

## Determination 2009/26

### The issuing of a code compliance certificate for a house at 91 Centennial Drive, Whitianga



#### 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 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.
- 1.2 The applicant is the owner, Mr D Hall (“the applicant”), acting through a firm of barristers and solicitors (“the applicant’s legal advisers”). The other party is the Thames-Coromandel District Council (“the authority”), acting through a firm of barristers and solicitors (“the authority’s legal advisers”). The builder and the master holder’s consultants have been included as persons with an interest in this determination.
- 1.3 This determination arises from the decision of the authority to issue a code compliance certificate for an 8-year old house, of which the applicant is the third owner.
- 1.4 The application for a determination raised 7 specific issues. However, I am of the opinion that, in accordance with sections 177 and 188 (a) and(b) of the Act, I can only determine the following matters that form part of the application:

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<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

- whether the authority's decision to issue a building consent was correct
- whether the building as constructed complied with the requirements of the Building Code<sup>2</sup> (First Schedule, Building Regulations 1992 that was current at the time the consent was issued).
- whether the authority's decision to issue a code compliance certificate was correct

I have stated my reasons for this opinion in paragraph 10.

- 1.5 In making my decision, I have considered the submissions of the parties, the report of the independent experts ("the experts") commissioned by the Department to advise on this dispute, and the other evidence in this matter.
- 1.6 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.

## **2. The building work**

- 2.1 The building work comprises a two-storey free-standing house built on an excavated sloping site that is part excavated subsoil and part fill, and that is in a wind zone that is at least "very high" for the purposes of NZS 3604<sup>3</sup>. The house is of timber framed construction on concrete sub-floor slabs and timber-framed intermediate floors. The house is relatively simple in shape and form but has some complex features. The pitched roof has hip and valley junctions, and 600mm projections to the majority of the eaves. A large timber deck supported on timber posts and beams is constructed at two elevations of the house, and this has a glazed metal balustrade. A timber bridge leads to the front entrance and this has balustrades formed from a timber handrail supported on timber balusters.
- 2.2 I have not received any evidence as to the treatment, if any, of the external timber wall framing. From the observations made by the expert and the various consultants, I accept that the timber used to construct the bridge and the deck is generally not treated to an acceptable level.
- 2.3 With the exception of a small area of external wall adjoining the upper floor kitchen, which has a textured-coated fibre-cement lining, the exterior of the house is clad with a brick veneer that on some elevations extends for two storeys. Where the brickwork is constructed above the first floor level, it is supported on a steel "shelf angle".

## **3. Background**

- 3.1 On 18 August 2000, the authority issued a building consent (No. ABA/2000/162) under the Building Act 1991 ("the former Act").
- 3.2 The authority carried out various inspections during the course of the construction. According to the authority, following an inspection around mid-April 2000, the builder was instructed to install sub-footing piles where foundations were in the vicinity of filled areas. The authority carried out a final inspection on 10 November 2000.
- 3.3 According to the authority, the builder engaged the services of a consulting engineer in November 2000 to design corbel piles to the rear of the house. The piles were

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<sup>2</sup> The Building Code is available from the Department's website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

<sup>3</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

installed under the supervision of another engineer, who issued a “Producer Statement – Construction Review” dated 4 December 2000.

- 3.4 On 26 January 2001, the authority issued a Notice to Rectify (No 10184) under section 42 of the previous Act. This notice listed the elements that failed to meet the requirements of the Building Code. These can be summarised as the:
- sub floor filling and the foundation bearing
  - elevated timber floor
  - upper level floor joists
  - deck baluster construction
  - brick cladding.
- 3.5 On 30 May 2001, the authority issued a second Notice to Rectify (No 10189), which stated that it was to be read in conjunction with the Notice No 10184. I summarise the particulars of contravention as being the:
- filling under the slabs
  - elevated decks and balusters
  - dpc membrane at the base of the brick walls
  - positioning of the reinforcing in the concrete floor members and slabs
  - additional defects relating to deck post foundations, specifically designed beams and foundation durability issues.
- 3.6 The master holder of the house building franchise (“the master holder”) engaged a firm of consulting engineers (“the master holder’s consultants”) in July 2001 to investigate items numbered 1 and 3 in Notice to Rectify 10184 and items numbered 1, 4, and 5 in Notice to Rectify 10189 (“the specified items”) and either justify the existing construction using specific design and/or propose particular remedial works to achieve code-compliance in relation to the specified items. The work was subsequently carried out.
- 3.7 The master holder’s consultants produced a report titled “Technical Evaluation of TCDC Notices to Rectify Nos 10184 and 10189” that was prepared during July 2001. The report noted that, in order to demonstrate code-compliance, a “specific design” approach had been taken. The report contained extensive analyses, details and test reports. I summarise the conclusions reached in the report as follows:
- The as-built foundation thickening corresponding to NZS 3604:1999, Figure 7.19, does comply with the Building Code for the particular site.
  - Two alternatives were provided to ‘reinstate’ the dynamic behaviour of the floor supported by the overspan joists to the lounge/dining area.
  - ‘The extent of ‘design surface movement’ from swell/shrink phenomenon in the underlying soils is unlikely to exceed the level permissible for slab on grade construction’
  - The “subgrade modulus” of the soils below the slab were not considered to be sufficiently low to “significantly reduce the amount of support provided for the slab by the underlying ground”.

- The existence of localised areas of sand fill beneath the floor slab should not result in any significant adverse settlement of the floor slab.
  - Based on the assumption that the piles underpinning the external footings have been designed to resist the loads imposed by the structure through the footing, the settlement of the external footing located within the fill area should not present a problem.
  - Two alternative suggested measures were described that could be undertaken to mitigate the risk of subsoils below the existing shallow footings or floor slab drying out and being subject to possible shrinkage.
  - Twelve new piles to be constructed to underpin the external footings founded on fill.
  - Underpinning/cantilever pile arrangements were recommended to be installed under 8 veranda post foundations.
- 3.8 A design reviewer engaged by the master holder produced a “Producer Statement – Design Review” dated 5 September 2001, which peer-reviewed the design work include in the report described in paragraph 3.7.
- 3.9 The master holder’s consultants issued a “Producer Statement – Design” dated 17 September 2001, which referred to the specified items and stated their belief that:
- ...on reasonable grounds that subject to:-
- (1) the verification of the following design assumptions PILING FOUNDATION CONDITIONS (INCLUDING LOCATION OF CUT/FILL INTERFACE) TO BE CONFIRMED and
  - (2) all proprietary products meeting the performance specification requirements
- The Drawings, Specifications and other documents according to which the building is proposed to be constructed comply with the relevant provisions of the Building Code.
- 3.10 On 6 December 2001, the master holder’s consultants provided a “Producer Statement – Construction Review”, which related to construction monitoring of the remedial work in a report of the same date. In summary, the report confirmed that the underpinning bore piles, the shrinkage cut-off, and the concrete footpath were constructed in accordance with the details shown on the engineers’ drawings and details.
- 3.11 On 12 December 2001, the authority carried out a final inspection of the building work. On the inspection record card compiled by the authority, it was noted against this inspection that the “serious deficiencies” regarding the fill under the foundations and the floor slabs had been remedied and that the required producer statements had also been provided.
- 3.12 On 13 December 2001 the authority issued a code compliance certificate, which stated that it was:
- A final Code Compliance Certificate issued in respect of all the building work under the above contract.
- 3.13 The authority prepared a Land Information Memorandum (“LIM”) with an application date of 30 June 2006 for the property. The LIM contained information regarding the remedial work that had been carried out to the foundations. A copy of

the LIM was forwarded to the real estate company that were acting on behalf of the applicant. I assume that the LIM was issued following an application from the applicant as part of an assessment to purchase the property.

3.14 The Department received the application for a determination on 18 December 2007.

#### **4 The reports prepared on behalf of the parties and the associated correspondence**

4.1 Various reports were prepared by consultants engaged by the parties. While these are detailed and informative, I have mainly based my findings on the report of the two independent experts commissioned by the Department. In addition, evidence produced at the hearing was also of assistance to me. Accordingly, I have listed only the main points set out in the reports and correspondence provided on behalf of the parties.

4.2 A second firm of consulting engineers (“the original owners’ consultants”) were engaged on behalf of the original home owners to inspect the house and produced a report dated 14 December 2000. The report:

- expressed concerns about the house foundations and the remedial work that had been carried out to support them, noting that the house had settled by about 12mm
- did not consider that the deck posts were adequately founded
- raised issues regarding the filling under the concrete basement floor
- noted that, based on the tests carried out on the particle board flooring, it should be replaced
- recommended that further information be provided in regard to deck balustrades
- suggested that the brick veneer be further inspected by a representative of the brick manufacturers
- listed items that it considered the authority would require to be undertaken in relation to the issues raised in the report.

4.3 The original owners’ consultants provided further information in a report dated 18 December 2000.

4.4 The original owners’ consultants wrote to the owners’ agent on 22 December 2000, recommending that further tests be carried out on the sub-floor foundations and the particle board flooring.

4.5 The original owners’ consultants produced a further report dated 17 January 2001 stating that:

- the house was constructed in a design wind zone that exceeded the “very high” category
- the roof truss tie-downs were barely adequate
- while there had been changes to the wall bracing design and it was probably adequate, there were concerns regarding the lower storey bracing

- the brick veneer was not continuous for the full height of the stud walls, so accordingly, it required a plywood exterior lining behind it, which had not been installed.
- 4.6 In late 2000 and early 2001, correspondence took place between the authority, the builder, and the master holder regarding site visits and meetings held between these organisations.
- 4.7 On 22 January 2001, a firm of soil consultants augured various locations and tested some of the random samples that were obtained. Some penetrometer tests were also undertaken. A contractor employed by the authority produced a field note also dated 22 January 2001 that described the tests carried out and expressed concerns about some of the methodology that had been applied.
- 4.8 The authority engaged an engineering consultancy to review the structural engineering aspects of the building and the consultancy produced a report dated 21 May 2001. The report described and commented on the plans, reports, and producer statements that had been provided in regard to the building. In summary, the report noted that the authority needed to add additional items to its Notices to Rectify regarding the post foundations, specifically designed beams, and the bracing design. It was also suggested that the authority should obtain further information from the builder regarding the foundations and some structural elements.
- 4.9 The master holder's consultants gave an opinion as to whether representative samples from the installed particle board floor satisfied the requirements of the Building Code. The consultants were also provided with a test report dated 23 August 2000, which provided an analysis of some particle board samples taken from the building. The consultants issued a report dated 6 December 2001, which concluded that:
- the floor to the front entry area should be removed and replaced
  - no remedial work was required to the flooring in the remaining areas of the house.
- 4.10 In a second report, also dated 6 December 2001, the master holder's consultants considered the load effects of using an alternative type of brick to that originally specified and concluded that the brick veneer constructed with the substituted brick would, when installed, comply with the Building Code.
- 4.11 The applicant engaged the original owners' consultants to report on the condition of the house. The consultants produced a report dated 12 June 2007 that commented on the two Notices to Rectify issued by the authority. The report noted that:
- the remedial work carried out on the foundations might not be adequate
  - much of the water-damaged particle board flooring had not been replaced
  - some of the remedial work carried out on the floor joists was unsatisfactory
  - the deck balusters were fixed to inadequate members that had become seriously decayed
  - some aspects of the brick veneer raised concerns
  - the sand filling under the slabs could cause problems if it became wet
  - the decks were in a dangerous condition

- there was inadequate cover to some of the reinforcing steel
  - the deck posts required adequate supports
  - the wind speed at the building site exceeded that for a “very high” wind zone.
- 4.12 The applicant engaged the services of a registered master builder to investigate the building. A report dated June 2007 was issued following a site visit on 7 June 2007, which listed various items that were considered to be defective and I summarise these as being:
- the elevated deck and front entrance access bridge, both of which were considered to be unsafe
  - the exterior brick veneer
  - the interior stair handrail
  - the remedial work carried out to the upper floor joists and to the particle board flooring
  - the ceiling insulation
  - the inadequate laps to the roofing underlay
  - various other defects, including the concrete floor slab.
- 4.13 In response to the “Technical Evaluation of TCDC Notices to Rectify Nos 10184 and 10189” report prepared by the master holder’s consultants (see paragraph 3.7), the original owners’ consultants corresponded with the applicant on 18 April 2008. The consultants still had concerns regarding the:
- strip foundations to load bearing walls
  - upper-floor joists
  - support provided by the uncontrolled filling
  - mesh reinforcement placement in the concrete floor slabs
  - sand hardfilling
  - underpinning of the external footings founded on fill.
- The consultants had only one minor concern regarding the remediation in relation to the expansive soils.
- 4.14 A contractor employed by the authority made a statutory declaration on 21 April 2008, which described his involvement in the inspection of the building as construction progressed. The contractor also remarked on the standard of construction and expressed concerns regarding the ground under the foundations. The contractor also suggested three alternative approaches to rectify any perceived problems with the foundations.

## 5. The submissions from the parties

- 5.1. The application for a determination, dated 17 December 2007, included submissions made on behalf of the applicant, which set out the issues that the applicant considered should be determined and listed the items that the applicant claimed had not been addressed by the builder. The submission also set out a list of defects that related to:
- the particle board flooring
  - the deck
  - the foundations and floor slab
  - the beams over the garage
  - the external brick veneer
  - the roof.
- 5.2. The authority's legal advisers wrote to the Department on two occasions (On 27 December 2007 and 5 March 2008) querying the Chief Executive's jurisdiction to determine matters in respect of the authority. This was on the grounds that the authority was not a "building consent authority" in terms of section 177 of the Act when it made the decisions to issue the building consent and the code compliance certificate. Accordingly, while the authority accepted that the Chief Executive could determine whether particular matters complied with the Building Code, it did not accept that the Chief Executive had the jurisdiction to reverse, confirm or modify the decisions that were made under the former Act. The letter dated 5 March 2008, also stated that the Chief Executive did not have jurisdiction to consider or make a determination on some of the issues raised in the applicant's submission.
- 5.3. In a submission on its own behalf dated 15 April 2008, the authority was of the opinion that the applicant had received a copy of the LIM prior to purchasing the property. The authority considered that most of the items listed by the applicant had been addressed prior to the issuing of the code compliance certificate and many of the items related to workmanship rather than compliance issues. The authority conceded that there was a water-ingress problem relating to the deck perimeter and that there were problems relating to the brickwork. However, these two matters had arisen in the 7 years since the code compliance certificate was issued. The authority also reiterated its legal adviser's opinions as to which issues the Chief Executive had the jurisdiction to consider or make a determination. In an attachment to the submission, the authority set out the background to the dispute and detailed its justifications for issuing the code compliance certificate.
- 5.4. In an e-mail dated 18 April 2008, the applicant's legal advisers did not agree with the submissions made on behalf of the authority that the Chief Executive lacked the power to determine some of the issues raised by the applicant in its application for a determination. The submission put forward arguments to support its contentions.
- 5.5. Regarding the issues relating to the jurisdiction of the Chief Executive, as put forward by the applicant and authority, I have responded to these as set out in paragraph 10.



5.6 The applicant forwarded copies of:

- the “Technical Evaluation of TCDC Notices to Rectify Nos 10184 and 10189”
- the “Producer Statement – Design Review” dated 5 September 2001
- the “Producer Statement – Design” dated 17 September 2001
- the consultants’ reports that are described in paragraph 4
- the test report regarding the particle board flooring
- some of the authority’s inspection documentation.

5.7 The authority forwarded copies of:

- the documentation relating to a request by the applicant for the release of documents held by the authority
- the LIM of 30 June 2006
- the two Notices to Rectify
- the consulting engineers “Producer Statement – Construction Review”
- some of the authority’s inspection documentation
- the correspondence between the parties and other involved persons and organisations.

## **6. The first expert’s report and submissions**

6.1 As mentioned in paragraph 1.5, I engaged an independent expert who is a member of the New Zealand Institute of Architects specialising in building surveying, to provide an assessment of the condition of those building elements that are subject to the determination.

6.2 The expert visited the site on 4 March 2008 and produced a report that was completed on 11 March 2008. I have summarised the expert’s findings as set out below.

- The deck and the front entry access bridge were showing signs of decay and were not code compliant in terms of the Building Code current at the time the building consent was issued.
- The deck balustrades were incorrectly secured and the fixings were corroded and had pulled away from the decayed timber in some instances.
- While there were cracks in the veneer and broken brick faces at some locations, the expert noted that in general, the brickwork was in good condition, had a uniform appearance, and had been competently laid. The expert did not consider that the support shelf angles had failed but noted that shelf angle brick courses were laid tight onto the courses below them. It was considered that further investigations of some aspects of the brickwork and the lack of plywood bracing were required.
- The stair handrail was not fixed in accordance with good trade practice.
- The remedial work to the upper floor joist system was not carried out to a good standard.

- While most of the ceiling insulation was well fitted, this was not the case at its junctions with some light fittings.
- The expert confirmed that the roof underlay had 80mm laps but concluded that this had not resulted in any observed moisture ingress. The underlay was unsatisfactorily finished around the flues.
- There were poor roof truss fixings.
- The performance of the particle board flooring appeared to be generally adequate.
- There was no evidence to show that the concrete garage floor slab had failed to meet the requirements of clauses B1 and E2. However this did not mean that the structure was adequate to resist loads in excess of those experienced to date.
- The bottoms of the garage door jambs were soft but not yet severely decayed.
- Based on visual checks of the ground floor slab and the operation of doors and windows, it was considered unlikely that significant settlement of the building had occurred.

6.3 The expert stated that there was little general indication that moisture had entered the house. The expert carried out non-invasive moisture testing at the interior walls and found only one area that recorded an elevated reading. Invasive testing revealed two areas where there were elevated readings and at the location where the highest of these was recorded, decay was likely to occur.

6.4 The expert also noted that some elements as constructed differed in some respects from those indicated on the consented plans. The two main differences were the substitution of coated metal tiles for concrete roof tiles and the change to a liquid applied membrane on the top of the deck floor. I note that the metal tiles constitute a light roof under design loads, when compared with the concrete tiles that constitute a heavy roof.

6.5 The expert also provided me with a supplementary report that commented on the adequacy of the consent application documentation, with particular emphasis on clauses B1 and B2. This supplementary report, which was dated 29 March 2008, came to the following conclusions;

- While the documents provided sufficient detail for the authority to approve the structural frame (Clause B1 consideration) including foundation, slab, and timber framing up to roof level, it is not certain that there was sufficient evidence concerning the roof trusses.
- If the engineers' producer statement regarding the brick veneer (Clause B1 consideration) and the relevant brick manufacturer's detail were perused, the authority could have accepted the brickwork on reasonable grounds. However, the documents did not adequately cover the associated framing and bracing.
- There were no design details provided for the entrance bridge and the balustrade support.
- With regard to Clause B2 consideration, the authority needed to have in its possession the relevant documentation to properly consider the compliance of various building elements.

- There did not appear to be any approval documentation to support the changes to the brickwork, roofing membranes and fascia gutters.
- The drawings lacked weathertightness provisions (Clause E2 considerations) in regard to the brick veneer, the deck, the direct fixed fibre cement linings, the roofing and specific construction details. However, it was noted that brick veneer was one of the Acceptable Solutions that were detailed in Approved Document E2/AS1.

6.6 In a letter dated 25 March 2008, the registered master builder employed by the applicant commented on the expert's initial report. In summary, the registered master builder stated that a code compliance certificate should not have been issued and also raised several issues, which I summarise as:

- The deck balustrade post detail was always likely to fail.
- The brick veneer is deteriorating and it requires replacing.
- The required remedial work to three floor joists has not been satisfactorily completed.
- The ceiling insulation is a potential fire risk.
- The laps to the roofing underlay do not comply with the manufacturer's instructions.
- The house is subject to high wind speeds that impose a risk to the roof trusses.
- Additional areas of the particle board flooring require replacing.
- The placement of the reinforcing steel in the foundations and floor slab is defective.

6.7 The original owners' consultants also commented on the expert's initial report in an email sent on 20 March 2008. The consultants considered that a code compliance certificate should not have been issued for the house and I summarise the other specific comments as:

- The house is constructed on defective hardfilling and the house is continuing to settle.
- There are still defective areas of particle board flooring.
- The remedial work to the upper floor joists has not been completed.
- The deck balusters are not code-compliant.
- The brick veneer is "well on the way to complete failure".
- The foundation reinforcing steel has insufficient cover.
- The high wind zone required specific structural considerations.

## **7 The second expert's reports**

7.1 I engaged a second independent expert who is a Chartered Professional Engineer ("the second expert"), to provide a structural assessment of some of the building elements that are subject to the determination.

7.2 The second expert visited the site on 24 April 2008 and produced a “Building Compliance Report” that was dated 9 May 2008, and which was received by the Department in its final form on 26 June 2008. I have summarised the second expert’s findings as set out below:

- While it could not be confirmed that rectification piles were installed (see paragraph 3.3), there seems to be little doubt that they were constructed. There are indications that these piles could not be substantiated by calculation unless they bear on rock. The extra piles ‘do not provide extra or adequate cover for the reinforcing in the original foundations except in the localised area of the actual pile’. However, there were no signs of movement in the brick work or foundations that would have resulted from inadequate support.
- The presence and extent of the ‘non-engineered material’ under the concrete slabs has been established and there does not seem to be any dispute that the slab reinforcing has inadequate cover. However, there are no signs of cracking of the slabs adjacent to the foundation. There are no areas of drumming in the floor slab and the expert was of the opinion that the review of the floor slab by master holder’s consultants showed it to be code compliant and did not require replacing.
- A check of the concrete slab levels as a comparison with those taken by the master holder’s consultants showed that there had been little or no change since the original levels were taken and remedial work carried out. Nor is there any visual evidence that the building as a whole had settled since 2001 or that there are new cracks in the slab.
- While the expert was unable to comment on the global stability issues without geotechnical input, there is no visible or measurable site evidence that the building as a whole is migrating down the slope.
- The upper floor joists have been adequately strengthened although there are workmanship issues.
- The particle board flooring that has not been replaced is performing adequately. However, there is evidence in bedroom 3 that the carpet underlay has absorbed moisture from the particle board floor and the expert could not find evidence of the 25 samples that were reported to have been taken from the flooring
- Some remedial work is required to ensure the future efficiency of the stormwater discharge from the building and the as-built details do not accord with the consented plans.
- Apart from the shelf angle course of bricks and a few cracks at lintels and corners, the brickwork is generally in good condition. There is spalling to the face shell of the course of bricks above the shelf angle and the gap between this course and the one immediately below has closed up. There was also some bulging of the brickwork at that location.
- The expert agreed with the assessment by the original owner’s consultants that the wind zone was “very high”.

- 7.3 Following a request from the Department, the engineer forwarded an addendum to the original report that was dated 4 July 2008. Commenting on the master holder's consultants 'design and remedial work for the foundations', the expert concluded:

Having reviewed this document we find [the master holder's consultants'] analyses of the existing foundation construction and design of the remedial work to the foundations to be code compliant in respect of the requirements of Clause(s) B1 of the Building Regulations 1992.

On the basis of [the master holder's consultants'] documents our opinion is that there is no reason not to accept that all construction of the remedial works have been completed to the extent required by Building Consent ABA 20000162 with respect to Clause(s) B1 of the Building Regulations 1992.

- 7.4 The engineer also commented on the statement from the original owner's consultants' that 'there are sections of the foundations that are suspect' (refer to paragraph 4.13). The engineer noted that the review was limited to the documentation relating to the extent of underpinning piling of the external walls, and concluded:

The documentation with respect to the [piles described in paragraph 3.3 and the piles designed by the master holder's consultants] show that these remedial works have been constructed satisfactorily.

The spacing of [piles described in paragraph 3.3] and the distance from pile P5 to the original ground at the next external corner west of P5 is similar.

With no discernable settlement apparent between the period July 2001 and April 2008 it can be assumed that the remedial work to the foundations (both [the consulting engineer described in paragraph 3.3 and the master holder's consultants'] work) are providing adequate support.

From our review, it is our opinion that the extent of remedial works to the foundations of the dwelling at 91 Centennial Drive, Whitianga is adequate.

## **8 The draft determinations.**

- 8.1 Copies of a draft determination were forwarded to the parties, the builder, and the master holder's consultants on 7 July 2008.
- 8.2 The authority did not accept the draft and the authority's comments were attached to a letter to the Department dated 28 July 2008 from the authority's legal advisers. In summary, the authority stated:
- The house was not eight years old when the code compliance certificate was issued.
  - It did not agree that the Chief Executive had the jurisdiction to determine whether the authority's decision to issue a code compliance certificate was correct.
  - The house was not in a wind zone which exceeds "very high".
  - The original owners' consultants had verified that plywood linings were not required on the stud walls behind the brick veneer.

The authority also commented in detail on the points raised in paragraph 9.2.3 of the draft determination.

- 8.3 The applicant also did not accept the draft determination. In a letter to the Department dated 28 July, the applicant's legal advisers noted that applicant accepted the findings as to the code compliance certificate and the notice to fix. However the applicant had concerns regarding the defects and remedial work described in the draft determination. I summarise these concerns as being the:
- second expert's and the master holder's consultants' conclusions on the adequacy of the foundations and ground floor slabs
  - first and second experts' observations on the particle board flooring
  - adequacy of the brick veneer
  - strengthening of the upper floor joists
  - laps in the roofing underlay
  - wind zone level.
- 8.4 Taking into account those submissions that I considered to be relevant, I issued a second draft determination that was forwarded to the parties, the builder, and the master holder's consultants on 3 February 2009.
- 8.5 The authority did not accept the second draft determination and its legal advisors provided a detailed submission dated 18 February 2009. The submission:
- raised a number of points of clarification regarding various paragraphs of the draft determination
  - put forward further arguments to support its contentions regarding the jurisdiction of the Chief Executive and the status of building consent authorities under the current Act
  - did not accept that plywood bracing was necessary behind the brick veneer, or that the driveway drain was defective, or that the entrance particle board had not been replaced.
- 8.6 The applicant accepted the second draft determination and made additional comments in a summary provided by his legal advisors dated 5 March 2009. The submission:
- commented on the submission from the builder
  - accepted the clarifications listed by the master holder's consultants
  - commented on the clarifications listed by the authority
  - provided further arguments as to the matters raised by the authority in regard to the jurisdiction of the Chief Executive and why the applicant did not agree with those submissions.
- 8.7 The builder in a submission dated 18 February 2009, provided further information regarding the balcony handrail, the brick veneer, the bridge, the entry particle board, and the wind zone. The builder also queried whether the determination process could be applied to buildings covered by the former Act.

8.8 The master holder's consultants in a submission dated 18 February 2009 listed several items of clarification or amendment that were considered relevant to the determination.

8.9 I have carefully considered all the submissions described above and have amended the determination, or have commented on the matters raised, as I have deemed to be appropriate.

## **9. The hearing, site visit, and subsequent submissions**

### **9.1 General**

9.1.1 The applicant requested a hearing, which was held at Whitianga on 4 November 2008 before me. I was accompanied by a Referee engaged by the Chief Executive under section 187(2) of the Act. The hearing included a visit to the house.

9.1.2 The hearing was attended by:

- the applicant, who was accompanied by his legal adviser, two consultants, an ex-officer of the authority, and two friends
- the authority, represented by its legal adviser, a consultant, and three of its officers
- the master holder's consultants, represented by a principal, its legal adviser, and two employees
- three other officers of the Department.

9.1.3 All the parties and the authority's engineering consultants spoke at the hearing and at the site visit. The evidence presented by those present enabled me to amplify or clarify various matters of fact and was of assistance to me in preparing this determination.

### **9.2 The preliminary hearing stage**

9.2.1 At the initial stage of the hearing, the various participants provided verbal and documentary opening submissions

9.2.2 I summarise the applicant's submissions as follows, noting that I was provided with a written submission from the applicant's legal advisers dated 20 November 2008 regarding the question of jurisdiction matter:

#### *The question of jurisdiction*

- Under the former Act, the Building Industry Authority ("the Authority") had specific authority to determine the issue of a building consent. As there were no time limits placed on the Authority's exercise of its jurisdiction except for the enactment of the current Act, there was no question that the Authority had jurisdiction to consider the determination application.
- The current Act extended the powers of determination compared with the powers granted under the former Act, strengthened the role of the regulator (the Chief Executive), and extended the jurisdiction to make determinations on matters relating to building control.
- The question of jurisdiction did not turn on whether the authority was a building consent authority at the time that it issued the relevant building consents and code compliance certificates. The question was whether those

decisions can be subject to a determination by the Chief Executive in terms of section 177 of the current Act.

- The transitions provisions set out in sections 433 and 438 deem that building consents and/or code compliance certificates issued under the former Act are building consents and code compliance certificates under the current Act. The powers conferred under the current Act, including determination provisions relating to the decisions of the authority to issue the building consent and code compliance certificate in question, are deemed to be made under sections 49 and 95 of the current Act.
- There is no legislative intent to prevent the Chief Executive from reversing code compliance certificates issued under the former Act.

*The technical issues*

- The applicant accepted the second expert's opinion that if the remedial piles were founded in rock they would be adequate. However penetrometer testing showed that they were not founded in rock.
- The applicant believed that there was a substantial failure of the brick veneer, which had deteriorated further since the previous inspections.
- The particle board flooring at the front entrance had not been replaced despite the recommendation by engineering consultancy and acceptance by the authority.

9.2.3 The authority's submission at the hearing can be summarised as follows:

*The question of jurisdiction*

- As the authority was not a building consent authority when it made the decision to issue the code compliance certificate, the Chief Executive does not have the jurisdiction to make a determination under section 177(1)(b).
- The only circumstance in which the Chief Executive can review the decision of a territorial authority to issue a code compliance certificate was if an application for a determination was commenced under section 17 of the former Act but not determined before 31 March 2005. Section 438 does not confer jurisdiction to review a decision of a territorial authority to issue a code compliance certificate issued under the former Act.
- Only the High Court can decide whether the authority could not have been satisfied on reasonable grounds that the building work complied with the Building Code when it issued the code compliance certificate. This is in line with the judge's decision in *Flynn v Scotson and Bay Building Certifiers Ltd*<sup>4</sup>. As the statutory and civil tests for negligence are the same, the decisions reached in the current draft have serious consequences for the authority.
- If the Chief Executive had jurisdiction to review any decision made under the former Act, there would be no reason for section 429 to have been enacted. If the Chief Executive does not have jurisdiction to review the decision to issue the code compliance certificate, the applicant is not left without a remedy because he has already commenced High Court proceedings against the authority.

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<sup>4</sup> DC Tauranga 28/5/2022 NP 1098/00



The authority's legal advisers forwarded a response to the applicant's submission regarding jurisdiction in a submission to the Department dated 22 December 2008, and which I summarise as:

- The meaning of “party” in section 176 maintains the distinction between a building consent authority and a territorial authority and section 177(b) empowers the Chief Executive to make a determination in respect of a building consent authority's decision to issue a code compliance certificate. As the decision to issue the code compliance certificate was not made by a building consent authority, the Chief Executive did not have jurisdiction regarding that decision.
- Section 429 sets out the one and only circumstance that the Chief Executive may make a determination in respect of matters decided under the former Act. Accordingly, the applicant's contention that the Chief Executive has jurisdiction to review any decision under the former Act is totally inconsistent with section 429.
- Sections 433 and 438 only give continuing legal effect to building consents and code compliance certificates issued under the former Act. They do not deem that if these are issued under the former Act, they are building consents or code compliance certificates issued under the current Act.
- The clear intention of Parliament was that only decisions by a building consent authority can be reversed, confirmed or modified. This interpretation of section 177(b) is consistent with section 429.

*The technical issues*

- The Chief Executive can only make a determination on the defects listed in the applicant's Annexure A.
- As established in the judgement in *Body Corporate 188529 v North Shore City Council*<sup>5</sup> the inspection role of the territorial authority ought not to be regarded as that of a clerk of works or a project manager. A territorial authority is not required to ensure that all building elements comply with the Building Code but has an overall responsibility regarding construction and durability.
- The authority accepted the two experts' reports and conclusions reached in a summarised report provided by the consultant accompanying the authority at the hearing. No one knows what is wrong with the brick veneer.
- The wind zone is “very high” for the purposes of NZS 3604.

9.2.4 The master holder's consultants, who were invited by the authority to attend the hearing, noted the limited scope of their involvement and proffered some suggested amendments that could be made to the draft determination in this respect. The consultants also stated that, while not required to do so, they had analysed some of the technical aspects that could assist the hearing process.

### **9.3 The site visit**

9.3.1 The hearing was adjourned so that a site visit could take place to clarify some of the technical matters arising from this determination. Some of the locations where the various invasive tests had taken place were also identified. One of the tiles at the

<sup>5</sup> 30/4/08. Heath J, HC Auckland CIV 2004-404-3230

entrance was removed to expose the particle board underneath. It remained to be decided whether the flooring in question had actually been replaced. The carpet was also lifted in areas of the lounge and the kitchen.

#### **9.4 Continuation of the hearing**

9.4.1 The hearing continued after the site inspection and the major technical matters were discussed.

##### *The foundations*

9.4.2 The parties' consultants and the master holder's consultants described the various testing methods and analyses that they had undertaken and made the following summarised observations:

9.4.3 The applicant's consultants stated:

- The remedial piles to the rear of the house as designed by the consulting engineer were deficient in diameter and depth, were set too far apart, and were not bedded in rock. The end pressure on the original piles was six times that imposed on the remedial piles.
- The hardfilling under the ground floor slab was sand that was too weak and lacked the required compaction. When removed, it showed signs of moisture that indicated capillary rise.
- There was zero cover to the slab and bottom foundation reinforcing and this was less than required by the Building Code.

9.4.4 The master holder's consultants stated:

- The movement in the building almost certainly related to initial consolidation and was unlikely to be ongoing. While the sand hardfilling was not well compacted, it was not very loose. Based on the deep bore testing, it was determined that moisture would not rise up to the slab.
- The supporting piles would only be overloaded at a few hard spots and the foundation beam is already bearing on firm ground. Taking into account the whole system of piles and foundation beams, while it was not conventional, the system in its entirety was considered to be performing adequately. Whether there was a rock bearing was not an issue and the foundations could be referred to as a beam/needle pile system. The structural analysis required consideration of the soil stiffness, and whilst there were bending moments in the beams, these were not excessive.
- From the invasive testing undertaken, only one situation was exposed where the reinforcing was resting on the base of the concrete. The remainder had minimum but adequate cover and a membrane was evident at all tested locations. Based on calculated corrosion rates, there would be no issues regarding the foundation and slab reinforcing over a 50-year period.
- The question of "downward creep" was not now an issue.

##### *The brick veneer*

9.4.5 The applicant noted:

- The builder had requested that the original owners select the bricks and this resulted in the change in the bricks used on the house. The manufacturer of the

bricks described on the consented documents required an engineers design relating to the intermediate support angle if other bricks are substituted.

- It was not reasonable for the authority to accept a producer statement for the brickwork as installed.
- That the durability requirement for brickwork might be 50 years, which differed from the normal B2 15-year requirement for external claddings.

9.4.6 Based on statements by the authority and its ex-officer, the following information was provided:

- At least seven inspections were carried out on the brickwork by the officer, who had concerns regarding the bricklayer involved. Due to shortcomings in the structure, no external bracing had been constructed. Consequently, suitable internal bracing elements were put in place to cope with a very high wind zone.
- The 10mm gap that was originally evident at the intermediate angle was required for ventilation but this gap had now closed. The face of the higher-level brickwork was bulging out a maximum of 10mm.
- The lower level brickwork was heavily loaded and the brickwork had not failed at the time that it was originally inspected.
- The authority was aware at the time that the code compliance certificate was issued that the bricks had changed. The notice to fix required a producer statement for the brickwork.

9.4.7 The master holder's consultants noted that it was requested to test three of the originally specified bricks and two of the substituted bricks. The bricks varied only marginally in size and the substituted bricks were 4 to 6 % heavier than the original ones. This increase was within the scope of the design for the proprietary brick veneer system at the site concerned.

*The particle board flooring.*

9.4.8 The applicant stated that the manufacturer would not issue the warranty for the particle board flooring as requested by the authority. Five samples of the flooring had been removed and these had been forwarded to the engineering consultancy for testing. The applicant's consultant did not accept the engineering consultancy's report regarding the adequacy of the flooring.

9.4.9 The authority noted that in December 2000 the applicant's consultant had stated that the particle board was not likely to deteriorate further. The builder had been given the opportunity to refer the matter to the authority but had not done so. The authority had not requested a warranty for the flooring.

9.4.10 The master holder's consultants noted that an analysis of the test results on the flooring found that the particle board in general fell within the required performance requirements of NZS 3604:1999. However, the particle board at the entrance did not.

*The deck and balustrade*

9.4.11 The authority accepted that the deck had failed. It also noted that in late 2001 an engineer engaged by the builder had informed the authority that, following an inspection of remedial work to the balustrade, the balustrade was code-compliant

and the deck would be code-compliant once the remedial work was completed. The authority was of the opinion that it could accept such a statement. However, I note at this juncture that the engineer subsequently informed the authority in writing that he had not in fact inspected the work.

9.4.12 The authority was of the opinion that the balustrade to the balcony had not failed until the timber to which it was attached had decayed.

9.4.13 The authority's ex-officer was of the opinion that the authority was aware before it issued its notice to fix that the balustrade manufacturer would not give a producer statement for the work.

## **10 The jurisdiction of the Chief Executive.**

10.1 As stated in paragraph 1.4, I am of the opinion that I could only determine certain of the matters that were set out in the applicant's submission. I have carefully considered the arguments put forward by the applicant and territorial authority in respect of this issue and have concluded that the following matters are not determinable in terms of section 177. These are:

- The validity of the territorial authority's inspections.
- The territorial authority's alleged failure to identify defects.
- The non-compliance of the builder to comply with the requirements of the Notices to Rectify.
- The maintenance of records by the territorial authority.

10.2 As described in the second draft determination, I responded to the territorial authority's submission described in paragraph 5.2 by letter dated 1 February 2008, and noted that I was of the opinion that I could determine the matters subject to this determination. However, as I have now received further submissions on the question of jurisdiction from both the applicant and the authority, I consider that I should make further comment, taking into account these submissions, and which I set out below.

10.3 Over the course of the determinations process, the authority has submitted that the Chief Executive does not have jurisdiction to determine its decisions to issue the building consent in August 2000 or the code compliance certificate in December 2001. The applicant disagrees and contends that the Chief Executive does have jurisdiction, albeit that those matters were decided under the former Act. There have been many submissions made by the lawyers for both the authority and the applicant on this point and these have already been referred to above in this determination.

10.4 I have carefully considered all the submissions on the matter of jurisdiction. I take the view that this matter must be viewed purposively as required by section 5 of the Interpretation Act. This requires me to determine the "meaning of an enactment... from its text and in light of its purpose". Accordingly, I am of the opinion that in considering the application of section 177 to council decisions under the former Act, I must interpret it by considering both the purpose and text of the Act.

10.5 The purpose of the Act is set out in section 3 and the Chief Executive is also required to take into account the principles set out in section 4 in exercising her functions, including determining any matter. The purpose of the Act includes regulating building work to ensure buildings can be used safely and contribute

- appropriately to health and well-being of its users. As a building consent authority's decisions have an impact on the safety of buildings and the health and wellbeing of building users (amongst other things), these decisions are subject to the Chief Executive's powers to conduct determinations.
- 10.6 Much of the authority's submissions were based on its view that the Authority's ability to determine consent and code compliance certificate matters was never expressly conferred on the Chief Executive in the Act. Instead, it was submitted that the 2004 Act merely gave the Chief Executive the powers to consider those same decisions if made under the new Act by a building consent authority. In this respect, I refer to section 424, which explicitly states that references to the Authority in any enactment in force immediately before the commencement of section 424 on 30 November 2004 must be read as references to the Chief Executive. From that time to the repeal of the former Act on 31 March 2005, there were two Building Acts in force. Section 416(1)(b) clarified that the Chief Executive was required to perform the Authority's functions and duties and exercise its powers during this time. This worked to assist with a smooth transition of the Authority's responsibilities and powers from it to the Chief Executive, which included the determinations function.
- 10.7 In its overview in section 5, the Act expressly states that it "replaces" the former Act. After the repeal of the former Act, there was no need for the Authority's statutory authority to be further conferred because the current Act had by then replaced the former Act and the Authority had been dissolved. Under the new Act the Chief Executive was given almost all of the Authority's powers, which had been considerably expanded in the Act. The Chief Executive then had an increasingly prominent role in building control and regulation of the building sector. Any references remaining in any document, including any enactment, that refer to the Authority is to be read as the Chief Executive.
- 10.8 Looking to other text in the Act to assist me with this matter, I have also carefully considered the transitional provisions in the current Act, in particular those relating to building consents and code compliance certificates (sections 433 and 438). These provisions are relevant because both these documents are at issue in this case.
- 10.9 These provisions bring consents and code compliance certificates issued under the former Act within the legal framework of the 2004 Act. They are to have the effect as if they were issued under the 2004 Act, or are to be treated as if they were granted under the 2004 Act.
- 10.10 On a plain reading of these provisions, and especially if a common-sense and purposive approach to the interpretation of the 2004 Act is taken, building consents and code compliance certificates issued under the 1991 Act become subject to the same legal framework as the equivalent approvals granted by a building consent authority under the 2004 Act. This includes, of course, the ability for a party to seek a determination in respect of such a decision.
- 10.11 As noted above, a purposive interpretation of the 2004 Act and, in particular, the transitional provisions, supports this position. Clearly it was Parliament's intent to give people affected by decisions of councils the ability to have those decisions scrutinised by an independent, expert body – first the Building Industry Authority and now the Chief Executive of the Department of Building and Housing. If the authority's literal interpretation and conclusion regarding the term "building consent authority" not being used in the former Act, was accepted, it would have the effect

of preventing the Chief Executive from ever being able to determine any building consent or code compliance certificate decision made under the former Act (unless they fell within section 429 where an application for determination was lodged under the former Act but not completed). This would mean that parties fundamentally affected by certain territorial authority decisions made up until 29 November 2004 would have no recourse to have those decisions determined (unless section 429 applied). The former Act included this right, and the current Act continues this right, but applying a narrow interpretation of the transitional provisions in the current Act would mean that a significant group of people whose situation spanned the two Acts would have no recourse except to the courts. Parliament cannot, in my view, have intended to have removed this right and thus there is no basis on which to adopt a narrow interpretation of the transitional provisions.

- 10.12 This is a timely point to pick up the retrospectivity issue raised. With respect, I do not consider that having the Chief Executive determine the same decisions the Authority was able to determine is retrospectively applying the law. Legislation is retrospective when it changes the relevant law with effect from a time before the enactment of that legislation. In this case, continuing determination of decisions under the former Act across to the 2004 Act scheme is not a change the law but is a continuation.
- 10.13 Finally, the authority has also submitted that, taking into account the requirements of section 177, my decision may have taken away the rights of the first and second owners of the property. In this respect, I note that section 177(b)(i) refers to a building consent authority's decision to issue a building consent or a code compliance certificate. There is no reference in section 177 as to the rights or status of building owners. If there are doubts as to the actions carried out by the authority or other persons involved in the building's construction, then the previous owners are entitled to exercise their rights against these entities outside the terms of the Act.
- 10.14 In summary, and in accordance with the above comments, I find that:
- the Chief Executive can determine a matter under the former Act
  - the Chief Executive can determine territorial authority or building consent authority decisions under both Acts

## **11 Discussion**

### **11.1 The decision of the authority to issue the building consent**

- 11.1.1 With regard to the validity of the building consent issued by the authority, I must consider whether the consented drawings and specification provide reasonable grounds to form the view that the house when constructed would comply with the Building Code. In considering this question I should have regard to the standard of documentation typically provided with consent applications for brick veneer clad houses.
- 11.1.2 As noted in paragraph 6.5, in his supplementary report the first expert was of the opinion that the documents were adequate in most respects. The expert considered that the authority would have had access to various standards that were referred to on the consent documents, and which would compensate for most of the missing details. However, the expert raised concerns regarding the lack of details for the:

- truss design
- framing and bracing behind the brickwork
- design of the entrance bridge and balustrade supports
- weathertightness provisions.

The expert also referred to changes made to certain elements as constructed when compared with the consented documents, and which did not appear to have been documented or noted by the authority.

- 11.1.3 I note that roof trusses are typically purchased directly by the builder from a variety of truss manufacturers, each of whom will have details specific to their product. Accordingly, the truss details may not be available to a authority until after a building consent has been issued.
- 11.1.4 The lack of detail for the framing and bracing behind the brickwork, the entrance bridge, and the balustrade supports is of concern. In addition the fact that a two-storey brick veneered house was not a common occurrence, in itself, was a matter requiring additional detailing over and above the normal requirements.
- 11.1.5 In my opinion, the question of elements, such as the brickwork, being amended during construction does not impinge on the matter concerning the issuing of a building consent. These issues should of course be taken into account by the authority as amendments to the original consent, together with such additional documentation that the authority may require. In addition, I do not consider that the authority could have foreseen the problems that were encountered once the foundations were under construction.
- 11.1.6 Taking into account the issues set out in the preceding paragraphs, I accept that there were some shortcomings in the documentation provided to the authority at the time it issued building consent No ABA/2000/162. However, on balance, and taking into account that a building consent is to be issued by a authority on “reasonable grounds” I am prepared to accept that the authority was correct in issuing a building consent for the house in question.

## **11.2 Compliance of the house with the building code**

- 11.2.1 The history of the house shows that remedial work has taken place since it was substantially completed in November 2000. This work includes the additional piling under the foundation beams that was carried out in two separate operations, the replacement of some flooring, and the amendments to the floor joists at the lounge/dining area.
- 11.2.2 The original owner’s consultants concerns are listed in paragraph 6.7 and these would apply to the house in its current state. These concerns are mirrored in the report prepared by the master builder that is described in paragraph 6.6, together with some additional matters.
- 11.2.3 Having reviewed the various reports, the remedial works carried out on the house, and the reports of the two experts commissioned by the Department I have concluded that the following elements, which relate to those items listed in Annexe A of the determination application, are not compliant in terms of the Building Code current at the time that the consent was issued:
- The decayed deck edge.

- The inadequately fixed deck edge balustrade and the excessive post spacing.
  - The problem with the bricks at the shelf angle course and the cracks, spalling and bulging in other areas of the brickwork.
- 11.2.4 While not part of the determination application, there are other items noted by the experts that also need rectification, and to which I draw to the attention of the parties. These are the:
- decaying wood bridge
  - decaying bottoms of the garage door jambs
  - inadequately installed interior stair hand rail
  - ceiling installation trimming around all lights
  - tidying up of the roof underlay around the flues
  - inadequate fixings between the trusses
  - inadequately applied deck membrane
- 11.2.5 I note that the second expert queried the efficiency of the stormwater discharge from the building and also that it did not comply with the consented plans. The authority is of the opinion that this work is code-compliant and only requires basic maintenance.
- 11.2.6 Based on the evidence that I have now received, I accept that there is now no necessity to address the question of remedial bracing behind the brick veneer elements.
- 11.2.7 From the evidence that has been provided, and in particular the reports from the second expert and the master holder's consultants, I am prepared to accept that:
- The remedial work carried out to the foundations of the house is adequate. I base this acceptance on the consultant's peer-reviewed analysis that the foundations as an entity are code-compliant and that the risk of corrosion to the reinforcing is negligible. This opinion is also supported by the lack of any signs of movement in the brickwork or the foundations that may have resulted from inadequate support over a 7-year period. Accordingly, I accept that the foundations of the house are code-compliant
  - The filling under the slab is adequate, as is the cover to the slab reinforcing. Accepting that the crack in the slab was caused by the initial settlement, there is no other visual evidence to show that the slab is not code-compliant.
  - The particle board flooring as a whole is performing adequately. However, the flooring to the entrance area should be replaced in line with the consultants' observations and the authority's concerns. In this respect, I do not agree with the authority's submission that this area of flooring has indeed been replaced. Accordingly, this area of flooring is not code-compliant.
  - There are serious problems evident in the brick veneer, which makes it non-compliant.
  - The timber to the deck is not code-compliant nor is the inadequately fixed deck balustrade.



- While the laps to the roofing underlay were only 80mm wide, the underlay is code-compliant in this respect.

11.2.8 While I have found that the house is not code-compliant at this time, I am of a view that satisfactory rectification of the items outlined in paragraphs 11.2.3 and 11.2.4 will result in the house meeting the requirements of the Building Code.

### **11.3 The issuing of a code compliance certificate**

11.3.1 Section 438(1)(a) of the current Act states that a code compliance certificate issued under section 43 of the former Act has effect as if it had been issued under section 95 of the current Act. Section 43(3)(a) of the former Act states that a territorial authority shall 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.

11.3.2 Having carefully examined all the arguments and evidence put before me, I have reached the conclusion that the defects as listed in paragraph 11.2.3 were present or non-compliant at the time that the code compliance certificate was issued. Accordingly, I consider that the building did not comply with the various clauses of the Building Code at the time the code compliance certificate was issued. This being the case, I am of the opinion that the authority should not have issued the code compliance certificate for this house.

11.3.3 In order to deal with the issue of the completed work which is code-compliant, I suggest that the owner apply for an amendment to the original consent which in effect removes from that consent the work described in paragraphs 11.2.3 and 11.2.4 and then seek a code compliance certificate for that work.

11.3.4 I also consider that the applicant could then apply for a new building consent covering the items set out in paragraphs 11.2.3 and 11.2.4. Once these items are rectified to the satisfaction of the authority, the applicant can then apply for a code compliance certificate for the remedial work.

## **12 The decision**

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

- the authority's decision to issue a building consent is confirmed
- the house as constructed does not comply with the Building Code current at the time the building consent was issued
- the authority's decision to issue a code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 April 2009.

John Gardiner  
**Manager Determinations**