



PROFESSIONAL PRACTICE: Notification of a Decision

A number of enquiries have been received by the Building Policy Branch in relation to the notification of decisions and the transfer of documents. This Advisory Notice provides information regarding the requirements in the *Development Act and Regulations*, particularly for privately certified applications but similar requirements also apply to the building rules assessment function of councils.

Making a decision on an application

Section 40 of the Act requires a relevant authority to notify an applicant of a decision on an application. As applications can be made for separate consents (section 33(2)) as well as for development approval, this means that the applicant must be notified of the decision on each application for a consent and/or development approval. It also means that, for the same project, there may be separate applicants for the different consents.

Regulation 89(1)(a) authorises private certifiers to make a decision on an application for a provisional building rules consent and regulation 89 (1)(da) authorises the private certifier to notify the applicant of that decision as set out in regulation 42.

Notifying the applicant

Regulation 42 prescribes the procedure to be followed by both private certifiers and councils when notifying an applicant of a decision. This procedure is as follows:

R42(1) – A decision on an application for provisional building rules consent (under Division 1 of Part 4 of the Act) must be in the form set out in Schedule 11, that is, the Decision Notification Form. *The Acts Interpretation Act 1915*, allows the use of a form having the same effect as the prescribed form so there is some flexibility regarding the actual format.

R42(2) – Notification of a decision in the prescribed format must be issued within 5 days of the decision being made.

R42(3) – Any notice of a decision must have the details of any conditions upon which the decision relies and the reasons for such conditions. Where such conditions are on a direction from a prescribed body then the relevant prescribed body must also be identified.

R42(5) – A notice of a decision issued on the prescribed form may include any classifications that have been assigned under the *Development Act*. Hence, the assignment of classifications should be included in the notification of provisional building rules consent.

R42(6) – If the decision is (or includes) a provisional building rules consent for which a Statement of Compliance will be required, then the decision notification form must be accompanied by notification

that a State of Compliance will be required in accordance with regulation 83AB, a list of any certificates or reports that will need to be submitted at that time, and a blank copy of the Statement of Compliance to be returned on completion of the work.

This means that a private certifier must include this information with the notification of provisional building rules consent to the applicant and with the required documentation to be forwarded to the council under regulation 92. For the subsequent issuing of the development approval by council, the only matter for determination is whether all of the relevant consents are in place for the proposed work. Accordingly, the decision notification of development approval does not need to re-issue this information. If the council performed the building rules assessment and the decision notification incorporates both building rules consent and development approval then the information in regulation 42(6) must be issued with that notification.

In addition to these requirements in Regulation 42 it is suggested that a private certifier should, when notifying the applicant of the decision, include advice that the certified drawings/documents will be issued by the council with the development approval.

Notifying the Private Certifier

Where a council has received notification of the engagement of a private certifier under section 93 of the Act, then it would be appropriate for the council to also send a copy of the decision notification for the provisional development plan consent to the private certifier. This would ensure that the private certifier is provided with the correct information regarding the granting of the provisional development plan consent for the proposed work that might be relevant to the granting of the provisional building rules consent.

Notifying the council

Section 93(b) of the *Development Act* requires a private certifier to do two things on making a decision regarding the granting of a provisional building rules consent:

- Firstly, to notify the council in writing of the decision, which is done by forwarding a copy of the decision notification form. This notification also acts as the private certifier's certification of compliance with the building rules for the purposes of section 36 (4) of the Act.
- Secondly, to forward certain information and documentation relating to the provisional building rules consent (regulation 92) to the relevant authority (council). It should be noted that the council is able to request the information or documentation if it is not provided.

The council will need to verify that the provisional building rules consent is valid insofar as:

- It has been certified by a registered private certifier.
- The decision has been notified on an appropriate decision notification form.
- The necessary information and documentation (as required by regulation 92) has been provided.

- Except for 'complying' development under the regulations, that the building rules consent was issued after the provisional development plan consent was granted.

Note: At this stage the private certifier has issued the provisional building rules consent and advised both the applicant and the council that the provisional building rules consent has been issued.

Issuing the development approval

Section 33 (2) of the Act stipulates that a development is considered to be an approved development when all of the relevant consents have been granted and the relevant authority has indicated that the development is approved. The notification of building rules consent by the private certifier includes a certificate that the consent is consistent with the provisional development plan consent and is therefore advice that all the relevant consents have been granted. Accordingly, the decision to grant a development approval must be notified to the applicant within 5 days of the council receiving the private certifier's certificate. Any checks regarding consistency with the provisional development plan consent should be done in this timeframe. Refer Advisory Notice 28/03.

If a private certifier has issued a provisional building rules consent, then regulation 42(4) requires the relevant authority (council) to attach a copy of the private certifier's decision to the notification of the development approval. **The certifier's consent (and any conditions) should therefore not be retyped into the development approval notification** as to do so is unnecessary; it risks errors being made and could arguably make council partially responsible for a consent that it has not assessed. Since notification of a private certifier's decision includes specific documentation, a copy of that documentation should also be included with the notification of development approval sent to an applicant.

The applicant for provisional building rules consent (possibly the builder) may be different from the applicant who applied for provisional development plan consent (the architect or developer). As the building rules consent must be issued after the development plan consent (except for complying development) then it will most likely be that applicant who is the current applicant for the proposed work and is seeking development approval – hence authorisation to commence construction (Note: the private certifiers advice to the applicant under regulation 89(3)). Accordingly **the council should send the decision notification form advising of the development approval to the applicant seeking provisional building rules consent**. If there is any doubt regarding who is seeking development approval then it should be confirmed with the applicant(s).

Regulation 45 also requires notifications of decisions to also be sent to the owner of the land if they are not identified as a party to the application. This copy of the development approval is required to be sent within 5 business days of the notice being sent to the applicant.

How many sets of plans?

Regulation 15 requires three copies of the plans, specifications and any other documents relating to the proposed development to be lodged with the relevant authority. For the purposes of the provisional building rules consent this also means the private certifier.

Regulation 99A requires the private certifier to be able to produce a copy of certain documents including

any plans or other documentation considered by the private certifier on the application and also notification of any decision. It would therefore be advisable that the private certifier retains one of the sets of documents pertaining to an application for this purpose.

Regulation 47 requires that if a development approval incorporates a provisional building rules consent (as one of the necessary consents) then a copy of the complete set of plans, specifications and other documents lodged by the applicant for the application, is to be returned by the council (as the relevant authority) to the applicant duly stamped or otherwise endorsed with the provisional building rules consent. (Refer Advisory Notice 13/97)

Regulation 92 requires the private certifier to send two sets of endorsed documents to the council. One set is obviously for the council's own records, while the second set is intended to be returned to the applicant pursuant to regulation 47. This process enables any matters relating to the building rules consent (and the endorsed plans and documentation) to be resolved before a development approval is issued. The set of endorsed documents sent out with the development approval will then be the only endorsed documents received by the applicant and construction can then commence in accordance with those documents.

Summary

On making a decision regarding an application for provisional building rules consent, a private certifier must notify the applicant of the decision using the prescribed form within 5 days of making the decision. The decision notification will typically include:

- Any conditions and the reasons for them
- Any classifications assigned to the building(s) and portions of the building(s)
- A statement advising the applicant that building work cannot commence unless or until the development approval is issued (regulation 89(3)).

It must be accompanied by written notification:

- Of any essential safety provisions that are to be maintained (Schedule 16 - Form 1)
- That a Statement of Compliance will need to be completed under regulation 83AB(8) and any required documentation that will need to be provided at that time

It will also be accompanied by:

- A blank copy of the Statement of Compliance

NOTE: This notification to the applicant will not include a copy of the endorsed plans.

A copy of the decision is to be sent to the relevant authority (council) immediately "on making the decision" and must have any prescribed information or documentation. This will typically include all of the above plus:

- Evidence of any concurrence from the Building Rules Assessment Commission
- A certificate that the provisional building rules consent is consistent with the provisional development plan consent.

While not required by regulation 92, there are two matters that are pertinent to the validity of the consent and for which councils can reasonably ask for information pursuant to section 93(b)(iii) of the Act (refer Advisory Notice 27/03). Accordingly the decision that is sent to the council should include:

- Verification that the Construction Industry Levy has been paid.
- A copy of the builder's indemnity insurance certificate for domestic building work where the builder is known.

The decision notification sent to council will also include two sets of the endorsed plans and specifications.

When advising the applicant of the development approval the council must attach a copy of the private certifiers decision notification. The council could simply attach a copy of the decision notification form received from the private certifier but in the interests of providing a complete development authorisation package it would be reasonable for a council to attach copies of all of the information/documentation received from the private certifier that is pertinent to the application. The council will also ensure that a copy of the plans (endorsed with the provisional building rules consent) is returned to the applicant, either accompanying the decision notification form or separately.

Other information that the council **must** provide with the development approval includes notice of any mandatory notification required for stages of construction.

Other matters where advice should be provided with the development approval are:

- Requirement to forward certificates of compliance to council for essential safety provisions when installed in the building (Schedule 16 – Form 2).
- Annual return requirements for essential safety provisions.
- Requirements for Certificate of Occupancy (if the private certifier will not be issuing).
- Notification that it is illegal to occupy a building without a Certificate of Occupancy (where relevant).

Further information

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ISSN: 1443-8038