

## Determination 2011/116

### Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier at 24 Tuapiro Road, Katikati



#### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the owner B Hamblyn (“the applicant”), and the other party is the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 7-year-old house because it was not satisfied that it complies with the Building Code (First Schedule, Building Regulations 1992). The refusal arose because the building work had been undertaken under the supervision of Bay Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the former Building Act 1991, but which ceased operating as a certifier before it had issued a code compliance certificate for the building work.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

- 1.3 The matter to be determined<sup>2</sup> is therefore whether the authority correctly exercised its powers in refusing to issue a code compliance certificate. In making this decision, I must consider whether the building work complies with the relevant clauses<sup>3</sup> of the Building Code, the grounds on which the authority based its decision to refuse to issue the code compliance certificate, and whether the decision to refuse to issue the code compliance certificate was correct.
- 1.4 Based on the information and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion as to whether this building will comply with the Building Code. This determination therefore considers whether it is reasonable to issue a code compliance certificate. In order to determine that, I have addressed the following questions:
- (a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? I address this question in paragraph 5.
  - (b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? I address this question in paragraph 7.2.
- 1.5 In making my decision, I have considered the report of the expert commissioned by the Department to advise on this dispute (“the expert”) and the other evidence in this matter.

## **2. The building work**

- 2.1 The building work consists of a detached house situated on a level building platform in a large rural site assumed to be in a medium wind zone for the purposes of NZS 3604<sup>4</sup>. The expert’s report takes the garage door as facing east, and this determination follows that convention. The single-storey house is fairly simple in plan and form and is assessed as having a low to moderate weathertightness risk.
- 2.2 The house was constructed by a “group housing company”; construction is conventional light timber frame, with a concrete slab and foundations, brick veneer and monolithic wall claddings, profiled metal roofing and aluminium windows. The 30° pitch gable roofs have eaves of 450mm to 650mm, except for projecting bathroom walls on the west elevation where eaves are reduced to gutter width only.
- 2.3 A large free-draining timber deck extends across the north living areas to the main bedroom. A timber pergola, supported on monolithic-clad timber framed columns, extends above the deck from the north wall of the family room. Monolithic-clad columns also support the northeast corner of the lounge verandah and the east entry canopy.
- 2.4 The drawings call for exterior wall framing to monolithic-clad walls to be H1.2 treated, with framing to brick veneer walls to be ‘chem free’. However, the specific schedule of materials for the house calls for ‘LOSP H1-plus’ for external framing

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<sup>2</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

<sup>3</sup> In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

with H3 bottom plates. Given the date of construction in 2004, I consider that exterior wall framing is likely to be treated.

## **2.5 The wall claddings**

- 2.5.1 Most external walls are brick veneer, incorporating a 50mm drained and ventilated cavity. On “front” walls of the house, veneer height is limited to six brick courses, while elsewhere it extends up to soffit level in line with window heads.
- 2.5.2 Upper walls and bathroom projections are clad in a form of monolithic cladding known as EIFS<sup>5</sup>. In this instance, the proprietary EIFS consists of 40mm polystyrene backing sheets fixed over 20mm battens and the building wrap to the framing, to which a mesh-reinforced textured coating system has been applied. The system includes purpose-made flashings to windows, edges and other junctions.

## **3. Background**

- 3.1 The authority issued building consent (No. 70837) to the original owners on 5 May 2004 under the Building Act 1991, based on a building certificate dated 20 April 2004 issued by the building certifier.
- 3.2 The building certifier carried out the following inspections:
- Foundations on 14 June 2004 (which passed).
  - Pre-pour slab inspections on 2 July 2004 (which passed).
  - Pre-line building and plumbing inspection on 19 August 2004 (which noted that some work was incomplete).
  - Pre-line building and plumbing re-inspection on 2 September 2004 (which passed, noting ‘timber moisture OK, bracing OK’).
  - Drainage inspection on 28 October 2004 (which passed, noting ‘received drainage as-built plan’).
- 3.3 The building certifier carried out final inspections on 16 November 2004, which confirmed the receipt of a producer statement (also dated 16 November 2004) for the EIFS cladding system. The final plumbing inspection passed, but the building inspection was recorded as a ‘fail’, with some minor work to be attended to and the summary also noting:
- [The EIFS] cladding needs to be checked by the technical rep not fitted to manufacturers specification and provide a producer statement confirming compliance.
- 3.4 A producer statement for the EIFS was subsequently faxed to the building company and the inspection record noted that this was forwarded to the authority. There were no further inspections recorded for the house and the building company wrote to the original owners on 25 November 2004 to confirm completion of the house, noting:

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<sup>5</sup> Exterior Insulation and Finish System

A Code of Compliance (sic) is issued at completion of your house. If you require this document please contact [the building certifier] and they will issue a copy. Please note that all fees have been paid for.

- 3.5 Based on the above letter, it is likely that the original owners assumed that all compliance issues had been completed and they just needed to contact the building certifier to obtain a copy of the code compliance certificate.
- 3.6 Without having carried out a further final building inspection or issued a code compliance certificate, the building certifier ceased to operate as a building certifier on 30 June 2005. In June 2006, the authority sent out pro-forma letters to all owners of buildings with uncompleted building consents that had been constructed under the supervision of the certifier.
- 3.7 In a pro-forma letter to the original owners dated 20 June 2006, the authority explained that when the building certifier ceased operating, an agreement had been made with a contractor to complete outstanding inspections on the building certifier's projects and make recommendations regarding the issuing of code compliance certificates. The authority went on to explain that the liability for building work imposed by the Act meant that:
- ...before Council accepts such liability by issuing Code Compliance Certificates it must be satisfied inspections carried out by [the building certifier] ... were satisfactory to confirm projects have been completed to the standards required by the Building Acts 1991 and 2004. Unfortunately our experience to date is that these inspections, supporting documentation and evidence are not satisfactory to support [the authority] issuing Code Compliance Certificates.
- 3.8 The authority explained that further inspections were therefore required in order to determine:
- If a Code Compliance Certificate could be issued or whether more building work and inspections are necessary, or
  - If a Certificate of Acceptance could be issued or whether more building work and inspections are required, ...
- 3.9 The authority also offered assistance with an application for determination. The authority concluded:
- [the authority] ...cannot accept any ongoing liability for ... certifier projects ... without being confident that the inspection documentation and inspections themselves were adequate in the first instance.
- 3.10 There is no record of inspections or correspondence after that time and the applicant purchased the property in January 2009, unaware of any outstanding matters. In a letter to the applicant dated 21 June 2011, the authority referred to its 2006 pro-forma letter to the original owners (see paragraph 3.7) and refused to issue a code compliance certificate, stating:
- The reason [the authority] declines to issue a code compliance certificate for this project is that it was not involved with approval of the building consent nor with inspections and therefore is not satisfied on reasonable grounds that the work complies with the building code.
- 3.11 The Department received an application for a determination on 22 August 2011.

## 4. The submissions

4.1 The applicant forwarded copies of:

- the consent drawings
- the 25 November 2004 letter from the housing company to the original owners
- the letter dated 21 June 2011 from the authority
- a CD-Rom of the property files held by the authority, which included the following documents pertinent to this determination:
  - the consent documentation
  - the authority's pro-forma letter dated 20 June 2006
  - the building certifier's inspection summary dated 29 June 2006
  - various other statements and information.

4.2 The authority acknowledged the application but made no submission in response.

4.3 A draft determination was issued to the parties on 17 October 2011. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.

4.4 The applicant accepted the draft without comment and nominating November 2004 as being the date compliance with B2 was achieved.

4.5 The authority initially responded on 11 November 2011 noting the date of November 2004 was agreed by the parties and that a further submission was pending.

4.6 On 15 November 2011 the authority emailed the Department seeking clarification 'why it seems to be suggested that [the authority] take on projects which were under the control of a building certifier ... and issue the code compliance certificates'.

4.7 In a further submission, dated 14 December 2011, the authority referred to the previous email correspondence with the Department. In its submission the authority:

- noted that its reason for declining the certificate was because it had not undertaken inspections, and it could not therefore be satisfied on reasonable grounds that the work complies with the code
- did not consider it could rely on or had an obligation to accept inspection notes and the records of building certifiers.

4.8 The authority also stated that its historical interpretation of the Act was that:

- section 436 related only to consents issued by and inspected by building consent authorities, and not to consents inspected by building certifiers
- section 437 applies to consents inspected by building certifiers, but only certificates of acceptance are provided for not code compliance certificates
- the certificates of acceptance provisions appears to support the authority's position with respect to 'limiting liability'.

The authority concluded by requesting the Department include within the determination an 'additional authoritative comment explaining the issue of code compliance certificates in such circumstances. This is considered in paragraph 0.

- 4.9 The authority also submitted that draft determination did not correctly reflect the context of the authority's reasons for refusing to issue a code compliance certificate and requested the determination be amended accordingly. In response I note:
- no evidence was or has been provided by the authority as to the non-compliant building work
  - the authority appears to have applied a policy position to work supervised by the building certifier, rather than assess each application for a code compliance certificate on a case-by-case basis.

## **5. Grounds for the establishment of code compliance**

- 5.1 In order for me to form a view on the code compliance of this house, I established what evidence was available and what could be obtained considering that the building work is completed and some of the elements are not able to be cost-effectively inspected.
- 5.2 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the building certifier's inspection records, but I consider it important to look for evidence that corroborates these records to verify that the building certifier's inspections were properly carried out. I also consider that the level of reliance is influenced by the information available to me and by the nature of this house.
- 5.3 In summary, I find that the following evidence will allow me to form a view as to the code compliance of the building work as a whole:
- The record of inspections carried out by the building certifier, which indicates satisfactory inspections of the building work (refer paragraph 3.2).
  - the drawings, producer statements and other technical information
  - The expert's report on the exterior building envelope as outlined below.

## **6. The expert's report**

- 6.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors and inspected the house, providing a report that was completed on 28 September 2011.

### **6.2 General**

- 6.2.1 The expert noted that the house generally appeared to accord with the consent drawings apart from some minor variations. The expert considered that the overall standard of workmanship was good, with the house generally 'well presented and maintained' and cladding installation reflecting 'reasonable standards of trade practice'. However, the expert noted that the EIFS was 'becoming due' for repainting and 'isolated patch repairs' to textured coating.

### 6.3 Windows

- 6.3.1 Windows are recessed by the EIFS thickness. The expert scraped a small area of textured coating from the jamb to sill junction of a bathroom window and observed that proprietary uPVC flashings had been installed. The expert also carried out dye tests which confirmed that the lower cavity was draining satisfactorily.
- 6.3.2 Windows within brick veneer walls are recessed by about 60mm, with the heads directly beneath eaves soffits. Sloping bricks form a traditional sill that projects beyond the brick veneer below. Where the veneer height reduces to sill height, the brick sill is plastered to match the EIFS finish above. The EIFS cavities above part-height brick veneer and at gable ends drain into the brick veneer cavity below.

### 6.4 Moisture levels

- 6.4.1 The expert inspected the interior and the roof space, taking many non-invasive moisture readings. The expert noted signs of moisture damage to the carpet edge and skirting at the corner of a bedroom adjacent to the bathroom, although invasive moisture readings were not elevated. On investigation, an overflow pipe from the hot water cylinder was observed to be leaking and wetting the slab adjacent to the bedroom corner. There were no other indications of moisture problems.
- 6.4.2 The expert carried out limited invasive moisture testing of EIFS-clad framing under a sill to jamb junction and below an apron flashing, with sound drillings and readings 'within acceptable prescribed levels'. In view of the lack of any apparent problems, the expert did not consider it necessary to carry out further invasive moisture testing.
- 6.5 Commenting specifically on the external envelope, the expert noted that:

- there is insufficient ventilation provided for the sub-floor space to the deck

#### **EIFS cladding**

- clearances between the bottom of bathroom wall cladding and adjacent gardens are insufficient, and column cladding also lacks clearance from timber decking
- the cavity closure to the gable end cladding above the north bedroom window does not allow drainage from the cavity
- as part of maintenance, patching of texture coating and paint is needed around the ends of apron flashings, including at the ends of gutters

#### **Brick veneer**

- there is insufficient clearance to brick veneer along the west elevation, the north bedroom wall and the south entry area, with garden areas and planters impeding weep holes
- the top of the brick veneer cavity is not sealed by the soffit lining as shown in the consent drawings, allowing damp air into the roof space.

## 6.6 Other relevant code clauses

6.6.1 The expert also commented on the compliance of the house with other relevant clauses of the Building Code, including the following summarised comments (with relevant code clauses provided in brackets):

- A connector is missing at the junction of the beam and post at the northeast lounge roof overhang, which is visible from the roof space (Clause B1).
- There is no clearance from the wood burner flue casing to adjacent combustible timber in the roof space (Clause C).
- The replacement of two downpipes with chains leading to planter boxes may result in damage from excessive water during very high rainfall (Clause E1).
- The leaking overflow from the hot water cylinder is leading to moisture damage in adjacent skirtings and carpet (Clause G12).
- The ceiling insulation is untidy in some areas (Clause H1).

6.7 The expert concluded that the construction design reflected ‘low-risk building practices’; and non-compliant items observed have only minor implications on the building’s compliance with the performance requirements of the New Zealand Building Code, with no ‘significant detrimental effects’ apparent.

6.8 A copy of the expert’s report was provided to the parties on 29 September 2011.

## 7. Discussion

### 7.1 The code compliance of the house

7.1.1 Taking account of the expert’s report and the other available evidence, I have assessed the compliance of this house with relevant clauses of the Building Code. The following addresses those clauses.

#### **Clause B1 Structure**

7.1.2 The house is a fairly simple conventional structure and the inspection summary records satisfactory inspections of foundations and floor slab. The summary also notes that bracing was passed during the pre-line inspections.

7.1.3 Apart from the missing connector identified in paragraph 6.6.1, the expert noted no visible signs of structural settlement, movement or other problems.

#### **Clause E1: Surface water**

7.1.4 The inspection summary indicates satisfactory inspections of drainage, with an as-built drainage plan provided. The expert noted no evidence of unsatisfactory surface water discharge, except for the chains identified in paragraph 6.6.1.

#### **Clause E2: External moisture**

7.1.5 The claddings generally appear to have been installed in accordance with good trade practice and to manufacturers’ instructions at the time of construction. However

taking account of the expert's report, I conclude that remedial work and/or maintenance is necessary in respect of the items outlined in paragraph 6.5.

- 7.1.6 I also consider the expert's report establishes that the current performance of the flush-finished EIFS cladding is adequate because there is no evidence of moisture penetration into the timber framing. Consequently, I am satisfied that the house complies with Clause E2 of the Building Code.
- 7.1.7 However the building envelope is also required to comply with the durability requirements of Clause B2 and that includes the requirement for the house to remain weathertight. Because the faults may allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.
- 7.1.8 Because the identified faults occur in discrete areas, I am able to conclude that satisfactory rectification of items outlined in paragraph 6.5 will result in the external envelope being brought into compliance with Clause B2 of the Building Code.

### **Clause E3: Internal moisture**

- 7.1.9 The expert observed no areas of non-compliance or evidence of interior moisture, apart from localised dampness resulting from a leaking overflow pipe identified in paragraph 6.6.1.

### **Clause F2: Hazardous building materials**

- 7.1.10 Shower cubicles are proprietary units with glass doors and are conventional units. These would have been inspected during pre-line inspections; indicating that safety glass is likely to be installed where required. The expert also identified no problems.

### **Clauses G1 to G8: (Personal hygiene, Laundering, Food preparation, Ventilation, Interior environment, Natural light, Electricity, and Artificial light**

- 7.1.11 The house generally complies with the consent drawings, the interiors were inspected by the building certifier and the drawings show adequate provision to comply with the requirements.
- 7.1.12 The expert noted that ventilation and lighting appeared satisfactory and observed no evidence of non-compliance.

### **Clause G12: Water Supplies, and G13: Foul Water**

- 7.1.13 The inspection summary records satisfactory inspections of pre-pour drainage and pre-line plumbing, together with a final plumbing inspection which passed, with an as-built drainage plan provided.
- 7.1.14 The expert observed no evidence of non-compliance, apart from the leaking overflow pipe identified in paragraph 6.6.1.

### **Clause H1: Energy Efficiency**

- 7.1.15 The building certifier's inspection summary indicates that satisfactory preline inspections were undertaken and the expert observed insulation in the roof space (refer also paragraph 6.6.1).

## Conclusion

- 7.1.16 Taking account of the above observations and the expert's report, I conclude that remedial work, investigation and/or maintenance is necessary in respect of the following areas:
- the inadequate post/beam junction at the north east lounge roof (Clause B1)
  - lack of clearance from woodburner flue casing to roof space timber (Clause C)
  - investigation of the chains that replace two downpipes (Clause E1)
  - in regard to Clause E2:
    - inadequate ventilation to the sub-floor space under the deck
    - inadequate clearances from the bottom of EIFS wall cladding to gardens
    - inadequate clearances from the bottom of EIFS column cladding to decking
    - lack of drainage to cavity closure at the bottom of the gable end cladding above the north bedroom window
    - lack of coating and paint around the ends of apron flashings and gutters
    - inadequate clearance to brick veneer and weep holes in some areas
    - the unsealed top of the brick veneer cavity
  - the leaking overflow pipe from the hotwater cylinder (Clause G12)
  - the disturbed ceiling insulation (Clause H1).
- 7.1.17 I consider that the expert's report, the building certifier's inspection records, the authority's assessment and the other documentation, allow me to conclude that the remaining building work is likely to comply with the Building Code.
- 7.1.18 The expert has identified some areas where maintenance is required. Effective maintenance is important to ensure ongoing compliance with the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

## 7.2 The appropriate certificate to be issued

- 7.2.1 Having found that the building work can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.
- 7.2.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a building consent authority may, on application issue a certificate of acceptance. In the case of this building, the owners are seeking a code compliance certificate.

7.2.3 In this situation, where I have reasonable grounds to conclude that the building work can be brought into compliance with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.

### **7.3 The durability considerations**

7.3.1 There are concerns regarding the durability, and hence the compliance with the building code, of certain elements of the building taking into consideration the age of the building work completed in 2004.

7.3.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods (“durability periods”) “from the time of issue of the applicable code compliance certificate” (Clause B2.3.1).

7.3.3 These durability periods are:

- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
- 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
- the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.

7.3.4 In this case the delay between the completion of the building work in 2004 and the applicant’s request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today’s date. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at a date in 2004.

7.3.5 It is not disputed, and I am therefore satisfied, that all the building elements in respect of building consent no. 70837, excluding those items that are to be rectified as described in paragraph 7.1.16 of this determination, complied with Clause B2 on 1 November 2004 (refer paragraph 4.6)

7.3.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.

7.3.7 I continue to hold that view, and therefore conclude that:

- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements.

- (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued in 2004.

7.3.8 I strongly recommend that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

#### **7.4 The authority's actions**

7.4.1 In its pro-forma letter dated 20 June 2006 (see paragraph 3.7), the authority stated that further inspections of the building certifier's uncompleted building consents would be necessary to determine whether a code compliance certificate 'could be issued or whether more building work and inspections are necessary'. I consider this approach to assessing compliance was reasonable. However, no such inspection appears to have been sought in response to this advice.

7.4.2 The authority's letter to the owners dated 21 June 2011 (see paragraph 3.10) stated that the authority could not issue the code compliance certificate because of the lack of knowledge of the work and the involvement of a building certifier.

#### **The application of section 95A**

7.4.3 Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:

... must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

7.4.4 In its letter of 21 June 2011 to the applicant, the authority provided no explanation for its refusal to issue a code compliance certificate beyond its lack of involvement with the 'approval of the building consent nor with inspections'.

7.4.5 The provisions of section 95A apply irrespective of the involvement of a building certifier: if an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which is likely to include a detailed assessment of the work concerned. In cases involving a building certifier an authority may suggest an owner to apply for a certificate of acceptance where the issue of the code compliance certificate is refused.

7.4.6 In this instance I do not consider the authority met its obligation in respect of section 95A as it did not place itself in a position where it could make an informed decision about the code compliance of the house.

#### **The establishment of compliance**

7.4.7 In regard to this house, the evidence as to compliance is able to be gathered from the building certifier's inspection records, the performance of the exterior envelope over the past seven years, and a visual assessment of remaining building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance. I also note that the house is a modest single storey structure with treated

framing, and with most walls clad with brick veneer with an eaves overhang: I consider the house presents a low risk in terms of the establishment of compliance.

- 7.4.8 The methodology I have used in order to form whether the house is compliant is discussed herein: this is fully consistent with the methodology applied in many other similar determinations.
- 7.4.9 I consider the authority was able to apply a similar methodology in reaching a decision itself as it outlined in its letter to the former owners dated June 2006. While it may not have come to a position where it believed it was able to issue a code compliance certificate, it would, at the very least, have been able to reach a decision in respect of the issue of a certificate of acceptance as provided for in section 437. The authority declined to make any assessment.
- 7.4.10 Had an inspection of the house been carried the authority should have been able to identify any defects requiring attention; without the applicant needing to apply for a determination. Any requirement for a determination should follow such an inspection, not precede it.
- 7.4.11 The authority has not provided me with any evidence of why it considers the house is not code-compliant. I do not believe that this is acceptable. It is important that an owner be given clear reasons why compliance has not been achieved so the owners can either then act on those reasons, or apply for a determination if the reasons are disputed.

### **My response to the authority's submissions**

- 7.4.12 In response to the authority's contention that the Department provide an 'authoritative comment' on the issue of code compliance certificates I note the following:
- The test whether compliance has been achieved for consents issued under the Building Act 1991 ("the former Act") applies irrespective of the involvement of a building certifier or not. Section 436 requires the assessment or code compliance to be made against the requirements of the Building Code that were in force at the time the consent was issued. The involvement of a building certifier does not effect the application of the transitional provisions.
  - While section 437 specifically provides for the issue of a certificate of acceptance in circumstances where a building certifier has not issued either a code compliance certificate or a building certificate (the latter under the former Act); it does not prevent an authority from issuing a code compliance certificate if it believes the work is fully compliant.
  - I do not consider I am suggesting that the authority 'take on' building certifier projects as a matter of course (see paragraph 4.6), rather I am inviting the authority to make decisions about certifier work based on its own detailed assessment of such work. I accept there will be circumstances where compliance will be difficult to establish; but this house is not such a case.
  - I have given my opinion in previous determinations about how the authority should establish compliance, and the impact of its view of its liability on such decisions. In Determination 2011/065 I said:

#### Paragraph 4.6.2

... Upon receiving an application for a code compliance certificate that complies with the requirements of section 92 of the Act, the authority is required to consider the application and determine whether or not to issue a code compliance certificate in accordance with sections 94 and 95 of the Act.

#### Paragraph 4.6.3

The fact that section 393 of the Act provides that the 10 year long-stop limitation period commences from the time a code compliance certificate is issued is not a good reason for the authority to refuse to issue a code compliance certificate. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions.

In my view this position is valid irrespective of the involvement of a building certifier or not.

### **Conclusion**

- 7.4.13 I take the view that the involvement of a building certifier is in itself not an adequate reason for refusal of a code compliance certificate in terms of section 95A, nor can it be taken as evidence that building work is not code-compliant. As the authority had not inspected the work, it was not in a position to form a view on reasonable grounds as to the compliance of the building work.
- 7.4.14 Notwithstanding that this determination has found that the building work does not comply with the Building Code in some limited respects, I am not satisfied that the authority acted in accordance with Section 95A of the Act in providing reasons for its refusal to issue a code compliance certificate for the house.

## **8. What is to be done now?**

- 8.1 The authority should inspect the house and issue a notice to fix that requires the applicant to bring the house into compliance with the Building Code. The notice should include the investigations and defects identified in paragraph 7.1.16, but not specifying how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.
- 8.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 8.1. The applicant should produce a response to the notice to fix as to the rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 8.3 Once the matters set out in paragraph 7.1.16 have been rectified to its satisfaction, the authority shall issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 7.3.

## 9. The decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in refusing to issue a code compliance certificate without providing adequate reasons for the refusal in accordance with section 95A of the Act.

9.2 I also determine that:

- the external envelope does not comply with Clause B2 of the Building Code
- various other elements of the house do not comply with Clauses B1, C, E1, G12 and H1 of the Building Code

and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.

9.3 I also determine that:

- (a) all the building elements installed in the house, apart from the items that are to be rectified as described in Determination 2011/110, complied with Clause B2 on 1 November 2004.
- (b) the building consent is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 November 2004 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in paragraph 7.1.16 of Determination 2011/110.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 December 2011.

John Gardiner  
**Manager Determinations**