



## Determination 2015/024

### Regarding the refusal to issue a code compliance certificate for a 12-year-old house completed under the supervision of a building certifier at 18 Ryelands Drive, Lincoln



#### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
- the current owners of the house, F and F Conolly (“the applicants”)
  - Selwyn District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the 12-year-old house because the authority was not satisfied that the house complies with the Building Code (First Schedule, Building Regulations 1992). The refusal arose because the building work had been undertaken under the supervision of M G Davis Engineering Services Ltd (“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.
- 1.4 The matter to be determined<sup>2</sup> is therefore the authority’s exercise of its power of decision in refusing to issue a code compliance certificate. In making this decision, I must consider:

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

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

- The status of code compliance certificate provided by the building certifier. (I address this issue in paragraph 8.)
- Whether the building work complies with the relevant clauses<sup>3</sup> of the Building Code that was in force at the time the consent was issued. (I consider this matter in paragraph 7.)
- Whether the authority acted appropriately in its refusal or purported refusal to issue a code compliance certificate. (I consider this matter in paragraph 10.)

1.5 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 complies 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 the building work complies, or can be brought into compliance with the Building Code, what is the appropriate certificate to be issued? I address this question in paragraph 9.

1.6 In making my decision, I have considered the report of the expert commissioned by the Ministry 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 site in a high wind zone as described in NZS 3604<sup>4</sup>. The expert’s report takes the garage and entry doors 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 weathertightness risk.

2.2 The house was constructed by a ‘group housing company’ and construction is conventional light timber frame, with a concrete slab and foundations, brick veneer cladding, profiled metal roofing and aluminium windows. The 28° pitched hipped roof has eaves of 600mm, with shelter reduced to about 100mm at a projecting gable above the west kitchen walls, projecting walls of the south ensuite, and the south wall of the garage.

2.3 All external walls are conventional brick veneer, which incorporates a 40mm drained and ventilated cavity. The brick veneer extends full height up to the soffit linings and also up to the verge of the gable above the kitchen.

2.4 The expert observed no evidence of treatment markings on timber he was able to inspect within ceiling cavities, and given the date of construction in 1998 I consider that the external wall framing is unlikely to be treated.

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<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

### **3. Background**

3.1 The authority issued building consent No. 021098 to the applicants on 6 September 2002 under the Building Act 1991, based on a building certificate dated 22 August 2002 issued by the building certifier.

### **3.2 Construction**

3.2.1 The building certifier was engaged to carry out all inspections and to issue a code compliance certificate. The building certifier carried out the following inspections:

- Foundations on 6 November 2002 (which passed).
- Pre-pour slab inspections on 7 November 2002 (which passed).
- Framing, trusses and fixings on 23 December 2002 (which noted that some work was incomplete).
- Pre-line building and plumbing re-inspection on 16 January 2003 (which passed, with fibreglass insulation subsequently noted as 'OK').
- Nailing of plasterboard bracing units on 16 January 2003 (which passed).
- Brick cavities and ties on 31 January and 5 February 2003 (which passed).

3.2.2 It appears that the certifier also carried out satisfactory final inspections and as-built plans for sewer and stormwater dated 18 February 2003 were later provided. However outstanding gas and electrical certification apparently prevented the issue of a final code compliance certificate.

3.2.3 At that stage, the certifier prepared a 'draft' code compliance certificate and other completion statements (all dated 12 February 2003), but these were retained by the certifier pending receipt of the outstanding certificates.

3.2.4 At some stage, it appears that the electrical and gas certificates were forwarded directly to the authority without the certifier being aware of this. The building certifier ceased to operate as a building certifier on 30 June 2005 without having issued a code compliance certificate for the house.

### **3.3 Post-completion**

3.3.1 The applicants moved into the house assuming that all compliance issues had been completed, and it was not until 2007 that the applicants realised the omission. The applicants obtained copies of the plumbing and gasfitting certificates from the authority's records and delivered these to the certifier. The certifier signed the code compliance certificate on or about 20 March 2007, despite the certificate being dated 12 February 2003, and as he could no longer issue these as a building certifier he endorsed the code compliance certificate with 'N/A For information only'.

3.3.2 In a letter to the authority dated 21 March 2007, the certifier enclosed the endorsed code compliance certificate and noted that he understood that 'the owners have been in touch with you in regard to the completion of the Code Compliance Certificate'. There is no record that the authority responded, but the applicants believed the matter to be resolved.

### **3.4 The authority's general information record**

3.4.1 I have seen no records of any further correspondence about the house. In 2014 the applicants became aware that a code compliance certificate had still not been issued for the house. The applicants approached the authority, which apparently refused to inspect the house to assess its compliance.

3.4.2 A copy of the authority's computer-generated record titled 'General Property Information' records the building consent for the house and includes a note dated 5 December 2014, which states:

A Code Compliance Certificate (No. 02/1143) issued by [the certifier] for BC021098 was handed to the Council by [the certifier] on 21/3/07. [The certifier] has endorsed the certificate with the words 'N/A For Information Only'. This Code Compliance Certificate is held, by the Council, for information purposes only. Anyone that wishes to rely on this Code Compliance Certificate will need to determine, for themselves, the accuracy and validity of this certificate.

3.5 The Ministry received an application for a determination on 8 January 2015.

## **4. The submissions**

### **4.1 The applicants' submission**

4.1.1 In an email following the application, the applicants outlined their understanding of how the situation arose and explained how they were unaware of any problems until 2007. At that stage the authority had verbally advised them that the house did have a code compliance certificate but it was now apparent that this was incorrect. As they were considering selling the property in the next few years this omission again became a problem.

4.1.2 The applicants provided copies of:

- the endorsed letter and certificates from the certifier dated 12 March 2003
- electrical certificate of compliance dated 21 February 2003
- gasfitting certification certificate dated 22 February 2003.

4.2 The authority provided a copy of the consent documentation, and the certifier's inspection records.

4.3 A draft determination was issued to the parties for comment on 3 April 2015.

4.4 The applicants accepted the draft without further comment in a response received on 15 April 2015.

4.5 The authority did not accept the draft, and in a response received on 1 May 2015 submitted (in summary):

- The determination should be in relation to the code compliance certificate issued by the building certifier; the draft does not address the validity of that certificate.
- If the building certifier's code compliance certificate is found not to be valid:
  - 'it would simply not be appropriate, fair, or procedurally correct for the authority to be forced to issue a [code compliance certificate] and effectively "guarantee" compliance with the Building Code given that the authority had no involvement in the consenting or inspection...'

- owners with certificates from building certifiers could potentially apply for a new code compliance certificate from the authority because of a minor typographical error on their present certificate
  - The authority is being exposed to potential liability if it is required to issue the code compliance certificate.
  - References to any refusal by the authority to issue a code compliance certificate should be removed; no application for a code compliance certificate has been made. (I note that later in the same submission the authority stated it had ‘refused to agree to issue the [code compliance certificate] under section 91; section 91 does not require the authority to provide reasons for its refusal’.)
- 4.6 The authority’s submission also referred to section 91 of the current Act and stated that if the building certifier’s code compliance certificate is found not to be valid section 91(4) would apply and the owner could apply for a certificate of acceptance. I address this issue in paragraph 9.
- 4.7 I have amended the determination as I consider appropriate to address the issues raised by the authority in its submission on the draft.

## **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 3.2.1).
  - the drawings, producer statements and other technical information
  - the simple and conventional nature of the house
  - the endorsed code compliance certificate prepared by the certifier
  - The expert’s report on the exterior building envelope as outlined below.

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

### **6.1 General**

- 6.1.1 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 on 10 February 2015, providing a report completed on 2 March 2015. The parties were provided with a copy of the report on 5 March 2015.
- 6.1.2 The expert noted that the house generally appeared to accord with the consent drawings apart from some minor variations. The expert considered the house had been 'finished to a high standard and is well maintained'.
- 6.1.3 The expert visually assessed the compliance of the house with the relevant clauses of the Building Code and his findings are summarised in the following paragraphs.

### **6.2 B1 Structure**

- 6.2.1 The house had suffered minimal damage during the Canterbury earthquakes, with minor cracking to linings repaired and the walls repainted. The owner advised the expert that damage had been cosmetic and limited to minor cracks to linings and brick mortar, with some nail popping to the garage ceilings.
- 6.2.2 The expert noted no evidence of movement or settlement of foundations, floor slabs, brickwork or roof framing. Despite experiencing severe earthquakes and storms, there were no visible signs indicating the structure had not resisted such forces.

### **6.3 E1 Surface water**

- 6.3.1 The expert observed that all landscaping is complete, with satisfactory falls to paving, unpaved areas at an appropriate level in regard to the house floor slab and gully traps finished 100mm above the surrounding ground.
- 6.3.2 The expert noted no areas where ponding was likely, with the concrete driveway unaffected by the earthquake and in excellent condition. The expert noted that the only visible slumping was to the asphalt on the authority's land.

### **6.4 E2 External moisture**

- 6.4.1 Roof penetrations appeared well sealed, floor and cladding clearances were satisfactory and the brick veneer included weep holes to the bottom and raked joints to provide ventilation under the soffits.
- 6.4.2 The expert noted no evidence of moisture penetration on the interior of external walls with non-invasive moisture readings within an acceptable range.

### **6.5 E3 Internal moisture**

- 6.5.1 The house was satisfactorily ventilated with extract fans in the kitchen and bathrooms vented to the outside. A ventilation system also supplies fresh dry air from the ceiling space into the passage.
- 6.5.2 Impervious linings and flooring were used in wet areas, with fixtures and fittings sealed at junctions with the walls. The expert noted no evidence of internal moisture problems, with no signs of mould on wall or ceiling linings.

## **6.6 Clause F2 Hazardous building materials**

6.6.1 Safety glass had been installed where required in the bathroom window in the glazing to the proprietary shower cubicle.

## **6.7 Clause F7 Warning systems**

6.7.1 Operational smoke alarms are installed adjacent to bedrooms and in the kitchen.

## **6.8 Clause G1 to G9 (Personal hygiene, Laundering, Food preparation, Ventilation, Interior environment, Natural light, Artificial light and Electricity**

6.8.1 The expert noted that:

- sanitary fixtures have satisfactory traps and drains are operating properly
- the kitchen provides satisfactory provisions for food preparation
- the house has sufficient opening windows, extract fans and a ventilation system, with the clothes drier adjacent to an opening window
- the electrical certificate of compliance covers pre-wiring and fit out, with no electrical problems observed.

## **6.9 Clause G11 Gas as an energy source**

6.9.1 Gas is provided from town supply via a meter and the gasfitting certificate covers the lounge fire and kitchen hob. The gas hot water heater is externally mounted under the eaves on the south wall beside the ensuite bathroom.

## **6.10 Clause G12 Water supplies**

6.10.1 Water is provided from town supply and the expert noted that flow rates appear satisfactory. Although no tempering valve is installed to the continuous gas water heater, the expert noted that hot water temperatures delivered at sanitary fixtures were an acceptable 47°.

## **6.11 Clause G13 Foul water**

6.11.1 The house is connected to the town sewer. Traps are fitted to sanitary fixtures and drains are operating properly and not being drawn. Fixtures are functioning properly with gully traps draining freely and no signs of overflow or other problems.

## **6.12 Clause H1 Energy Efficiency**

6.12.1 The expert checked insulation in the ceiling space. The removal of a light switch in the lounge allowed fibreglass insulation in the wall to be observed. The expert also noted that double glazing had been installed.

## **6.13 Summary**

6.14 The expert considered that his assessment together with the inspection records 'are consistent with the house having been built in accordance with the Building Code' and the expert's site inspection supported that view.

6.15 The expert also noted that 'minimal cosmetic damage' had resulted from the earthquakes and stated that, in his opinion:

...the house construction complies with the building code and there is no reason why a code compliance certificate should be withheld.

## **7. The compliance of the house**

### **7.1 General**

7.1.1 I note that the building consent was issued under the former Act, and accordingly the transitional provisions of the Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.

7.1.2 In order to determine whether the authority correctly exercised its power in refusing to issue the code compliance certificate or alternatively in its purported refusal to issue the code compliance certificate, I must consider whether the building work complies with the Building Code. The following paragraphs therefore consider the code compliance of the house.

### **7.2 Clause B1: Structure**

7.2.1 The house is a simple conventional structure and the certifier's inspection records note satisfactory inspections of foundations, floor slab, framing, structural fixings and bracing. Brick veneer ties were also passed during part-height inspections.

7.2.2 The expert noted no visible signs of structural settlement, movement or other problems, with only cosmetic damage sustained during past earthquake events.

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

7.3.1 An as-built stormwater plan was provided, which shows downpipes discharging into underground pipes and via a sump before exiting into the street stormwater system. The expert noted no evidence of unsatisfactory surface water discharge.

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

7.4.1 I note that an application can be made to the authority for a modification of durability requirements to allow durability periods to commence from the date of substantial completion in 2003. Although that matter is not part of this determination (see paragraph 1.4), I have taken the anticipated modification into account when considering the weathertightness performance of the claddings.

7.4.2 The cladding appears to have been installed in accordance with good trade practice and to manufacturers' instructions at the time of construction. The expert noted no elevated moisture levels within the house and no signs of cladding defects at risk of allowing moisture penetration through the exterior building envelope, with sealed roof penetrations and ventilation to the brick veneer cavities. The house is well maintained and appears to have remained weathertight for more than 12 years.

7.4.3 I consider the expert's report establishes that the performance of the claddings is adequate because there is no evidence of moisture penetration into the timber framing and no areas likely to allow moisture ingress in the future. Consequently, I am satisfied that the house complies with Clauses E2 and B2 of the Building Code.

### **7.5 Clause E3 Internal moisture**

7.5.1 The expert observed no areas of non-compliance or evidence of interior moisture, with no visible mould on linings, ventilation and extract systems installed to remove moist air, and fittings sealed against impervious surfaces.

## **7.6 Clause F2 Hazardous building materials**

7.6.1 The expert observed appropriate safety glass had been installed where required. Glazing would have been inspected by the certifier. No evidence of non-compliance was observed.

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

7.7.1 The house generally complies with the consent drawings, the interiors were inspected by the building certifier and drawings show adequate provision to comply with the requirements.

7.7.2 An electrical certificate of compliance was issued for the house and the expert noted that facilities, ventilation and lighting appeared satisfactory, with no evidence of non-compliance observed.

## **7.8 Clause G11 Gas as an energy source**

7.8.1 The gasfitting certificate covers the lounge fire and kitchen hob. Although I have not seen a separate certificate covering the externally mounted gas hot water heater, installation of the heater is likely to have been carried out by installers approved by the supplier. In addition, there has been no evidence of problems after more than 12 years, with the continuous water heater well maintained and in good condition.

## **7.9 Clause G12 Water Supplies and G13 Foul Water**

7.9.1 The certifier's inspection records show satisfactory inspections of pre-pour drainage and pre-line plumbing, with an as-built drainage plan provided. The expert observed no evidence of non-compliance, with acceptable hot water temperatures, fixtures functioning satisfactorily and no evidence of problems.

## **7.10 Clause H1 Energy Efficiency**

7.10.1 The certifier's inspection records passed ceiling and wall insulation. The expert observed fibreglass insulation in the roof space and in the lounge wall via a removed light switch; and also noted that double glazing had been installed.

## **7.11 Conclusions**

7.11.1 I concur with the expert's opinion that this house is well maintained and in good condition after more than 12 years, during which it has withstood severe earthquake and storm events with no evidence of significant damage.

7.11.2 In the absence of any evidence to the contrary, I consider that the expert's report, the building certifier's inspection records and the other documentation, allow me to conclude that the building work is likely to comply with the Building Code.

## **8. The status of the certificate provided by the building certifier**

8.1 While the building certifier had carried out satisfactory final inspections, and a code compliance certificate was drafted, the building certifier did not sign and issue the code compliance certificate prior to ceasing operation as a building certifier on 30 June 2005. The certificate signed and endorsed as 'for information only' in March 2007 cannot be treated as a code compliance certificate issued by the building certifier under the former Act.

- 8.2 The authority has expressed concern that this conclusion will mean owners of other homes with code compliance certificates issued by building certifiers, with for example minor typographical errors on the certificate, could seek a new code compliance certificate for which the authority would then be liable.
- 8.3 I do not see such examples as being analogous to the circumstances in this case, the main difference being that the building certifier did not issue the code compliance certificate for this house prior to ceasing operating as a certifier, and as such no decision to issue had been made. Where a certificate has been issued, albeit with an error, the certificate could be reissued with the error simply corrected<sup>5</sup>; in those circumstances no new decision is being made and the date of the certificate would not be changed. Where the decision to issue the original certificate is in question, a determination may be applied for.
- 8.4 While the certificate provided by the building certifier has no status under the Act, I consider the fact the certificate was drafted at the time of completion indicates the building certifier was satisfied as to the compliance of the building work. (See also paragraph 5.)

## 9. The appropriate certificate to be issued

- 9.1 In its response to the draft determination, the authority stated that it considered it would not be 'appropriate, fair, or procedurally correct' for it to be required to issue a code compliance certificate, and also raised concerns about potential liability.
- 9.2 As the building consent was issued under the former Act the authority is required to consider the application for a code compliance certificate under the transitional provisions of the current Act.
- 9.3 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.
- 9.4 The transitional provision in section 436 of the Act requires the authority to consider an application for a code compliance certificate under the former Act. Section 43(3) of the former Act (as modified by section 436(3) of the Act) requires the authority to issue a code compliance certificate 'if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code that applied at the time the building consent was granted'.
- 9.5 There is nothing in the transitional provisions that precludes the authority from making a decision about a code compliance certificate because the consent was based on a certificate issued by a building certifier, or because the building work was inspected by a building certifier. The involvement of a building certifier is not an adequate reason for refusing to issue a code compliance certificate, nor is it evidence that building work is not code compliant.
- 9.6 In the case of this building, the owners are seeking a code compliance certificate and there is nothing in the Act restricting them from seeking a code compliance certificate. The applicants have on two occasions sought to resolve this issue and

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<sup>5</sup> *Interpretation Act 1999* Section 13 Power to correct errors "The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once."

have been left with the impression that a code compliance certificate would not be issued by the authority, and that the only option available to them is to seek a certificate of acceptance. In addition the authority has refused to undertake an inspection of the building work. The actions of the authority have had the practical effect of a refusal; on that basis I have made this determination on the authority's refusal or purported refusal.

9.7 In this situation, where I have reasonable grounds to conclude that the building work complies with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued.

9.8 The matter of the authority's potential liability in issuing a code compliance certificate has been addressed in a number of previous determinations involving this authority<sup>6</sup>. I remain of the view set in those determinations; in 2013/028 I said:

5.2.5 ... section 393 provides that, in respect of the issue of a code compliance certificate, the 10 year long-stop limitation period commences from the time the code compliance certificate is issued (section 393(2) and (3)(a) of the Act).

5.2.6 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function. 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.

## 10. The authority's regulatory actions

10.1 In regard to this house, the main 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 12 years, and a visual assessment of other building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance.

10.2 Although I have seen no evidence of a formal request to the authority for a code compliance certificate from the applicants, the applicants approached the authority about the house on a number of occasions. It appears that the authority's advice to the applicants was verbal as I have seen no formal correspondence; however the applicants have remained under the impression a code compliance certificate could not be sought and the authority's response to the draft determination accords with the applicants' impression.

10.3 The authority has not turned its mind to the compliance of the house. Had an appropriate inspection of this conventional low risk house been carried out in response to the requests for a code compliance certificate, the authority should have been able to reach its own view of the compliance of the house without the applicant needing to apply for a determination. If a determination was required about any disputed matters of compliance, this should have followed such an inspection, not preceded it.

10.4 I remind the authority that section 95A of the Act requires it to give the reasons for a refusal to issue a code compliance certificate:

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

<sup>6</sup> Determinations 2013/028, 2013/063, and 2014/006 for example.

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

The involvement of a building certifier is not an adequate reason under Section 95A for refusing to issue a code compliance certificate, nor is it evidence that building work is not code compliant.

- 10.5 The authority has not provided me with any evidence of why it considers the house is not code compliant. It is important that, should an owner be declined a code compliance certificate, they be given clear and appropriate reasons why. The owners can either then act on those reasons or apply for a determination if they dispute them. I conclude the authority did not properly exercise its power of decision its refusal, or purported refusal, to issue a code compliance for the house.
- 10.6 In responding to the draft determination the authority stated that it had 'refused to agree to issue the [code compliance certificate] under section 91' of the current Act. The authority has misinterpreted the meaning of this section; section 91 addresses who may issue a code compliance certificate, namely the authority that granted the building consent (s91(1)), and the circumstances in which a building consent authority other than the one that granted building consent may issue a code compliance certificate (s91(2)). Section 91(4) sets out what an owner must do if either the building consent authority is unable or refuses to issue the code compliance certificate (s91(3)(a)) and no other building consent authority will agree to issue the code compliance certificate(s91(3)(b)). Section 91 does not address the refusal itself.
- 10.7 For completeness I note that sections 94, 95, and 95A cover: the matters for consideration by the authority in deciding whether to issue a code compliance certificate; the issue of the certificate; and the refusal to issue a code compliance certificate.

## **11. What happens next?**

- 11.1 I suggest that the applicants now formally apply to the authority for a code compliance certificate and also for an amendment to the consent to modify the durability provisions in B2.3.1 to allow specified periods to commence from the date of completion in February 2003. I leave the matter of the modification of durability provisions to the parties to resolve.
- 11.2 Once the above is satisfactorily resolved between the parties and the building consent amended accordingly, the authority shall issue a code compliance certificate in respect of the amended consent.

## **12. The decision**

12.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the house complies with the relevant requirements of the Building Code that was in force at the time the building consent was issued
- the authority incorrectly exercised its powers of decision in refusing, or in its purported refusal, to issue the code compliance certificate

and I accordingly reverse the authority's decision to refuse to issue a code compliance certificate for the building work.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 19 May 2015.

John Gardiner  
**Manager Determinations and Assurance**