can apply for a determination if you have a 'direct interest' in the matter. This can occur, for example, when neighbouring building work affects your property in some way. If you want to check whether your property will be affected by neighbouring building work, you can ask at the council for the publicly available building consent documents for that property, including the plans and specifications.

Applying for a determination

To apply for a determination you need to:

- fill in Form D1, which is included in this pack, and send it to us with your supporting documents and the fee (see below)
- fill in Part 1 of Form D2 and send a copy to the other parties, with a copy of Form D1 and your supporting documents.

Form D1 explains what sort of supporting documents you should send. Send as much information as you can. Form D2 ensures the other parties to the determination have received a copy of the application.

We charge a fixed fee for determinations:

- for single houses, attached houses, flats and apartments up to four units, and garages and sheds, the fee is \$281.25 (\$250 plus GST)
- for all other buildings the fee is \$562.50 (\$500 plus GST).

Information that needs to be included in a determination application

A determination generally relies on the information you provide. Clear and complete documentation will help us assess and process your determination.

The information should be:

- clearly labelled (and indexed, if possible)
- typed or neatly handwritten
- accompanied by a summary of the key points with references to the supporting documents.

Information to support an application can include (not all will be available or appropriate in every instance):

- correspondence about the dispute
- drawings
- plans and specifications
- design calculations
- reports
- photographs
- producer statements.

Reasons your application may be declined

We can decline your application if:

- you are not a party to the matter
- the problem or question is not a matter covered by the Building Act
- we have already made a determination, or we are about to make one, on the exact same matter
- it is deliberately trying to cause trouble or is not serious.

Withdrawing your application

You can withdraw your application at any time. We will refund the application fee if we haven't already used an independent expert to help us.

If an expert has been engaged and carried out an assessment, we will keep the fee.

If you withdraw the application, we will tell the other parties.

Being a party to someone else's determination application

You will receive Form D2 and a copy of the application itself. Please complete form D2 and send it to us as soon as possible.

You will receive copies of all correspondence to other parties, reports, draft determinations etc that may be produced as the determination is processed. You will be given the opportunity to comment on all information presented by other parties. You can also request a hearing if you wish.

The rules the Department follows when processing a determination

We are required to avoid unnecessary delay and formality and recognise tikanga Māori.

We must also follow the 'rules of natural justice', which is significant because these rules set the process we follow. The rules require us to:

- ensure the party whose decision is being disputed (this is usually the council) knows the application has been made
- ensure all relevant material is copied to all the parties (for example, draft determinations, correspondence, experts' reports)
- give enough time for the applicant and the parties to respond to reports, submissions by other parties etc
- grant a hearing if one is requested
- give reasons for the decision reached.

We understand that progress on a building project or a house sale, for example, may be being held up by the determination. We will aim to issue the determination as quickly as possible to minimise disruption.

The steps in the determination process

Receive and accept the application

When we receive the application, we will decide whether the dispute or question is one that the Building Act applies to. If it is, we will tell the person who applied and the other parties that a determination has been applied for. We must do this within 10 working days.

Look in detail at the application

We will look at all application information and will ask for clarification or any information that may still be required. We may also need to clarify the matter being disputed.

Appoint an independent expert

Determinations often concern technical matters and we will usually engage an independent expert at our expense to investigate and report on the matter. The expert will provide a written report that is copied to all the parties for their comment. For complex determinations more than one expert may be appointed.

Provide a draft determination

We will produce a draft determination after we have received the expert's report and the parties have commented on it. We will then send the draft determination to the parties for comment.

Hold a hearing if one is requested

You may request a hearing, which would normally be held following the release of the draft determination. Written material can be submitted at a hearing, but we ask that any significant amounts of information be supplied before the hearing so the other parties have time to consider it and can respond at the hearing. Legal representation is not necessary, although you can have a lawyer attend and speak on your behalf if you wish.

You can request a hearing at the time of application or at any time during the determination process.

Issue the final determination

We will issue the final determination after the parties have commented on the draft and after any hearing is held. The final determination will respond to matters you may have raised in response to the draft determination or at the hearing, if one was held.

How long it takes to get the determination

We understand that a dispute may be delaying progress on a building project or a house sale, so we try to issue the determination as quickly as possible.

We are required to issue the final determination within 60 working days of receiving the application, or longer if agreed to by the parties.

The 60-day period does not include time when we may be waiting for information or comment from the parties – the ‘clock is stopped’ during these times. If you can’t give us the information by the date given, you can ask for an extension. We have the power to make the determination if the information requested is not provided in reasonable time.

Building work that may need to be done before a determination is issued

The council generally can’t make you do work while you’re waiting for the determination to be issued unless there is work that is unsafe if left in its present state. If you have been sent a notice to fix about work that is unsafe, you must comply with the notice.

Otherwise, the council can’t require you to carry out building work related to the determination unless the Department agrees this is necessary.

What to do if you think there are errors in the determination

If there are things in the determination that you think are wrong, you can ask us to clarify or correct the error and reissue the determination. We can only do this within 20 working days of the determination being issued.

We can correct inconsequential mistakes, such as an incorrect date. However, we can’t make changes that affect the other parties, unless the parties also agree to the change. We can’t make any changes if the determination is being appealed (see below).

Other legal options if you are not satisfied with the determination

You can go to court if you’re not satisfied with the determination. The courts can decide whether:

- the **decision** reached in the determination is incorrect. This is called an appeal. If you want to appeal, you must do it within 15 working days of the date the determination is issued. The District Court’s decision will be final.
- the **process** of making the determination was correct and fair. This is called a judicial review.

You need to wait until we have issued the determination before you can ask for an appeal or judicial review.

The availability of earlier determinations and how they are used

Determinations provide decisions that can be used by councils and others as a guide when faced with a similar problem.

We are not bound by previous determinations in the way that a court is bound by the decisions of a higher court. However, we will always take account of previous determinations if we think the circumstances are similar.

Once issued, determinations are available free from our website (www.dbh.govt.nz). You can search for a determination by Building Code Clause, subject or keyword, or you can browse them all.

We include a summary of interesting determinations in our monthly newsletter, *Codewords*.

Advice about leaking houses or apartments

Owners of leaking houses or apartments can either seek a determination or use the Weathertight Homes Resolution Service (WHRS). The WHRS is part of the Department of Building and Housing and was set up in 2002.

In general terms, a determination decides whether the building work complies with the Building Code. The determination process can't decide who is responsible for water leaks, nor who should pay to have them fixed and repair any damage.

The WHRS provides a means of assessing the leak and any damage. It provides mediation and adjudication services to decide who is liable for leaks and who should pay to have them, and any damage, fixed.

If you believe your house does not comply with the Building Code it may be more useful for you to make a claim to the WHRS rather than seek a determination.

You can use the WHRS if your leaking house or apartment is less than 10 years old. You can also use the service if you think the leaks are caused by alterations that are less than 10 years old.

If you have already applied for a determination, you can't also ask the WHRS to take your claim to adjudication at the same time. You need to wait until after the determination has been issued, then seek the help of the WHRS adjudication process. The first stage in any WHRS claim is to assess the applicant's property in detail. The assessment that was done for the determination may be very useful to the WHRS when it does its assessment.

Completing Form D1 (application for determination)

To apply for a determination you must:

- use Form D1 (this form is equivalent to Form 14 in the Building (Forms) Regulations 2004)
- send enough supporting documents for us to make a determination. Examples are:
 - plans and specifications
 - drawings
 - design calculations
 - reports
 - photographs
 - producer statements
 - letters you have written or received.
- type or clearly handwrite any written material, highlight the key points and include a list of contents
- label all your documents clearly
- tell us which sections of the Building Code your documents are about
- send us three copies of Form D1 and your supporting documents (we suggest you keep the originals)
- send the following documents to the other parties (these are the people you list in section C of this form):
 - copies of Form D1 and your supporting documents
 - Form D2, with your details written in Part 1
- send the application fee to the Department of Building and Housing.

Read the following notes as you fill in each section of Form D1.

A. Notes for the applicant:

You need to make sure you are legally able to apply for a determination. Read through section B first to make sure you are a party defined in section 176 of the Building Act.

B. Notes for appointment of agent:

You can choose to have someone represent you in the determinations process. That person becomes your agent and we will send all correspondence and copies of documents to them. An agent can represent you at a hearing.

C. Notes for the applicant:

Please tick only the boxes that describe you. You may have to tick more than one box. For example, you may be the owner of the building and the licensed building practitioner.

D. Notes for other parties:

You may need to choose more than one of these. In many cases the only other party is the council.

We will not go ahead with the application until each party you have listed in this section fills in Form D2 and sends it to us. This tells us they have received all the documents.

E. Notes for the building/dam:

Fill in only the relevant parts.

F. Notes for matter for determination:

This section lists what you can apply for a determination about. Choose what applies to you. You will probably need to tick only one box, but you can tick more.

G. Notes for related applications:

You probably won't have to fill in this section. You only have to tell us if we have already received an application for a determination about the same problem or work. For example, if you are having a problem with a neighbour's building, you will need to tell us if you know that another neighbour has already applied for a determination.

H. Notes for hearing:

Please indicate whether you wish to have a hearing. A hearing is a meeting convened by the Department to which all the parties are invited. It will give you the opportunity to present your case and also respond to written or verbal submissions made by the other parties. All the parties are given the opportunity to speak and make a written submission.

I. Notes for attachments:

Attachments are the documents attached to a determination application that help support your case. Attachments can include such information as correspondence about the dispute, reports, plans and specifications. Attachments should be clearly labelled and referenced in the application itself.

J. Notes for completion of application:

When we have checked your application, we may ask you to send us more supporting documents. If we decide that other people need to know about your application, we will ask you to send a copy of your application and documents to them.

Checklist

Have you done the following?

- Filled in Form D1.
- Included all your supporting documents.
- Written your details in Part 1 of Form D2.
- Sent Form D2, a copy of Form D1, plus copies of all your supporting documents, to all the other parties.
- Sent three copies of your application and supporting documents, along with your application fee, to the Department of Building and Housing.

Cladding determinations

You must give us enough information about your building work for us to make a speedy, informed decision.

If your determination application relates to cladding, the following information will help you go to the right people for the information you need.

The council can provide:

- building consent information
- approved plans
- specifications
- building inspection records.

The owner (who is usually the applicant) can provide:

- notice to fix
- cladding manufacturer's specifications (these may be in the building consent information)
- warranties, guarantees or producer statements issued for the cladding
- documents that show the level of timber treatment (such as invoices from timber suppliers)
- summary of important dates, from council approval to completion of the building to final inspection
- details of the builders and subcontractors used and whether they were accredited suppliers or installers of the cladding system (this may be in the building consent information).

When you make your application (on form D1), you should send:

- **three** copies of the application and supporting documents to the Department of Building and Housing
- **one** copy of the application, supporting documents and Form D2 to **each** of the other parties involved.

The other parties will fill in Form D2 and return it to us. All parties can send a written response to the Department setting out their views on the matter in dispute.

Frequently asked questions

The council won't issue my building consent. Can I apply for a determination?

Yes. If you don't agree with the council's decision to refuse your building consent application you can apply for a determination.

What is a code compliance certificate?

A code compliance certificate (CCC) is a certificate issued by a building consent authority (usually the local council). It shows that the council is satisfied all the building work under a particular building consent has been properly completed.

Whose responsibility is it to apply for the code compliance certificate?

The owner of the building needs to apply for the CCC as soon as all the work covered by the consent is completed.

Sometimes the builder will apply on the owner's behalf, but it is the owner's responsibility to ensure the application is made and the CCC is issued.

Who is a 'party' to a determination?

A 'party' is someone (individual or organisation) who has a direct interest in the determination either as an affected party (such as a neighbour) or who has to fulfil a regulatory duty in respect of the work (such as the New Zealand Fire Service).

The council is nearly always a party to a determination and often the only other party. Contact the determinations team at the Department of Building and Housing, at the outset, if you are unsure whether there are other parties to the determination.

The notice to fix from the council says I have to take the cladding off my house because it doesn't have a ventilation cavity. What can I do?

If you disagree with the notice to fix issued by the council, you could apply for a determination to decide whether the notice to fix is correct.

Before you apply for a determination, fix any items listed on the notice that you agree do not comply with the Building Code. Then apply for a determination about the remaining items in dispute.

The council says my building was built too long ago to get a code compliance certificate. What does the council mean?

When the council issues a CCC it is saying that the building will be durable for the periods of time specified in the Building Code. The Building Code has different durability periods for different building elements, for example claddings have a 15-year durability period. The durability periods commence from the date the CCC is issued.

The problem arises when the council is asked to issue a CCC for a house that has been completed for a significant time. For example, a house was completed 10 years ago but the CCC has not been applied for until now. If the council agrees to issue the CCC, it is saying the cladding will be durable for another 15 years when it has already been exposed to the elements for 10 years. If the council issues the CCC it will, in effect, be guaranteeing a 25-year durability period for the cladding, which the council is unlikely to be willing to do.

The matter can be referred to the Department for determination. A successful application may require the council to issue the CCC with a durability period that would start back when the building was completed so, in effect, the durability period is 15 years as required by the Building Code.

My house is leaking. I have been told I can either seek a determination or make a claim to the Weathertight Homes Resolution Service.

Which approach should I use?

If you know your house has suffered damage from water leaks, the WHRS can provide a means of assessing the damage and providing mediation and adjudication services to resolve who is liable for the damage and who should contribute to the cost of having the damage fixed.

If you know your house is leaking and you would like to know how to fix it you should enlist the services of an expert, for example an architect or a building surveyor. A determination will not help as you already know your house doesn't comply with the Building Code because it is leaking.

A determination will generally only provide a decision about whether the cladding complies with the Building Code. A determination cannot decide liability, nor is there a general provision for costs to be reimbursed to any party unless a party causes unreasonable costs or delays.

Is my house classed as a 'leaky building'?

Any building may leak as a result of construction faults, but buildings thought to be most 'at risk' from water entering are those with so-called 'monolithic' claddings – these are typically claddings forming a continuous seamless surface fixed to timber-framed walls. The claddings typically include solid cement plaster with a paint finish, and flat cellulose or polystyrene sheet finished with a textured coating. Features that may adversely affect the level of risk from leaks include the absence of roof overhangs (eaves), the presence of balconies with solid balustrades, a mix of different claddings and the use of complex building shapes.

If you believe your house to be at risk, engage the services of a building expert, such as a building surveyor, to carry out an assessment.

Can I apply for a determination by the Department if I have already applied to the WHRS?

Yes, you can apply to the Department of Building and Housing for a determination at any time. However, an application for determination may impact on the processing of your WHRS claim. In particular, if your WHRS claim is either going to adjudication or is currently in the process of adjudication, the adjudication can't commence or continue until after the determination has been issued.

Do I need to hire a lawyer or a technical expert to help me with my application?

No. You don't have to engage a technical expert or a lawyer, but you can choose to engage such experts to represent you if you wish. This would be at your own cost.

The Department's staff will provide you with general guidance on the determinations process.

How formal is a hearing? Do I need to have legal representation?

A hearing is semi-formal and is chiefly an opportunity for each of the parties to be heard and to respond to statements made by another party. Written material can be submitted at a hearing, but we ask that any significant amounts of information be supplied before the hearing so the other parties will have time to consider it and be able to respond at the hearing.

Legal representation is not necessary although you can bring legal counsel if you wish.

Can my application be processed urgently?

No. The Building Act 2004 states that a determination should be made within 60 working days after an application is received.

While we make every effort to make the determinations process as efficient as possible, the Department can't cut corners. In all cases we must follow due process, because:

- determinations are a quasi-judicial process
- we must follow the requirements of the Building Act
- determinations decisions can be appealed to the courts.

Are costs able to be reimbursed to the successful party?

Not normally. However, costs might be awarded against a party if it was felt that the party had caused costs to increase or unreasonably caused delays.

The application instructions say I have to prepare a minimum of four copies of my application. Is this necessary?

Yes. You should prepare a minimum of four copies of your application (Form D1 plus the accompanying documents).

Send three copies to the determinations team at the Department.

Send one copy to the council (it is almost always a party to a determination) – include with this copy Form D2 but only with Section 1 completed. The council will acknowledge the application by completing the remaining sections of the form and sending it to the determinations team.

Do exactly the same if there are any other parties – send them a copy of the application and form D2 for them to acknowledge the application.

Your application may be returned if you don't meet these requirements. It is important that all parties are given a copy of any correspondence sent to the Department relating to your application.

What is the purpose of Form D2?

Form D2 is used to confirm that the other parties to the determination know that a determination has been sought and that they have a copy of the application itself.

It is important that the application and any subsequent information and correspondence is copied to all the parties so they are kept fully informed and are able to respond to any statement or actions made by the other parties.

If you write to the Department about the determination, please ensure it is also copied to the other parties.

Do I need to get the copies signed and certified by my solicitor?

No.

Glossary

Building Code

Regulations, established under the Building Act, that set the minimum performance standards New Zealand buildings must meet.

Building consent

A consent for building work to begin in accordance with the approved plans and specifications and how they fulfil the requirements of the Building Code. It is not a resource consent.

Certificate of acceptance

A certificate issued in special circumstances when a code compliance certificate can't be issued that provides a limited assurance that work complies with the Building Code.

Certificate for public use

A council will issue a certificate for public use where it is satisfied it is safe for members of the public to use the premises. Councils can take into account any safety precautions that have been put in place. Certificates for public use can be for all or part of public premises. Once all the building work is complete, a code compliance certificate must be obtained.

Code compliance certificate (CCC)

A certificate issued at the completion of building work confirming that the work has been completed in accordance with the building consent.

Compliance schedule

A document that lists the inspection, maintenance and reporting procedures for systems in a building (eg, lifts, fire alarms) to ensure their continued safety of operation.

For single residential dwellings, compliance schedules are only required if there is a cable car.

Determination

A binding decision on matters of doubt about specific compliance with the Building Code or disputes over a council's decision.

Determinations are made by the Chief Executive of the Department of Building and Housing. Determinations are legally binding unless overruled by a District Court on appeal. Property owners, councils and licensed building practitioners and others can seek a determination (see also Party to a determination).

Notice to fix

A notice issued by a council for breaches of the Building Act or regulations (eg, where building work does not comply with the Building Code). The notice specifies what remedial work must be done and by when. It is an offence to fail to comply with a notice to fix and a building owner can be fined up to \$200,000, plus a further \$20,000 a day as long as the offence continues.

Party to a determination

Anyone who has a direct interest in a determination.

This will include the applicant and nearly always the council. Other parties may also include affected neighbours and government or Crown agencies such as the New Zealand Fire Service.

Producer statement

A statement supplied by someone that 'certain work will be or has been carried out in accordance with certain technical specifications'. For example, a statement may be made by an engineer confirming that a building design complies with a particular New Zealand Standard, or by a cladding installer confirming that a cladding was installed in accordance with the manufacturer's specifications. Producer statements can assist councils in deciding whether the work will comply with the Building Code.

Submission

Normally a written statement by a party to a determination setting out their case or response to the information presented by another party. Submissions often include supporting information such as plans, specifications and correspondence. A verbal statement made at a hearing is also considered a submission.

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