



Building Consent Authority Complaint 2014/002

21 October 2014

COMPLAINT AGAINST THE BUILDING CONSENT AUTHORITY OF AUCKLAND COUNCIL

1. The matters of complaint

- 1.1 This is a complaint decision under Part 3 Subpart 1 of the Building Act 2004¹ (“the 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 complaint was lodged by R Beniston (“the complainant”) against the Building Consent Authority (“the BCA”) of Auckland Council, in accordance with section 200 of the Act, received by the Determinations and Assurance Group of the Ministry of Business, Innovation and Employment on 2 September 2014. I note Determination 2013/066² relates to this complaint (“the determination”).
- 1.3 The complainant has lodged this complaint regarding:
 - The time frame it took the BCA to respond to the complainant’s remedial proposal following the determination; and
 - The ‘complete incompetence [of the BCA] in misinterpreting such a clear ruling from the Ministry [the determination]’

2. Background

- 2.1 The complaint centres on the issuing of the complainant’s code compliance certificate for a house built at 38 Ostend Road, Waiheke Island (“the building”). The complainant applied to the Ministry for a determination regarding the BCA’s refusal to issue a code compliance certificate due to concerns about the weatherboard fixings. The determination confirmed the refusal; however it said that resolution of a limited number of items in paragraph 6.4.1 of the determination would result in the weatherboard cladding being brought into compliance with Clause E2 and B2 of the Building Code to the satisfaction of the BCA.
- 2.2 Determination 2013/066 was issued on 4 November 2013. On 9 November 2013 the complainant sent a proposed resolution to the BCA. The BCA replied on 20 January 2014 with a substantive response, rejecting the proposal and seeking internal legal advice. On 22 January 2014 the BCA responded, again rejecting the proposal, and requiring the replacement and re-nailing of all the weather boards

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

² Determination 2013/066 Regarding the refusal to issue a code compliance certificate due to concerns about compliance of weatherboard fixings to a house (*Ministry of Business, Innovation and Employment*) 4 November 2013

using rose head grooved nails. The complainant sought assistance from an officer of the Ministry on 22 January 2014 by email regarding the interpretation of the determination. The Ministry responded on 22 January 2014 to the complainant and the BCA, providing clarification that the determination did not require the re-nailing of the all the weather boards. A full final inspection was carried out by the BCA and the code compliance certificate for the building was issued in July 2014.

- 2.3 For a full timeline of correspondence between the complainant and the BCA refer to Appendix A.

3. The legislation

- 3.1 Under section 200 of the Building Act 2004, the Chief Executive may receive complaints alleging that a BCA has been negligent in or has failed or is failing, without good reason, to properly perform any of its functions under Part 2 or 3 of the Act. The functions of a BCA include the issuing of building consents, notices to fix, code compliance certificates and inspecting building work for which it has granted consent.
- 3.2 Specific to this complaint, the BCA is governed by the Building (Accreditation of Building Consent Authorities) Regulations 2006 (“the Regulations”). The relevant sections that apply to this complaint are as follows:

10 Establishing and assessing competence of employees

- (1) A building consent authority must have a system for establishing the competence of a person who applies to it for employment as an employee performing building control functions.
- (2) A building consent authority must have a system for assessing annually (or more regularly) the competence of its employees performing building control functions.
- (3) The competence assessment system must cover the following:
 - (a) employees' understanding of the philosophy and principles of building design and construction; and
 - (b) employees' understanding and knowledge of building products and methods; and
 - (c) employees' knowledge and skill in applying the Act, the building code, and any other applicable regulations under the Act; and
 - (d) employees' ability to—
 - (i) process applications for building consents; and
 - (ii) inspect building work; and
 - (iii) certify building work; and
 - (e) employees' ability to communicate with internal and external persons; and
 - (f) employees' ability to comply with the building consent authority's policies, procedures, and systems

17 Assuring quality

- (1) A building consent authority must have a system for assuring the quality of its performance of its building control functions.
- (2) The quality assurance system must cover the following:
- (j) the procedure for communicating with internal and external persons;
 - and
 - ...
- (4) A building consent authority must have a system for ensuring that—
- (a) its employees comply with the authority's quality assurance system;
 - ...

4. The Ministry's Approach

- 4.1 I undertook preliminary enquiries on this matter including collecting evidence by:
- providing the BCA with an opportunity to make submissions and provide a formal written response to the complaint;
 - providing the complainant the opportunity to review this response and provide further comment; and
 - providing the BCA with an opportunity to make a second submission.
- 4.2 I issued a draft decision for comment on 3 October 2014.
- 4.3 I have performed a careful and extensive review of the information collected and submissions provided to determine whether there is evidence of a failure and/or negligence on the part of the BCA.

5. Responses to the complaint from the BCA and complainant

- 5.1 The application details were sent to the BCA on 2 September 2014. The BCA responded on 15 September 2014, in summary:
- The BCA acknowledged and apologised that there was a delay in responding to the complainant's request 'received on 9 November 2013, which was not acted upon until 24 December 2013'. However the BCA noted under section 7 of the Act 'working day' is defined as a day in the period beginning 20 December in any year and ending with the close of 10 January in the following year.
 - The BCA provided a detailed background and timeline regarding the complaint.
- 5.2 The complainant was sent a copy of the BCA's response, and responded on 21 September 2014, in summary:
- The complainant contended the BCA should have processes in place to cover holiday absences and asked whether the BCA has had any change in process regarding the time taken to respond to his initial query.

- The complainant contended the BCA has not addressed the misinterpretation of the determination. The complainant does not believe the officer of the BCA was concerned that the drawing submitted did not reflect what was built on site; and submitted the BCA rejected his proposal on the exact grounds as it had originally refused to issue the code compliance certificate.

5.3 The BCA sent a second submission dated 25 September 2014 responding the complainant's concerns. In summary:

- The BCA contended its submission dated 2 September was addressed to the Ministry not the complainant, and sincerely apologises to the complainant for any inconvenience the complainant has been put to.
- The BCA conceded the Christmas holiday period does not justify the delay in responding to the complainant, although it can assist to explain the delay. The BCA again acknowledged the response time was not reasonable. The BCA has initial response targets within 24 hours depending on the complexity of the project; however internal advice may need to be sought which can delay follow up response times.
- The BCA recorded the current complaint as one 'where the system failed'. All complaints are analysed on a regular basis to look for improvement opportunities.
- The BCA referred to paragraph 6.4.1 of the determination. The BCA contended it was not disputing the determination, rather seeking advice it was reading the determination correctly by asking whether the proposal to remediate required the agreement of the BCA. The BCA stated the determination process is to confirm or not decisions made by the BCA and it does not believe the determination process can provide for remedial work to be undertaken to enable the code compliance certificate to be issued as this is outside of the provisions of the determination process.

6. The draft decision on the matters of complaint

6.1 On 3 October 2014 I issued a draft decision to the parties for comment. The draft decision upheld the complaint and issued a warning to the BCA regarding responding to external persons in a timely manner and interpreting guidance provided in a determination correctly. The applicant accepted the draft on 7 October 2014.

6.2 The BCA a provided submission dated 13 October 2014 in response to the draft. In summary the BCA contended that:

- The draft decision stated the BCA 'did not have good reason to fail to perform its functions in issuing the CCC for the building' the BCA stated the delays were around accepting the content of the drawing proposing remedial action, not the physical issuance of the code compliance certificate. The BCA stated it took some four months after the issues were resolved in January 2014 for the complainant to advise the remedial work was

completed and arrange an inspection. The code compliance certificate was issued in 11 working days.

- The BCA stated the management of determinations has been transferred to a different team stating ‘with the range of skills available in that team we believe matters arising out of determinations will be better managed’.
- The BCA stated in ‘complex situations’ like the complainant’s case, a 24 hour response time may not be appropriate and agrees this should always be communicated to the other party and expected time frames provided.

6.3 I have taken account of the BCA’s comments in the complaint where appropriate and I make the following comments on specific points:

- In order for a complaint to be received under section 200 of the Act the complainant must allege the BCA, without good reason, is failing or has failed to properly perform any of its functions under Part 2 or Part 3 of the Act. There are no functions of the BCA under Part 2 or Part 3 of the Act which specify the two matters raised by the complainant for investigation (refer paragraph 1.3); thus the complaint must be linked (as was the determination) to the issuing of the code compliance certificate. I take this to be broadly the powers under sections 91-95, Part 3 of the Act as opposed to merely the physical issuance of the code compliance certificate.
- The complaint has been primarily focussed on the period of time between 9 November 2013 and 22 January 2014.
- I note that any comments in relation to paragraph 7.4 of this complaint regarding the competence of the BCA’s staff, relates to all staff within the BCA as opposed to a specific team. I recognise a member of the public may deal with one team (for example that which manages determinations) and then subsequently another team at a later date therefore a range of skills need to be available across all relevant teams.

7. Analysis

7.1 Under section 203 of the Act the Chief Executive has specified powers regarding a complaint. After conducting an investigation and considering the submissions made by the BCA, I must be satisfied the BCA has failed without good reason to properly perform their functions or has been negligent in performing those functions.

7.2 The complainant has raised two main matters of complaint; the length of time the BCA took to respond to his proposal and the BCA’s interpretation of the determination, and a secondary matter of the requirement to complete a full final inspection. I will deal with each of these matters in turn.

7.3 Time period for response

7.3.1 In relation to the time taken to respond, there was a significant period of time taken between the complainant sending the initial proposal (9 November 2013)

and the first response from the BCA (24 December 2013) and the rejection of the proposal (20 January 2014). I acknowledge that the time period falls over the Christmas/New Year time frame and, for example, the email dated 24 December 2014 from the complainant could reasonably be expected to have some delay in response due to public holiday periods and staff being on leave. I also acknowledge the Act specifies between 20 December and 10 January the following year to be non-working days. However, it appears the emails sent 9 November 2013 and 9 December 2013 were largely ignored by the BCA, the complainant was not given any indication the proposal was being looked into or any time frame to expect a response. I consider this unreasonable.

- 7.3.2 The BCA has a policy of 24 hour response time for external enquiries, with complex enquiries taking a longer period of time. Under section 17(4)(a) of the Regulations all staff of the BCA should be familiar with complying with the quality assurance system, which includes policies on communicating with external persons. The BCA has already acknowledged the time period taken to respond to the complainant to be unreasonable, has apologised to the complainant and will review their systems and make improvements to avoid a similar situation. I stress the importance of prompt response from the BCA to avoid frustration, delay, and potentially financial cost to external persons.
- 7.3.3 If the BCA needs to seek internal advice, or require a longer period of time to respond to an enquiry, the external person should be given, at minimum, an estimated time where he can expect a response from the BCA.
- 7.3.4 I note under section 93 of the Act a 20 working day period is provided to the BCA upon receiving an application for a code compliance certificate. I do not consider this time period to be applicable in this case due to the determination application and subsequent correspondence; however, it provides a useful benchmark for what would be considered reasonable for the issuing of a code compliance certificate, inclusive of any communication response time periods between the BCA and the owner.
- 7.3.5 As noted in paragraph 7.4.2 below, the BCA has not utilised the systems available to them in the determinations process to resolve an apparent confusion in a timely way. In my view this has contributed to the complainant's issue regarding the time frame for response. The BCA did not provide comment on the draft determination, seek clarification or, at a minimum, contact the Ministry as the complainant did for an informal discussion.

7.4 The 'misinterpretation of the determination'

- 7.4.1 The relevant paragraphs of the determination state:

6.3.2 Taking account of the above [observations on compensating circumstances for the building] I have reasonable grounds to conclude that the weatherboards installed to ceilings, soffits and most of the exterior walls of this particular house are likely to be satisfactory in these particular circumstances. However I note that weather boards adjacent to the crank in the wall are not provided with additional support from timber scribes

...

6.4.1 Taking account of the expert's report and my assessment of weathertightness performance, I consider that the following items require further attention:

- Additional support to the ends of the weatherboards at the crank in the wall, in a similar manner to that provided by the scribes at the doors
- A detailed proposal accurately showing the actual weatherboard fixings and the proposed additional support to the ends of the boards at the crank.

...

6.4.3 ...I am able to conclude that satisfactory resolution of the items outlined in paragraph 6.4.1 will result in the weatherboard cladding being brought into compliance with Clause E2 and Clause B2 of the Building Code.

7.4.2 The Ministry endeavours to write all determinations in a clear manner so a lay person can understand the issues, despite determinations often dealing with technical building matters. If a party is not clear regarding any part of a determination, there are procedures to follow including; submitting responses to draft determinations before they are issued as final decisions³; applying for a clarification after a final determination has been issued⁴; or if a party disagrees with a lodging an appeal to a determination in the District Court.⁵ I note the BCA did not take any of the above mentioned steps for the complainant's determination, the draft determination was accepted by the BCA without comment.

7.4.3 In relation to the reading of the determination, this matter relates to section 10 of the Regulations, where the BCA must employ competent staff members who have knowledge of the Act and associated regulations. The determinations process forms an integral part of the interpretation of the Act, and provides guidance to the BCA in particular situations. The BCA's employees should be able to use the determinations processes available, such as commenting on the draft determination or seeking a clarification, to resolve misinterpretation matters.

7.4.4 I acknowledge the meaning of paragraph 6.4.1 of the determination taken in isolation may have been ambiguous, and the conclusion reached in the expert's report⁶ could have created confusion. However, in my view when the determination is read as a whole it was clear that the only matter at issue was the additional support required to the weatherboards at the crank in the wall.

7.4.5 A determination provides a specific decision under section 188 of the Act. The decision is binding on the parties. However in many circumstances, like the determination relating to this complaint, a determination will comment on what is to happen next to the parties by way of providing guidance. It is important to read the whole determination in context, as opposed to particular sections in isolation.

³ Section 186(5) of the Act

⁴ Section 189 of the Act

⁵ Section 208 of the Act

⁶ The Ministry engaged an independent expert to assist with the determination. The expert was a member of the New Zealand institute of Architects and inspected the building on 22 August 2013. The expert's report was provided to the parties on 3 September 2013.

7.4.6 In an email dated 22 January 2014, just over 11 weeks after the final determination was issued, an officer of the BCA stated:

We...believe the current nailing will fail, we are prepared to accept if the weatherboards are nailed using rose head grooved nails in compliance with E2, BRANZ guidelines and manufacturers requirements, we would be prepared to issue the code compliance certificate.

7.4.7 The BCA's failure to take into account guidance provided in the determination, and requiring the complainant to return to the position before the determination was issued (re-nail all the weatherboards) undermines the procedure of parties applying for a determination from the Ministry. I consider the apparent inability of the BCA's staff to read the guidance provided in the determination and failure to use the processes available to resolve this misinterpretation has contributed to the complainant suffering a delay in having his code compliance certificate issued and significant frustration.

7.5 The final inspection for a code compliance certificate

7.5.1 The complainant made mention of the BCA's requirement to fully inspect the building again before issuing a code compliance certificate in his application. I agree with the response to the draft determination from the BCA that this falls outside of the complainant's two specified matters provided on his complaint application, I therefore reserve providing comment on this matter.

8. Conclusion

8.1 I am not satisfied that the BCA had good reason to fail to properly perform its functions under Part 3 of the Act relating to the complainant's code compliance certificate for the building.

8.2 Under section 203(2) I am issuing a warning to the BCA regarding the time frame involved in responding to the complainant, and the failure to use the processes available to the BCA to resolve a misinterpretation of the determination decision.

8.3 In this case I do not consider it practical to require remedial action to be taken by the BCA. However, I would suggest for the BCA to undertake further training of employees who are required to interpret determination rulings, and the importance of promptly replying to correspondence to ensure good business practice.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 21 October 2014.

Yours sincerely

John Gardiner
Manager Determinations and Assurance

Appendix A

Timeline of correspondence between the complainant and the BCA

Date	Detail
21 February 2012	The BCA issues building consent No. B/2011/6364
22 January 2013	The BCA receives an application for a code compliance certificate from the complainant.
26 June 2013	The complainant applies for a determination from the Ministry
3 October 2013	The draft determination was issued to the parties
14 and 16 October 2013	The complainant and the BCA accepted the draft without comment
4 November 2013	Final Determination 2013/066 issued regarding the refusal to issue a code compliance certificate due to concerns about compliance of weatherboard fixings at the complainant's house.
9 November 2013	The complainant emails the BCA with a copy if a drawing outline of the proposal solution as specified in the determination
9 December 2013	Complainant follows up previous email due to non-response from the BCA. An officer for the BCA responds forwarding to an alternative team within the BCA
24 December 2013	Complainant follows up previous email due to non-response from the BCA.
19 January 2014	Complainant follows up previous email due to non-response from the BCA.
20 January 2014	<p>BCA emails the complainant declining the proposal, requiring the removal and re-nailing of the weatherboards.</p> <p>The complainant disputes the refusal, referring back to Determination 2013/066</p>
21 January 2014	BCA seeks internal legal advice regarding the proposal. The complainant summarises the position so far for the BCA
22 January 2014	<p>The BCA emails the complainant again rejecting the proposal and relying on internal legal advice.</p> <p>The complainant emails an officer of the Ministry seeking clarification about the ruling contained in the determination.</p>

11 May 2014	The complainant emails the BCA advising work is complete, request for final inspection
17 May 2014	The complainant emails the BCA due to no response
19 May 2014	The BCA responds requesting suitable time to inspect
July 2014	Code compliance certificate issued