



Building Consent Authority Complaint 2015/001

COMPLAINT AGAINST THE BUILDING CONSENT AUTHORITY OF CLUTHA DISTRICT COUNCIL

1. The matters of complaint

- 1.1 This is a complaint 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 G Bremner (“the complainant”), received by the Determinations and Assurance Team of the Ministry of Business, Innovation and Employment on 12 February 2015 against the Building Consent Authority (“the BCA”) of Clutha District Council in accordance with section 200 of the Act.
- 1.3 The complainant is seeking this complaint regarding six matters (verbatim):
- The “conditions” attached to the building consent are *ultra vires*
 - The work complies with both the building consent and the building code
 - An “as built” drainage plan is not “building work”
 - The discretion exercised by the [BCA] is inconsistent with section 3 of the Building Act
 - The drawing of an “as built” drainage plan is not sanitary plumbing
 - The extension of time for the project which seems to have been unilaterally decided upon by the [BCA] is unlawful
- 1.4 Two additional matters are noted by the complainant being:
- The [BCA] staff never follow section 93(2)(b) of the Act and instead “archive” consents for projects that fall under this subsection; and
 - The staff are under the misapprehension that they cannot issue a code compliance certificate for any project in the absence of an application from the owner in any circumstance.
- 1.5 I will deal with each of these matters in turn, broadly speaking the complaint falls into more general matters of:
- (a) whether a BCA can require an as built drainage plan for a code compliance certificate.
- (b) whether a BCA can unilaterally decide to grant an extension of time relating to section 93 of the Act.
- (c) whether Form 6 is required to be complete prior to a BCA issuing a code compliance certificate under section 93 (2)(b)(ii) of the Act.

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.

- 1.6 I note the separate complaint lodged with the BCA (refer paragraphs 2.11 and 4.1) provided a useful context and resulted in a broader scope of this complaint decision than what was stated on the complaint form lodged with the Ministry.
- 1.7 I note background matters relating to Official Information Act requests and subsequent correspondence with the Office of the Ombudsman have been omitted for the purposes of this complaint.

2. Background

- 2.1 The complainant sought a building consent to undertake some alterations to an existing weatherboard cottage (the building) in October 2009. The Building Consent (BLD/2009/13029) was granted by the BCA in December 2009.
- 2.2 The building works were completed around spring in 2010. The complainant notes a final inspection and the issuing of a code compliance certificate was not organised by the builder.
- 2.3 A final inspection took place on 17 January 2012 however the as-built drainage plans could still not be found. The BCA notified the complainant the plans were required before a code compliance certificate is issued.
- 2.4 In the intervening time period some documents had gone missing, the complainant was granted a time extension until 31 July 2012 to obtain the documents. The complainant states the BCA gave a six month extension until 28 February 2013 without consulting him.
- 2.5 On 30 August 2012 the BCA wrote to the complainant noting the importance of an owner or future owners to have a general indication of where drains are laid within the property.
- 2.6 On 8 February 2013 the BCA sought the as-built drainage plans before the code compliance certificate could be issued.
- 2.7 On 20 March 2013 the BCA wrote to the complainant seeking the as-built drainage plans stating 'a decision has been made not to issue a code compliance certificate at this stage, as [BCA] records indicate the final documentation has not been supplied'. The letter notes if no response is received the building consent will be 'archived'. I therefore do not consider this letter to be a refusal to issue a code compliance certificate under section 95A of the Act.
- 2.8 On 9 August 2013 the as-built drainage plan was obtained and provided to the BCA. The complainant was asked to complete an application form for a code compliance certificate.
- 2.9 On 19 September 2013 the complainant wrote to the BCA explaining his reading of section 93 of the Act and section TS-33² of the BCA's Manual suggests after the two year period of (and any mutually agreed extensions of time) following the issue of a building consent have elapsed the BCA is able to make decision on whether or not to issue a code compliance certificate without receipt of an

² TS-33 Code Compliance Certificate from the BCA Manual dated August 2013. The BCA has noted this manual is joint between Southland District, Gore District and Invercargill City Councils.

application; and the BCA is required to make a decision on whether or not to issue a code compliance certificate even if no application has been received from the owner.

- 2.10 On 25 September 2013 the BCA sent a further letter to the complainant noting the reason several copies of Form 6 had been sent to the complainant was that all inspections and outstanding matters were complete and ‘all [the BCA] are waiting for to issue the CCC is your application for CCC to be returned to us’.
- 2.11 On 30 September 2013 the complainant wrote to the BCA regarding the non-issue of the code compliance certificate as a formal complaint.
- 2.12 On 11 October 2013 the BCA wrote to the complainant stating:
- I have reviewed your letter dated 30 September 2013 regarding the non-issue of a code compliance certificate. The [BCA] has now received a copy of the requested plumbing as built plan, but you have chosen not to apply for the code compliance certificate
- Given the concerns you have raised, I will get an independent review of the process in early November, when an external consultant is here on other work. I will let you know the outcome of that. In the interim, should you wish to apply for the code compliance certificate, it will be able to be issued.
- (Refer to paragraph 5.2 for information about the independent review of the process by an external consultant.)
- 2.13 On 21 November 2013 the complainant requested through the Local Government Official Information and Meetings Act 1987 (LGOIMA) the following: a) in the last five years has the BCA ever issued a code compliance certificate for a completed building project without having received an application for the certificate from the building owner and b) if yes, how many have been issued?
- 2.14 On 18 December 2013 the BCA responded to the LGOIMA request with a) no and b) not applicable.
- 2.15 On 28 March 2014 the complainant wrote to the BCA’s Regulatory Services Committee Chairman regarding the failure of the BCA to respond to his formal complaint. The BCA responded acknowledging the letter and noting it would look into the matter.
- 2.16 On 2 May 2014 the BCA wrote to the complainant regarding the above mentioned letter. The BCA stated:
- ...it now falls on the applicant to make a final application for the CCC, which I am assured by our Building Control Manager, will be issued. An application form is enclosed with this letter.
- If you do not wish to make an application, the building works will remain as inspected, but without the completion certificate.
- 2.17 A complaint application was received by the Ministry on 12 February 2015.

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 following sections of the Act are relevant:

92 Application for code compliance certificate

(1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.

(2) The application must be made—

(a) as soon as practicable after the building work is completed; and

(b) in the prescribed form; and

(c) either—

(i) to the building consent authority that granted the building consent for the building work; or

...

93 Time in which building consent authority must decide whether to issue code compliance certificate

(1) A building consent authority must decide whether to issue a code compliance certificate for building work to which a building consent relates within—

(a) 20 working days after the date specified in subsection (2); or

(b) any further period after the date specified in subsection (2) that may be agreed between the owner and the building consent authority concerned.

(2) The date referred to in subsection (1)(a) and (b) is—

(a) the date on which an application for a code compliance certificate is made under section 92; or

(b) if no application is made, the expiry of—

(i) 2 years after the date on which the building consent for the building work was granted; or

(ii) any further period that may be agreed between the owner and the building consent authority concerned.

(3) Subsection (1) applies whether or not an application for a code compliance certificate is made under section 92.

(4) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application for a code compliance certificate, and, if it does so, the period is suspended until it receives the information.

4. Initial submissions

4.1 On 12 February 2015 the Ministry received a complaint application from the complainant. The complainant included correspondence between himself and the BCA and a copy of his complaint lodged to the Chief Executive of the BCA (dated

30 September 2013) which forms the basis of his complaint to the Ministry. In a brief summary:

- The ‘condition’ on the building consent that an as-built drainage plan be available on site at the time of the associated inspection and required for a code compliance certificate is unreasonable and unlawful and lacks a legal basis. The complainant submits this ‘condition’ on the building consent conflicts with sections 93(2), 94(3) and 18(1)(b) of the Act. The BCA has not considered whether the condition is fair and reasonable in the circumstances. The parliamentary intent of the Building Act was not to allow BCA’s unlimited discretion to impose conditions on building consents, and restricts discretion to specific sections of the Act only.
- There was no dispute the physical building work complies with both the Building Code and the Building Consent.
- The complainant submits the as-built drainage plan was on site at the time of the drainage inspection by the BCA (on 24 June 2010) the inspection record does not suggest otherwise.
- Under sections TS-33 4.2 of the BCA’s manual, reference is made to outstanding ‘compliance documentation’. The complainant submits an as-built drainage plan is not a compliance document as defined in section 22 of the Act, or under a wider interpretation section 19 of the Act.
- The as built drainage plan is not ‘building work’ under section 94 of the Act and more appropriately is described as ‘design work’.
- Under section 94 of the Act ‘reasonable grounds’ implies an exercise in common sense.
- The as built drainage plan is not ‘sanitary plumbing’ and therefore the statement from the BCA for the complainant to have the plans drawn up by a plumbing company that did the building work is incorrect.
- The extension of time the BCA unilaterally granted was done so without the agreement of the complainant or without advising the complainant it had been done.

4.2 On 5 March 2015 the BCA provided a written submission in response to the complaint application. The BCA stated it has repeatedly asked for the application form (Form 6) however the complainant has not completed Form 6. The BCA states ‘if [the Ministry] is happy the [BCA] issues a Code Compliance Certificate without the application, we will issue it without hesitation’.

4.3 The BCA noted that some correspondence to the complainant implied that a code compliance certificate would be issued upon receipt of an as-built drainage plan; the BCA acknowledged this would be confusing to the complainant. The BCA stated they followed the Building Consent Authority Manual 2010 that was in effect at the time.

5. Further submissions

5.1 Following the issue of the draft complaint decision on 24 March 2015, the authority provided a further submission on 26 March 2015 including a copy of a code compliance certificate for the complainant's building consent issued on 24 March 2015. The authority apologised for the 'mixed message' from correspondence with officers of the authority and noted its processes are now clear as a result of the review and they will continue to work with its external auditor and IANZ to 'keep abreast of [its] requirements and best practice'. The manual (which is a joint manual with Southland District, Gore District and Invercargill City Councils) will be amended accordingly and forwarded in due course.

5.2 On 27 March 2015 the complainant sent a submission to the draft complaint decision, in summary:

- The complainant forwarded a copy of the BCAs 'independent quality control audit' dated 19 December 2014.
- The independent audit notes in relation to section 7(2)(h) of the BCA Regulations for receiving and managing complaints about building control functions that there had been no complaints since July 2013.
- The complainant states it is unlikely that any matters raised in his complaint to the authority were raised with the external consultant and it is unlikely his complaint was handled in accordance with the authority's complaints process.
- The complainant noted the scope of his complaint to the authority was broader than the scope of his complaint to the Ministry however did not object to comments made in the draft decision relating to broader matters.

5.3 I note that the independent audit would not look into the specifics of an individual complaint; an audit is to ensure the authority has correct procedures to follow in relation to a process in this case the complaint process. However, referring to paragraph 2.11, the complainant lodged a complaint with the BCA on 30 September 2013 which would appear to be within the time period assessed by the internal auditor as one where no complaints were received. I recommend the BCA investigate this matter further to ensure auditors have correct information for an accurate report.

6. The Ministry's Approach

6.1 I have undertaken 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
- providing a draft complaint decision issued on 24 March 2015 for both parties to provide further submissions

- 6.2 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.

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 six specific matters for complaint and two further 'broad' matters for complaint. I consider the focus of this investigation is stated in paragraph 1.5. I will deal with each of these matters in turn.

Matter One - the requirement for an as built drainage plan for a code compliance certificate

- 7.3 I have not viewed the building consent documents lodged for the complainant's building (BLD/2009/13029) nor would a complaint application be an appropriate regulatory mechanism for this to occur as the focus of a complaint application is on the BCA's functions under the Act and whether these functions are being performed correctly as opposed to a review of an individual building consent. The law as stated (section 49 of the Act) is that a BCA must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application. In issuing a code compliance certificate section 94 states a BCA must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent.
- 7.4 A BCA must have policies and procedures to follow (refer to the Building (Accreditation of Building Consent Authorities) Regulations 2006 at section 7). I consider that if a building consent stated an as-built drainage plan were to be provided, under section 94 of the Act the BCA can seek the as-built drainage plan in order to be satisfied on reasonable grounds that the building work complies with the building consent.
- 7.5 In relation to conditions, I recommend 'conditions' that can be imposed under Act (for example sections 73, 77, 113, 90) are distinct from 'advice notes' and the BCA should make this distinction clearer by using an alternative phrase.³
- 7.6 I note if the building work has not been done as drawn on the building consent documents the owner may need to amend the building consent. An amendment to a building consent can be done under section 45(4) or in the case of a minor amendment section 45A.

³ Refer Determination 2014/064 Regarding the authority's exercise of its powers of decision in requiring a Record of Work for tanking as Restricted Building Work for a building consent at a house Ministry of Business Innovation and Employment 19 December 2014 at paragraph 5.10.10

Matter Two - whether a BCA can unilaterally decide to grant an extension of time relating to section 93 of the Act.

It is clear under section 93(2)(b)(ii) that any further period of time ‘may be agreed between the owner and the building consent authority’. The BCA cannot decide to grant an extension without consultation with the owner and notifying the owner of the extension of time. I also note there appears to be no written evidence of this extension.

Matter Three - is Form 6 required to be complete prior to a BCA issuing a code compliance certificate under section 93 (2)(b)(ii) of the Act.

- 7.7 Under paragraph 2.2 the complainant stated the builder at the time omitted from organising a final inspection and applying for a code compliance certificate. It is clearly the intention of the Act under section 92 and 14B relating to the responsibilities of an owner, for an owner to apply for a code compliance certificate on the prescribed form (Form 6) after all the building work has been carried out. This onus remains on an owner and should be adhered to.
- 7.8 However, in my view the wording contained in section 93 is such that after two years on the date for which a building consent for the building work was granted, a BCA must decide whether to issue a code compliance certificate for building work to which the building consent relates. It is noted in 93(3) that this applies ‘whether or not an application for a code compliance certificate is made under section 92’. Section 92(2)(b) sets out the requirement for an application to be on the prescribed form (Form 6). I consider 93(3) specifically puts aside this requirement when the two year period has passed in these circumstances. I do not consider that this entitles an owner to avoid the responsibilities contained in section 92 in the first instance.
- 7.9 It has been established in case law that there is a general ‘duty of care’⁴ that a BCA owes to an owner to take account of its formal knowledge as to the progress of the building work whether or not the owner has formally applied for a code compliance certificate under section 92.
- 7.10 The BCA has stated through a LGOIMA request from the complainant that in the last 5 years it has never issued a code compliance certificate without an application form, and it is clear through correspondence to the complainant and with reference to TS-33 of the BCA’s manual that an application for a code compliance certificate must be completed on the prescribed form prior to the issue of a code compliance certificate in any circumstance. I consider this is contrary to the Act.
- 7.11 As a parallel example, when a determination is issued under section 188 of the Act that relates to the issuing of a code compliance certificate, it is not a requirement of the determination decision for the prescribed form to be completed.
- 7.12 In this case, there has been no dispute as to whether the building work complied with the building consent following the submission of the as-built drainage plans on 9 August 2013. To date, a code compliance certificate has not been issued as

⁴ Bagley v Riddell DC Dunedin NP581/93, 25 October 1994

the complainant has declined to complete the application form. I consider the BCA ought to have issued the code compliance certificate without the prescribed form.

- 7.13 I acknowledge following the issue of the draft complaint decision on 24 March 2015 the BCA promptly issued the complainant's code compliance certificate on the same date. The BCA has acknowledged (refer paragraph 5.1) its processes have been clarified as a result of this complaint decision.

8. Conclusion

- 8.1 Under section 203 of the Act I uphold the complaint in respect of the third matter, that the BCA has failed to perform its functions under the Act relating to the issuing of code compliance certificates under section 93(2)(b) of the Act.
- 8.2 In respect of the first matter I do not consider the complaint upheld, and in respect of the second matter I consider the BCA was incorrect to extend the time frame without the complainant's knowledge, however I do not consider this is evidence they have failed to perform a function under the Act.
- 8.3 I consider the BCA should alter its manual (TS-33) to reflect the findings of this complaint. I ask that the BCA sends me an amended version within a three month timeframe.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 April 2015.

Yours sincerely

John Gardiner
Manager Determinations and Assurance