

Determination 2010/030

The issue of a code compliance certificate for two relocated buildings at 91 Whangapoua Road, Coromandel



The house (left) and cottage (right)

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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 parties to the determination are:

- the Barlow Family Trust, which is the current owner of the buildings, (“the applicant”)
- the Thames-Coromandel District Council (“the authority”), carrying out its duties and functions as a territorial authority or building consent authority.

I consider that Mr C Lyons, who is the original owner of the building, is a person with an interest in this matter.

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

1.3 The matter to be considered in this determination

- 1.3.1 The matter to be determined, in terms of section 177(b)(i) of the Act², is whether the decision of the authority to issue a code compliance certificate dated 11 August 2005 for a group of relocated buildings was correct.
- 1.3.2 In order to determine whether the code compliance certificate should have been issued, I need to consider whether the building work complied with the Building Code (Schedule 1, Building Regulations 1992) when the code compliance certificate was issued.
- 1.3.3 In considering the compliance of the building work, I must consider:
- the Building Code requirements that applied at the time the building consent was issued in 2003 (and as amended in 2004), and how those requirements applied to the relocated buildings
 - the conditions of the building consent.
- 1.4 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

1.5 Matters outside this determination

- 1.5.1 The application for a determination requested that I consider whether the authority’s decision not to issue a notice to fix was correct. I have not received any information as to whether the authority made any assessment in regards to a notice to fix as a result of its final inspection of 21 March 2005. However, as a notice to fix is issued for non-compliant building work, and a code compliance certificate for the relocated buildings was issued on 11 August 2005, it appears that the authority was satisfied that the building work complied with the Building Code.
- 1.5.2 The applicant also raised various other matters regarding costs of remedial work, town planning issues, the granting of resource consents, and certain actions taken by the authority. However, these are matters that fall outside my jurisdiction under section 177 of the Act, and therefore this determination is limited to the matters that fall within the Act as outlined in paragraphs 1.3.1 & 1.3.2 above.
- 1.5.3 In the applicant’s submission of 2 December 2009 the applicant also requested that I consider awarding costs. I acknowledge the applicant’s request and note that any consideration for a direction as to costs under section 190 would only commence after the determination has been made. It is also important to note that a direction as to costs applies to costs and delays incurred only during the process of the determination. Also, an award for costs under that section does not turn on the merits of an authority’s decision that led to the determination.
- 1.5.4 In an email dated 16 September 2009 acknowledging the application, the authority raised the matter of the jurisdiction of the Chief Executive to determine the matters as had been described in the application Form D1 where the applicant had inserted

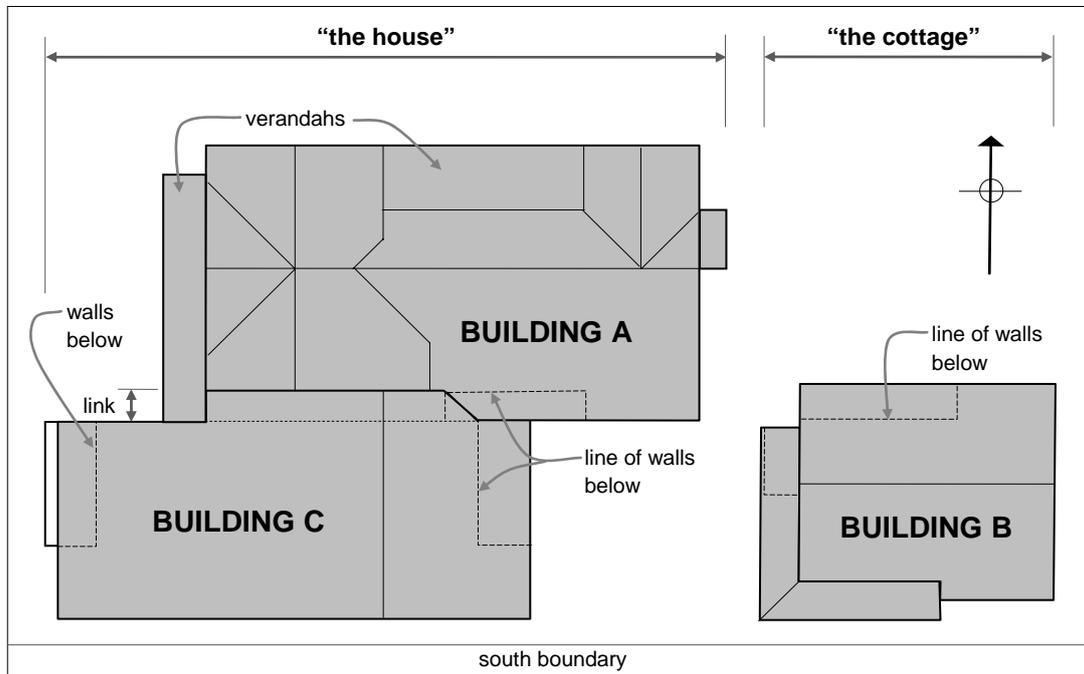
² In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

the wording ‘fail to’ for the issue of a notice to fix and ‘fail to’ amend a building consent/code compliance certificate. (I note that the applicant had also written on the form that they sought to have the determination consider the decision to issue the code compliance certificate and ‘not to issue a notice to fix’. Refer paragraphs 1.3.1 and 1.5.1).

- 1.5.5 In respect of the ‘failure’ of the authority to amend a building consent or code compliance certificate, I consider that a ‘failure to exercise’ a specific power is distinct from a ‘refusal’. A failure to exercise a power under the Act is determinable under section 177(d) and 177(e). A refusal requires the decision-maker to turn its mind to a statutory provision and make a decision. The matters that can be determined under 177(b) of the Act are matters that relate to a decision. I have seen no evidence that an application for an amendment was made by the applicant and subsequently refused by the authority.

2. The building work

- 2.1 The building work consists of a large house and detached cottage, situated on a flat rural site that the expert considers to be in a medium wind zone in terms of NZS 3604³.
- 2.2 Construction is generally conventional light-timber framed; and is based on the use of three relocated buildings, hereafter described as “the house” and “the cottage” as shown in the following sketch:



³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.3 The house comprises Buildings A and C as described in the following sections:

Building A

- 2.3.1 Building A (“the first relocated house”) was built prior to the 1920’s and was relocated onto the site in 2003. The house had native timber framing, timber double-hung windows, timber floors and lapped sheet corrugated steel roofing. This building had 40° pitch gable roofs and a lean-to verandah infill to the north elevation.

Building C

- 2.3.2 Building C (“the second relocated house”) appears to have been built in the 1960’s and was relocated onto the site in 2004. The house had timber framing, timber sash windows, timber floors, fibre-cement sheet wall cladding and corrugated steel roofing. This building was a simple rectangular shape, with an asymmetrical low-pitched gable roof.

The resulting house

- 2.3.3 The large house as it stands now was formed by linking Buildings A and C. The resulting house has five bedrooms with ensuite bathrooms, three living areas, and an additional attic bedroom within the roof of the west gable of Building A. A verandah has been added to the west elevation of Building A, which extends past the link to butt against Building C. The resulting building is complex in plan and form, and is assessed as having a low to moderate weathertightness risk.

2.4 The cottage

Original Building B

- 2.4.1 Building B is described in the consent documents as a ‘second-hand garage’, which was also moved onto the site in 2003. The consent drawings show a simple rectangular shape, with a gable roof, timber framing, and corrugated steel wall and roof claddings, with the floor described as ‘40mm cobblestones’. The expert describes the as-built floor as concrete pavers laid directly over aggregate.
- 2.4.2 There is no indication of the original age of the garage. The consent drawing also shows three garage doors in the north elevation and a small bathroom in the south east corner. No windows are shown, although a door is indicated in the east elevation.

The resulting cottage

- 2.4.3 Prior to the issue of the code compliance certificate in 2005, Building B was substantially altered to convert it from a garage to a dwelling (“the cottage”). I have received no evidence that a building consent was applied for or issued for this work.

2.4.4 This conversion included the following changes:

- changes to the north elevation including:
 - recessing part of the wall
 - re-cladding in weatherboards
 - replacing garage doors with timber joinery
- additions to parts of the east and south elevations including:
 - adding a lean-to verandah around the south west corner
 - a plywood clad wall under the west verandah
 - installing an external laundry under the south verandah
- interior changes including:
 - adding a kitchen
 - partitioning to provide a bedroom
 - expanding and relocating the bathroom.

2.5 The spa room

The spa room was apparently constructed prior to July 2004. I have not seen a building consent for the construction of this building, although it appears on the amended plan approved on 6 July 2004; it therefore appears that the spa room was covered in the scope of the code compliance certificate issued in 2005.

The spa room was demolished by the applicant in 2008, and is therefore not shown on the sketch in 2.2 above.

3. Background

The 2003 relocations

3.1 The authority issued a building consent (No. 20030874) to the original owner on 21 May 2003, under the Building Act 1991 (“the former Act”). The consent was to ‘resite second-hand dwelling and garage’ (Buildings A and B).

3.2 Conditions attached to the building consent stated that the relocated buildings were subject to special conditions, which included the following:

All reinstatement works must comply with all relevant requirements of the New Zealand Building Code, in particular, NZS3604:1990 for structural aspects of light timber framed buildings.

All damaged, rotten or otherwise defective material are to be repaired or replaced to Council’s satisfaction.

The entire exterior of the building, including the roof is to be repainted.

3.3 The authority carried out only two inspections during the relocation of and consequential building work to Buildings A and C in 2003, which appear to be:

- the sewer drainage and Building B foundations on 5 June 2003
- the foundations of Building A on 31 August 2003.

- 3.4 The steep pitched roof rafters of Building A were cut through to reduce the transport height for the relocation process. The upper roof was then reinstated as part of the work under the building consent.

The 2004 changes

- 3.5 The conversion of Building B from a garage into a dwelling appears to have been undertaken during 2004, although there is no record of any amendment to the building consent or of any inspections undertaken during this construction work (refer paragraph 3.13).
- 3.6 In April 2004, the original owner asked the authority about moving another existing house (Building C) onto the property and linking it with Building A to provide 'bed and breakfast accommodation'. He was told that this would not require resource consent unless more than six guests were accommodated.
- 3.7 The original owner submitted a revised floor plan of the house showing Building C replacing a proposed extension to Building A shown in the original consent drawings. The revised drawings also included a 'new garage' (which was not constructed) and a 'spa room' (which was constructed but has since been demolished).
- 3.8 The revised drawings are stamped and signed as approved by the authority on 9 July 2004 and included the following conditions:
- Amendments only have been approved. These plans are to be read in conjunction with original approved plans dated 16.5.03 for endorsements, inspections etc.
- Subject to any condition endorsed on any building Consent issued for this work and any requirement endorsed hereon.
- 3.9 According to the authority, a building consent was not issued for the removal of Building C from its original location, and erection at its current site, which took place 'sometime between 2 June 2004 and 9 September 2004.'

Issue of the code compliance certificate in 2005

- 3.10 No further inspections were carried out until the final inspection on 21 March 2005, when the inspection summary noted 'OK to issue [code compliance certificate]' and the record stated:
- Final inspection approved all Building work approved to sign off. Neat tidy job. Smoke alarms.
- 3.11 The authority issued a code compliance certificate on 11 August 2005.
- 3.12 On the same date, a resource consent was approved 'To carry out a homestay operation for up to 12 people'. A revised floor plan of the house attached to the approval notes 'homestay bedrooms x 5 sleeping up to 12', and the plan is stamped as approved on 11 August 2005. The letter accompanying the resource consent notified the applicant that:

Please note that all necessary building, plumbing and drainage consents must be obtained before the activity begins and all work must be carried out in accordance with the plans submitted. Any variation to the plans will require consent from Council.

According to the authority, no consent was sought in response to this request.

- 3.13 Building B (the converted garage) was in use as manager's accommodation by this time, and an encumbrance dated 5 August 2005 is recorded on the property's certificate of title which refers to a covenant that the 'manager's unit' would be accessory to the main dwelling, would be used only as a manager's unit and would not be let separately.

Building work undertaken in 2008

- 3.14 The property was sold to a second owner in October 2005 and then in November 2008 to the applicant. The applicant discussed the condition of the house with the authority. Based on advice that 'like for like works done under the 1st schedule of the 2004 Building Act does not require inspection', the applicant carried out various repairs and other work in 2008, including:
- replacement of most of the original roofs with new profiled metal roofing, including extending the new roof to cover the southwest link junction, adding flashings, connecting downpipes to cesspits
 - various repairs, added support beams to the roof framing
 - various repairs to windows, weatherboards and floor framing.
 - completion of the attic bedroom and stairs
 - exterior and interior repainting
 - replacement with timber weatherboards of fibre-cement claddings in Building B and plywood cladding to parts of Building A, including moving a window
 - the replacement/addition of steps to verandas.

I note that a number of these items comprise building work not exempted from the need for a building consent under Schedule 1 of the Act.

The dispute leading to the application for determination

- 3.15 The property was advertised for sale the following year, and a prospective purchaser sought clarification from the authority. A response from the authority on 17 July 2009 included the following information:

... the garage/"manager's residence" [Building B] does not comply with the Building Code. The building was consented as a garage. It has since undergone an apparent change of use to become a manager's residence.

The code compliance certificate was in respect of a building consent to relocate a second hand dwelling and second hand garage. We are aware that this additional work has subsequently been undertaken on the site. We can not confirm that this additional work is code compliant because it has not been inspected to determine this. We recommend that you engage a suitably qualified person to inspect this work.

- 3.16 In an email to the authority dated 22 July 2009, the applicant listed the repair work carried out to the house and sought ‘acceptance/approval’ from the authority for the work ‘under the like for like provisions as discussed prior to commencement’. The applicant then inspected the authority’s property file and questioned the authority on various aspects regarding the background to the development of the property.
- 3.17 According to the applicant a potential sale of the property was lost ‘due to the lack of clarity in [the authority’s] documentation’ and a series of emails ensued relating to the following matters:
- Building B (the garage) did not accord with the consent drawing. Instead, with the knowledge of the authority, the original owner/builder converted it to accommodation to be used while Building A was moved onto the site.
 - Building C was in a bad state of repair prior to its relocation, having been deemed an ‘uninhabitable property’ by the authority following flood damage in 2002. Major areas of flooring were rotten and the roof was unsafe. Notwithstanding the condition, the authority approved moving the building onto the site in lieu of a previously approved extension to Building A.
 - The attachment of Building C to Building A required major changes to the structure, electrical wiring, plumbing and drainage.
 - The information provided by the authority is unclear as to what was consented, inspected and approved in regard to the development of the property.
- 3.18 The situation remained unresolved and the Department received an application for a determination on 15 September 2009.

4. The submissions

- 4.1 The applicant made a submission dated 9 September 2009, which explained background to the dispute and described the information provided. The applicant stated:

It is our contention that the [authority’s] inspection failed to identify multiple areas of non-compliance and [the authority] should not have issued the Code Compliance Certificate. It is also our contention that [the authority] should have issued a notice to fix to the owner at that time to rectify all of the areas of non-compliance.

- 4.2 The applicant forwarded copies of:
- the 2003 consent documentation
 - the 2004 amended drawings
 - the authority’s inspection summary
 - the code compliance certificate dated 11 August 2005
 - correspondence with the authority
 - a DVD showing:
 - non-complying work in 2008
 - construction work during the 2008 repairs

- the completed repair work
 - various other statements and correspondence.
- 4.3 The authority acknowledged the application on 16 September 2009 but made no submission in relation to the matters raised by the applicant, nor provided any further information.
- 4.4 The draft determination was issued to the parties for comment on 23 December 2009. The applicant accepted the draft without comment in advice to the Department dated 25 January 2010. The authority responded to draft determination on 2 March 2010.
- 4.5 The authority, while accepting the decision to reverse the issue of a code compliance certificate, submitted that the determination did not have to decide whether the authority correctly applied the test under section 115 of the Act, with respect to the change of use of the relocated buildings. The submission included a copy of the resource consent issued in August 2005 and its covering letter (refer paragraph 3.12). The submission contended that '[a] Council cannot ... treat an application for resource consent or even the issue of resource consent as written notice under section 114 of the ... Act'. The submission also made observations about the extent and nature of the consented work.
- 4.6 The applicant's legal advisers responded to the authority's submission in a letter to the Department dated 18 March 2010. The legal advisers did not accept the authority's position. The legal advisers submitted that the combined effect of the grant of the resource consent, and the issue of the code compliance certificate, was to approve the change of use under section 115, and that the application for the resource consent was notice by the then owner under section 114.
- 4.7 The applicant's legal advisers noted the date on which the application for resource consent was made (15 March 2005) and the similarity of the plan attached to the application and the work that the authority would have inspected as part of the building consent for Building A. The submission also noted the granting of the resource consent and issue of the code compliance certificate on the same day (11 August 2005). In the legal adviser's opinion the issue of the code compliance certificate served to confirm that the work complied with the Building Code. The timing of both approvals had been taken to mean that no further approvals were required.
- 4.8 The submission also outlined what it believed was the appropriate course of action for the authority to have taken to 'decouple[d]' the issue of the resource consent and the code compliance certificate, being:
 - (a) [Issue] the resource consent with a condition that the [applicant] obtain the required approval for the change or use under Section 115 of the ... Act
 - (b) [Decline] to issue a code compliance certificate for the building work ... until [the authority] was satisfied ... that the building would meet the requirements of the Building Code for its proposed use.
- 4.9 I have considered the submissions of the parties and amended the determination as appropriate.

5. The legislation

5.1 The relevant sections of the Act include:

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will –
 - (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to –
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

- (1) In this section and section 115, change the use, in relation to a building, means to change the use of the building in a manner described in the regulations.
- (2) An owner of a building must give written notice to the territorial authority if the owner proposes—
 - (a) to change the use of a building; or . . .

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

- (a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and
- (b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will—
 - (i) comply, as nearly as is reasonably practicable, with every provision of the building code that relates to either or both of the following matters:
 - (A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:
 - (B) access and facilities for people with disabilities (if this is a requirement under section 118); and
 - (ii) continue to comply with the other provisions of the building code to at least the same extent as before the change of use.

6. The code compliance of the building work in 2005

6.1 The transitional provisions of the Act (section 436) apply to this situation as the consent was granted under the former Act. Under the former Act, an authority was

only able to issue a code compliance certificate if it was satisfied, on reasonable grounds, that the building work complied with the Building Code.

6.2 I must therefore consider whether the building work complied with the Building Code that applied at the time the building consent was issued. In order to do so I also need to consider the evidence available and the condition of the building work at the time the code compliance certificate was issued in 2005, as well as the extent of building work carried out since.

6.3 The evidence

6.3.1 In order for me to form a view as to the code compliance of the building work at the time the code compliance certificate was issued in 2005, I needed to establish what evidence is available and what could now be obtained considering that some repairs and alterations were carried out in 2008, and some defects have since been remedied.

6.3.2 While the applicant has provided some evidence regarding the likely condition of the house in 2005, I consider it important to look for information that corroborates or contradicts that evidence and therefore can be used to verify whether the authority's final inspection of the building work in 2005 was properly conducted.

6.3.3 In forming a view as to the code compliance of the building work in 2005, I have taken into account the following:

- The applicant's DVD recording the condition in 2008 and the photographic record of the repair work subsequently undertaken.
- The inspection records, correspondence and other information.
- The expert's report as outlined below.

7. The expert's report

7.1 As mentioned in paragraph 1.4, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Architects. The expert visited the site on 21 October 2009 and produced a report completed on 16 November 2009 and forwarded to the parties on 17 November 2009.

7.2 General comments

7.2.1 The expert noted that the consent and amendment drawings were very limited and did not include accurate drawings of the buildings prior to their relocation. The complete extent of the reinstatement work and other alterations carried out prior to the issue of the code compliance certificate in 2005 is therefore unclear, and must be based on an assessment of the evidence now available.

7.2.2 Based on his inspection and the other records, the expert generally considered that much of the building work in the reinstatement and alterations of the relocated buildings prior to the issue of the code compliance certificate had been of a poor standard, and was carried out in ignorance of, or without a view to, compliance with requirements of the building controls regime that applied the time. The expert

focussed his attention on the reinstatement work covered (or presumed to be covered) in the building consent.

7.2.3 The expert noted that, in his view, the Act generally does not require existing housing stock (including relocated houses) to be upgraded to comply with current Building Code requirements, with the exception of some fire protection measures.

7.2.4 In response I note that the requirements of section 112 apply to relocated buildings. I consider that section 112(1)(b) requires an assessment to be made as to whether the building in its new location complies with the requirement of the Building Code to the same degree as before the relocation, taking into account the environmental factors that will apply in the new location, including seismic, corrosion, and wind zones. If the environmental factors are the same between the sites, or no worse, then there will be no net effect on the building's ability to comply with the Building Code in its new location.

The basis of the compliance assessments

7.2.5 Taking into account the 2008 repairs and alterations, the expert investigated:

- the apparent compliance when the 2005 code compliance certificate was issued
- the assessed compliance at the time of his inspection.

7.2.6 Due to the different forms and functions of the structures, the expert considered the compliance of each building separately as follows:

- the house (the linked Building A and Building C)
- the cottage (the original garage, Building B)
- the spa room (since demolished).

7.3 The house

Clause B1 Structure

7.3.1 The expert examined sample areas of the subfloor to Building A and Building C, noting that all timber piles were 125mm x 125mm and appeared to be treated to H5.

7.3.2 The expert also investigated the roof structure to Building A, noting that the roof rafters had been cut in order to reduce the building height during the moving process. 20mm repair plates had been fixed to one side of the rafters to rejoin the timbers.

7.3.3 Commenting specifically on the foundations and roof framing, the expert noted that:

Building A

- bearers are 90mm x 65mm over piles spaced at 1400mm, and therefore require engineering calculations as they do not comply with NZS 3604
- bearers are butt jointed, with no connectors over the joints
- some wire dogs are missing or fixed only to one side of bearer joints
- the ends of some original floor joists are severely decayed

- the cut rafters have been joined with ply packing to the cut and repair plates are nailed to one side only, with no supporting engineering design
- the 2008 records show missing cross ties and other roof supports

Building C

- while the original bearers have ‘halved’ joints that appear adequate, the new bearers have butt joints with no connectors
- most of the original wire dogs have been cut, with no new fixings to the piles
- the 2008 records show unfixed packing under piles and an unconnected pile extension
- new floor joists and particle board flooring appear to have been installed in 2008 in order to repair storm-damaged flooring and framing.

7.3.4 The expert noted that his inspection could not establish the full extent of structural defects and further investigation by an engineer is required. However, he was able to conclude that, based on his inspection of the work completed at the time the code compliance certificate was issued, the building work on the house did not comply with Clause B1 at that time.

The external envelope

- 7.3.5 The expert noted that most of the external envelope of the house was original and had not been altered, apart from the replacement of defective material and repainting as to comply with the requirements of the building consent (refer paragraph 3.2).
- 7.3.6 The expert inspected the interior, taking non-invasive moisture readings and noted no visual evidence of moisture on the linings. All readings were low, except in the south east corner of Building C, where the applicant reported that a gutter had overflowed. The expert concluded that the corner top was an isolated defect, and there were no other signs of current moisture penetration in the house.
- 7.3.7 The expert noted that the added or altered timber window and door joinery was installed in a traditional manner to match that used in Building A, with timber sills, facings and scribes with metal head flashings over the top facing.
- 7.3.8 The expert studied the photographic and video records of the external envelope of the house prior to and during the 2008 repairs and alterations, and noted that:
- a roof valley was created at the east end of the link, which did not appear to drain to the perimeter
 - the west end of the link lacked a gutter and apron flashing at the junction with Building C, reportedly resulting in leaks
 - some weatherboards and timber windows appeared to be decayed and although the 2008 repairs are clear, the extent of defective material in 2005 is not clear
 - the roof had corroded and the paintwork was obviously old, indicating that the roof had not been repainted as required in the consent conditions

- the subfloor had been clad in sheet plywood with only the south side open, resulting in inadequate sub-floor ventilation
- the ends of some existing floor joists were severely decayed, with the damage clearly pre-dating the relocation of the buildings
- a south door to the hall of Building A (now sheltered by the 2008 link verandah) had interior architraves to plywood sheet cladding and no flashings.

7.3.9 Commenting specifically on the current condition (subsequent to the 2008 repairs) of the building work in the external envelope, the expert noted that:

- there are unsealed gaps at the top of the south east corner, and moisture levels in the adjacent framing are elevated
- the apron flashing to the west end of the link is distorted, with gaps apparent.

The remaining code clauses

7.3.10 Where possible, the expert also observed the visible elements of the consented building work and assessed their apparent compliance with the other relevant clauses of the Building Code.

C Fire safety

7.3.11 The expert noted that the change of use from a detached dwelling to transient accommodation has implications on the fire safety measures required. The expert therefore considered that further specialised investigation is required into the compliance of the house, which should include the:

- unprotected glazing to the south wall (possibly under 1m from the boundary)
- adequacy of the fire warning systems in view of the function of the house.

7.3.12 In respect of the expert's comments, I have noted in paragraph 10 that the change of use requires consideration of building elements, other than those relating to fire safety, in terms of section 115 of the Act.

D1 Access routes and F4 Safety from falling

7.3.13 When the code compliance certificate was issued, it appears that the attic space was unlined and the stairs unfinished. However, the following defects should have been apparent:

- the riser is 260mm (exceeding the 220mm maximum in D1/AS1)
- there was no handrail or barrier (a 840mm high barrier is now installed but there is still no handrail)

E1 Surface water

7.3.14 The 2008 video records show downpipes discharging directly onto the ground (which have since been remedied).

7.4 The cottage

The construction history

- 7.4.1 The expert noted that there is no foundation plan for Building B, as the consent drawings include only a section and a typical pile detail, neither of which accord with what has been constructed.
- 7.4.2 The site appears to have been prepared with new concrete pile foundations, crushed stone aggregate, 100mm x 100mm H4 treated bearers and concrete pavers laid loose over the aggregate. The bearers also act as the bottom plates for the original garage wall framing, which appears to have been reassembled onto the bearer/plate.
- 7.4.3 The expert noted that the building had not been constructed in accordance with the consent drawing (refer paragraph 2.4.2) and the records he was able to see confirmed that Building B been altered and fitted out as a dwelling by the time the code compliance certificate was issued in 2005.

Code compliance of the cottage

- 7.4.4 The expert assessed the cottage for code compliance with the relevant Building Code clauses, and made the following comments taking into account its current use as a residential dwelling:

B1 Structure

- the concrete piles do not extend 150mm above ground level, with most of the tops aligning with the ground
- in some areas, the concrete piles extend above the ground, with the bearer/plate running between and nailed to the side of the piles
- there are no visible fixings connecting the bearer/plate to the piles

C Fire Safety

- the wood burner appears second-hand and is able to be moved
- the LPG water heater is vented inside
- the underbench-style oven is not supported

E2 External Moisture and B2 Durability

- commenting on weathertightness, the expert noted that:
 - the bearer/plate is in contact with the concrete pile and the aggregate and can absorb moisture, with elevated moisture levels recorded in the timber
 - ground water moisture can reach the wall framing, linings and skirtings
 - there are insufficient clearances to the interior floor and the framing
 - the added second-hand windows are inadequately weatherproofed, and any minor moisture penetration cannot evaporate from the lined walls
 - the north double doors are built from boards with open gaps apparent.

E3 Internal Moisture

- the unsealed concrete pavers with open joints provide a porous floor surface in the bathroom and kitchen

G9 Electricity

- there is no electrical compliance certificate
- the stove is unsupported and the connection appears unsafe

G11 Gas as an energy source

- the LPG heater is inside, with no vent to the outside

G13 Foul Water

- the toilet is installed on the pavers, which allows movement, and there is a leak at the connection of the pan to the foul water pipe

H1 Energy Efficiency

- the walls had been insulated with carpet underlay.

7.4.5 The expert concluded that the extent of work that would be necessary to upgrade the cottage was so extensive as to make it likely to be uneconomic.

7.5 The spa room

7.5.1 The expert noted that, while the spa room had been demolished prior to his investigation, the 2008 video recording showed that it would not have complied with Clause B1 at the time the code compliance certificate was issued because:

- there were no foundations
- bearers had been laid directly on the ground.

7.6 The applicant's comments on the expert's report

7.6.1 In a letter to the Department dated 2 December 2009, the applicant commented on the expert's report. The applicant noted that the report was 'in general terms, a fair and accurate appraisal of the current status of the property'. I summarise the applicant's comments that I consider to be relevant to this determination as:

- the ramp had been constructed to the kitchen deck to replace the non-compliant steps
- the report did not address the roof structure or the re-location of building C or the bridging section between the two re-located buildings
- no building consent was issued for the relocation of the building C or its attachment to another building
- the 'garage/manager's unit' was not completed as shown on the consented plans and was altered and fitted out as living accommodation by the time that the code compliance certificate was issued in 2005.

7.6.2 The applicant also noted that no drawings were provided to the authority to show details of the decks to the east and west ends of building A and to the west end of

building C. In addition, a storm event some time between 2006 and 2007 had caused significant damage to building C and electrical and plumbing work had been carried out that does not feature in the authority's records.

- 7.6.3 It was also noted that the code compliance certificate, the approval of a revised plan showing the joining of the houses, and the resource consent for a change of use all had the same date of 11 August 2005. In addition, the encumbrance instrument was dated 5 August 2005.

8. Evaluation for code compliance

8.1 The house

- 8.1.1 I have evaluated the code compliance of the house by considering the following three categories of the building work:

- The structural aspects of the building work.
- The weathertightness of the external building envelope (Clause E2) and durability (Clause B2 in so far as it relates to Clause E2).
- The remaining relevant code requirements.

- 8.1.2 The compliance of the cottage and spa room is addressed in paragraphs 7.4 to 7.5 and I accept the findings of the expert.

The structure

- 8.1.3 Taking account of the expert's report, I conclude that a structural engineer's investigation of compliance with Clause B1 is required in regard to the items outlined in paragraph 7.3.3, together with further investigation to establish the full extent of structural defects in the consented building work.

- 8.1.4 I consider the expert's report establishes that the house does not currently comply with Clause B1 and also that the house did not comply with Clause B1 at the time the code compliance certificate was issued in 2005.

The external envelope

- 8.1.5 I consider the expert's report establishes that the current performance of the external envelope is not adequate because there is water penetration into the building in at least one area at present. Consequently, I am satisfied that the consented building work to the house does not comply with Clause E2 of the Building Code.

- 8.1.6 In addition, the building work is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults on the house are likely to allow the ingress of moisture in the future, the building does not comply with the durability requirements of Clause B2.

- 8.1.7 Because the faults identified with the claddings occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 7.3.9 will result in the house being brought into compliance with Clauses B2 and E2.
- 8.1.8 I also consider that the expert's report and the items outlined in paragraph 7.3.8 establish that the consented building work to the house did not comply with Clauses B2 and E2 at the time the code compliance certificate was issued in 2005.

The remaining Building Code clauses

- 8.1.9 I consider that lack of a handrail and the riser heights to the stairs identified in the expert's report establishes that the consented building work to the house did not comply with Clause D1.
- 8.1.10 I accept expert's comments in paragraph 7.3.11 regarding the need for investigation into the fire safety of the south wall glazing and the fire warning systems (Clause C).
- 8.1.11 I also consider that the expert's report and the items outlined in paragraph 7.3 establish that the consented building work to the house did not comply with Clauses C, D1, E1 and F4 at the time the code compliance certificate was issued in 2005.

8.2 The cottage

- 8.2.1 The expert's report and the other evidence have satisfied me that this building was not constructed in accordance with the building consent or with the Building Code that applied at the time the building consent was issued, and was altered and fitted out as a dwelling by the time the code compliance certificate was issued in 2005.
- 8.2.2 In particular, I consider that the items outlined in paragraph 7.4 establish that the cottage does not currently comply with Clauses B1, B2, C, E2, E3, G9, G11, G13 and H1, and also did not comply with these clauses at the time the code compliance certificate was issued in 2005.

8.3 The spa room

- 8.3.1 The expert's report and the other evidence have satisfied me that the spa room was not constructed in accordance with the building consent or with the Building Code current at the time the building consent was issued and, at a minimum, did not comply with Clause B1 at the time the code compliance certificate was issued in 2005.

9. The 2005 code compliance certificate

9.1 The buildings covered by the 2005 code compliance certificate

- 9.1.1 The expert has identified various defects in the building work that indicate that at the time the code compliance certificate was issued in 2005 parts of the building work were not compliant with the Building Code that applied at the time the building consent was issued or with the conditions of the building consent. While some defects are minor, I am of the opinion that there were many significant defects relating to the structure and the external envelopes of the buildings that should have

been obvious to an inspector even though the extent and number of the authority's inspections are somewhat limited.

- 9.1.2 As many of the identified departures from the Building Code were significant they would provide grounds for the authority to refuse to issue a code compliance certificate for these particular relocated buildings. These defects would also have been grounds for the authority to issue notices to fix, following the foundation inspections in 2003 and the final inspection in 2005 (refer paragraph 1.5.1).
- 9.1.3 I am therefore of the opinion that the identified defects are sufficient for me to accept that the building did not comply with various clauses of the Building Code in a number of significant respects and that the authority's decision to issue the code compliance certificate should be reversed.

9.2 The cottage and spa room only

- 9.2.1 In the case of the cottage, the expert's report and the other evidence have satisfied me that the cottage when used as a dwelling is likely to be dangerous and insanitary in terms of section 121 of the Act. I am also satisfied from the information available that the cottage was used as a dwelling unit from 2005 to about 2008.
- 9.2.2 In the case of the spa room, the expert's report and the other evidence has also satisfied me that this building was dangerous and insanitary and appears to have been in that state from 2005 until it was demolished in 2008.
- 9.2.3 If an authority is satisfied that a building is dangerous or insanitary in terms of section 121 of the Act, it may give written notice requiring work to be carried out to reduce or remove the danger, or to prevent the building work from becoming insanitary. Prior to the issue of the code compliance certificate in 2005, there were grounds for the authority to issue notices in terms of section 124(c) for both of these buildings.
- 9.2.4 In the case of the cottage, due to the significance and extent of the defects identified by the expert and outlined in paragraph 7.4, I am unable to conclude that it is practical to undertaken the necessary remedial work. I therefore leave the question of the future viability of that building as a matter for the applicant to consider and to resolve with the authority.

9.3 The current house

- 9.3.1 In regard to the house only, I note that considerable work has been undertaken since the code compliance certificate and this work has remedied some of the defects in that building. I therefore have reasonable grounds to conclude that the consented building work to the house can be brought into compliance with the Building Code once the identified investigations and remedial works are satisfactorily completed.
- 9.3.2 The following paragraphs outline the identified defects and required investigations in respect of the current compliance of the house:
- Clause B1: Paragraphs 7.3.1 to 7.3.4
 - Clauses E2 and B2: Paragraphs 7.3.5 to 7.3.9

- Clause D1: Paragraph 7.3.13
- Clause C: Paragraph 7.3.11

10. The change of use

- 10.1 The authority issued a resource consent in August 2005, to change the land use to 'carry out a homestay operation for up to 12 people'. The covering letter from authority said that 'consents must be obtained before the activity begins ...'. The resource consent was issued on the same date that the authority issued the code compliance certificate.
- 10.2 The authority received the application for resource consent in March 2005. In the 5-month period before its approval in August 2005, it is reasonable to assume that authority would have been aware of the intended change of use and its potential effect on the building work in respect of which it was in the process of considering whether to issue a code compliance certificate.
- 10.3 The then owner did not comply with the authority's specific request to apply for consents in respect of the change of use, or clarify this requirement. However, as noted by the applicant's legal advisers in the submission dated 18 March 2010 (refer paragraph 4.6), the plan attached to the resource consent approval 'was consistent with the actual building work that had been carried out onsite and presumably inspected by the [authority]'. The applicant's legal advisers therefore considered the change of use had been "'approved" by the [authority] when it issued the code compliance certificate on August 2005'.
- 10.4 On balance this does not seem to have been an unreasonable assumption. However, while that might be the case in this instance, I do not accept the applicant's position that an application for a resource consent (in the general case) can be taken to be notice by the owner under section 114, nor that the issue of the code compliance certificate is to approve a change of use under section 115. Any approval by an authority under section 115 has to be expressed in terms of that section. Given the importance of section 115, I do not consider it appropriate to imply approval based on other actions of an authority.
- 10.5 I note that the application for resource consent was made when the previous Act was in force, and the acceptance given after the current Act came into force. There are no specific transitional arrangements in the current Act for change of use provisions that span both Acts. I note that the requirements of a change of use of section 46 of the previous Act do not differ substantively in their effect from those set out in section 115 of the current Act.
- 10.6 The authority submits that it was inappropriate to treat the application for a resource consent as a written notice of a proposed change of use under section 114. However, it is not necessary to make such a finding in this determination and I have not done so. It is sufficient for the purposes of this determination that the authority was advised by the owner of the proposed change of use.
- 10.7 Paragraph 5.4.2 of Determination 2008/6 said:

...I can find nothing in the Act that makes notice under section 114 a precondition [to the exercise by the authority of its powers] under section 115. In other words, and in the absence of decided cases, I consider that if a territorial authority is aware from a written document of an actual or proposed change of use, whether or not that document identifies itself as being written notice under section 114, then the territorial authority is entitled to issue written notice under section 115 (or, if it is not satisfied as to compliance, advice to that effect or, if appropriate, a notice to fix).

- 10.8 In my opinion, the application for a resource consent served to make the authority aware of the proposed change of use, and in the process of considering whether to issue a code compliance certificate for the building work potentially affected by the proposed change of use, it was reasonable for the authority to take steps to clarify the situation with the owner. That might well have involved putting a specific question to the applicant such as – was the owner giving written notice under section 114? If that was the case the authority then needed to consider whether the building in its new use would comply with the requirements of section 115, or would a notice to fix be required?
- 10.9 The authority would have been able to exercise one of the two subsequent alternatives, namely, the issuing of either a written notice under section 115 approving the proposed change of use, or a notice to fix. I note that the issuing of a notice under section 115 concerns ability of an owner to change a building's use, however, it does not give effect to that change.
- 10.10 In terms of section 115 the change of use requires the building, in its new use, to comply as nearly as is reasonably practicable on reasonable grounds with every provision of the Building Code relating to:
- Means of escape from fire
 - Protection of other property
 - Sanitary facilities
 - Structural performance
 - Fire rating performance.
- 10.11 It is unclear whether the authority has considered compliance of the house, for use as a homestay, in terms of section 115. I note that some building work has taken place since the issue of the code compliance certificate in August 2005.
- 10.12 If the authority is not satisfied that the requirements of section 115 have been met, then the authority should issue a notice to fix to rectify any relevant defective building elements.

11. What is to be done now?

- 11.1 Now that the code compliance certificate has been reversed, a notice to fix should be issued to the owner to take account the findings of this determination, identifying the areas and investigations listed in this determination, and referring to any further defects that might be discovered in the course of investigation and rectification, but not specifying how those defects are to be fixed.

- 11.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 11.1. Initially, the authority should inspect the house and issue the notice to fix. The owner should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 11.3 I also note that the expert has identified that the building work as constructed (or subsequently altered) varies significantly from the consent documentation, and the building consent should be amended to appropriately reflect those changes, including the demolition of the spa room.
- 11.4 Once the matters set out in this determination have been rectified or resolved to its satisfaction, the authority may issue a code compliance certificate in respect of the building consent as amended. In respect of the building work undertaken in 2008, the authority could, following an application from the building owner, issue a certificate of acceptance covering the relevant building 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 the code compliance certificate, dated 11 August 2005, for the house is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 31 March 2010.

John Gardiner
Manager Determinations