Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2011/106

Regarding the refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier at 50 Tarapatiki Drive, Whitianga

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("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 owners, Mr and Mrs Morgan ("the applicants"), represented by an agent (who was previously the manager of the building certifier company)
- Thames-Coromandel District Council ("the authority"), carrying out its duties and functions as a territorial authority or building consent authority.

1.3 This determination arises from the authority's decision to refuse to issue a code compliance certificate for a 7-year-old house because it is not satisfied that the building work complies with certain clauses[2] of the Building Code (First Schedule,

[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.

[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.

Building Regulations 1992). The refusal arose because the building work had been undertaken under the supervision of Nationwide Building Certifiers ("the building certifier"), which was duly registered as a building certifier under the former Building Act 1991, but which ceased operating as a certifier before it had issued a code compliance certificate for the work.

1.4 The matter to be determined[3] is therefore whether the authority was correct to refuse to issue the code compliance certificate for the building work. In deciding this, I must consider:

1.4.1 Matter 1: The external envelope

Whether the external envelope of the building ("the external envelope") complies with Clauses E2 External Moisture and B2 Durability of the Building Code. The external envelope includes the cladding, its configuration and components, junctions with other building elements, formed openings and penetrations.

1.4.2 Matter 2: Other relevant code requirements

Whether the building work complies with the other relevant clauses of the Building Code.

1.4.3 Matter 3: The durability considerations

Whether the elements that make up the building work comply with Clause B2 Durability of the Building Code, taking into account the age of the building work.

1.5 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.

2. The building work

2.1 The building work consists of a single storey house and a double garage which is separated from the house by a narrow breezeway. The buildings are sited on a gently sloping, exposed residential section in a semi-rural location. The site has been classified as a specific design wind zone for the purposes of NZS 3604[4]. (I note here that the agent has submitted that the wind zone is very high.)

2.2 The building is somewhat complex in design with multiple claddings. It has been constructed from lightweight timber framing founded on timber pile foundations and with particle board flooring.

2.3 The cladding is a mixture of fibre-cement weatherboards and silver anodised aluminium weatherboards, both of which have been fixed onto a 20mm draining and ventilating cavity system.

[3] Under section 177(1)(b) and 177(2)(d) of the Act.
[4] New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.4 The roof of the building is predominantly a simple eight-degree mono-pitch skillion design which extends over the house, breezeway and garage in a single plane. The main portion of the roof is clad with a proprietary long run metal roofing material. The entrance porch and feature inglenook in the lounge have flat roofs covered with a standard butynol lining. The entrance porch has two parapet walls on either side of the roof, which drain to a water outlet set against the main wall of the house.

2.5 Aluminium exterior joinery includes face-fixed windows, and bi-fold doors opening onto four timber slatted decks.

2.6 The expert removed two timber samples from the external timber framing of the building and forwarded them to a testing laboratory for decay and preservative analysis. Subsequent analysis indicated that the framing timber is a mixture of H 3.1 and H1.2 treated timber. There were no signs of mould or deterioration.

3. Background

3.1 On 4 October 2001, a firm of consulting engineers ("the first engineer") provided a geotechnical report regarding the subdivision which contains the property in question. This included the following comments:

> A minimum foundation depth of 600mm into natural ground is required.
>
> Foundations within 5m of slopes exceeding 15^{o} should be designed to resist lateral soil creep to a depth of 1m below the ground surface.

3.2 The authority issued a building consent (No. ABA/2004/0604) for the construction of the building on 27 April 2004 under the Building Act 1991, based on a building certificate issued by the building certifier.

3.3 The authority's documents show that the building certifier carried out the following progress inspections for the building work:

- footing inspection on 19 May 2004 (which passed, noting that all holes were 'deeper than required')
- footing inspection for the garage block wall on 24 May 2004 (which passed)
- roof/frame inspection for the dwelling only on 29 June 2004 (which passed, noting that the garage roof/frame inspection for the garage was to be carried out at a later date)
- roof/frame inspection for the garage on 8 July 2004 (which passed)
- pre-line building and pre-line plumbing inspections on 16 August 2004 (both of which passed)
- floor slab inspection for the garage only (which passed, although the date of this inspection is not noted on the inspection record)
- masonry block wall infill inspection for the garage only (which passed, although the date of this inspection is not noted on the inspection record).

3.4 It appears that the building certifier did not carry out a final building inspection or issue a code compliance certificate. The building certifier's approval as a certifier expired on 30 December 2004 and the consent was returned to the authority.

3.5 The authority subsequently carried out a final inspection on 31 July 2009 which identified a number of items which required attention. Those items were subsequently completed and then checked during a further inspection by the authority on 29 October 2009.

3.6 Following the inspections of July and October 2009, the authority undertook a complete review of the building consent file and subsequently wrote to the applicant on 12 March 2010 to explain the reasons for refusing to issue a code compliance certificate for the building work. The authority stated in its letter that it could not be satisfied as to compliance in respect of the following matters:

- [The building certifier's] certificate contained the following exclusion "E2 exclusion [the building certifier] to provide a PS4 for claddings outside NZBC". A PS4 (producer statement construction review) has not been provided.
- ... Both claddings are alternative solutions and we believe that they were outside the scope of [the building certifier's] approval. Furthermore, the building is located in a sea spray environment and very high wind zone; that being the case, [the authority] has concerns with respect to the structural integrity of the framing and the durability of both the framing and cladding.
- At the time of application, a project information memorandum (PIM) was issued. The PIM contained a geotechnical report issued by [a consulting engineer]. This report stated that "shallow depths of topsoil and disturbed earth had been noted on site and that foundations should be excavated through this to found within the natural ground. A minimum foundation depth of 600mm into natural ground is required". The plans accompanying the application show footing to be 450mm deep.

In its 12 March 2010 letter, the authority further stated that the first engineer's geotechnical report also raised a number of issues regarding the compliance of the building with the Building Code:

- It appears that the building is sited over the building restriction line and within 5m of slopes exceeding 15 degrees.
- It is not clear from the drainage as-built plan supplied where the on-site wastewater system, irrigation fields or stormwater runoff are sited.
- The producer statement supplied at the design stage was issued subject to good ground conditions being verified; there is no record that an engineer was called to verify site conditions.

3.7 The authority further states in its 12 March 2010 letter that

- During construction, a producer statement construction review was requested for compacted hard fill beneath the floor slab. This documentation has not been provided. ...
- A producer statement for the installation of the on-site wastewater system has been supplied by the contractor responsible for the installation of the system. In this instance, [the authority] does not believe that the contractor has the necessary expertise required to verify that the system satisfies the intent of the geotechnical engineer's report. Furthermore, this statement

> was issued in 2004, some six years ago and was issued subject to on-going maintenance being undertaken. It is unclear from the drawing supplied (which is not to scale) exactly where the tank and effluent fields are located. ...
>
> - The drainage as-built plan provided is not to scale and does not indicate where or how storm water is collected or discharged to. ...
> - A written undated statement issued by [one of the applicants] states that tile and slate underlay was used in both bathrooms and the laundry and was sealed using [a chemical] primer grout additive from [a specified manufacturer]. The grout is an alternative solution for which no supporting documentation has been provided.
> - The statement also advises that the two ... showers were installed by [one of the applicants] in accordance with the attached specifications. This statement does not demonstrate compliance nor does it confirm that work has been carried out in accordance with the Building Code. ...
> - As it appears that most of the work under this building consent was completed by the end of 2004, Council is concerned about the durability of various building elements. For example, the warranty issued by the roofing contractor is subject to manual washing of unwashed and high risk areas every three months. ...

3.8 In June 2011, the applicant engaged a chartered professional engineer ["the second engineer"] to undertake a site visit and post-construction review of the building work. Following the visit, the second engineer prepared a letter to the authority dated 29 June 2011, which outlined the second engineer's observations and response to the authority's reasons for refusing to issue a code compliance certificate for the building work. The second engineer noted in the letter that:

> While we consider it unlikely that the base of the foundations is below adjacent finished ground levels (as nominated on design plans) we must conclude that the foundations are located on competent soils, such that no discernable movement has occurred since construction.
>
> Close scrutiny of the areas [containing the western line of timber piles and the few piles near the western corner of the building] shows no sign of lateral or vertical movement of either the pile foundation or the ground itself around the base of these piles.

3.9 The second engineer also produced a "partial" PS4 - Construction Review Producer Statement that included the statements:

> All building foundations appear to be constructed in an appropriate manner and generally in accordance with issued approved plans. Masonry foundation walls appear to be constructed as per approved plans, and are performing excellently.

3.10 In a letter dated 14 July 2011, the agent outlined his response to the concerns raised by the authority in its letter to the applicant dated 12 March 2010, in which the authority refused to issue a code compliance certificate for the building work. In the letter, the agent states that

> [The building certifier] required that all cladding systems be on a cavity system if [the authority] wished our company to undertake certification of their project. This was not a requirement under E2 at the time that this consent was issued.

> … All exterior cladding inspections had been completed on this project, prior to [the building certifier] being placed into receivership.
>
> … Added flashings were installed at [the building certifier's] request as the designer had not covered them on his plans.
>
> … The builder has acknowledged that an error has been made; when installing the head flashings; the building wrap has not been carried over the face of the head flashings to any of the windows.
>
> … The Geotech report issued by [the first engineer] has been followed fully.

3.11 The Department received the application for a determination on 15 July 2011.

4. The submissions

4.1 Through the agent, the applicant forwarded copies of the plans and specifications for the building work, the post-construction review by the second engineer engaged by the applicant (see paragraph 3.8), the letter from the authority to the applicant explaining the reasons for refusing to issue a code compliance certificate (see paragraphs 3.5, 3.6, and 3.7), and a letter from the agent outlining his response to the matters raised by the authority in its letter of refusal (see paragraph 3.10).

4.2 The authority acknowledged the application for determination in a letter dated 15 August 2011, and included a submission which outlined the authority's response to the points made by the agent in his letter dated 14 July 2011, as well as the authority's reasons for refusing to issue a code compliance certificate for the building work. In its submission, the authority stated that

> The report by [the first engineer] was not used in the design of the building and the wind zone used was incorrect in the processing procedure. The fact that it is now seven years since the project was completed concerns [the authority] in respect to the durability of some building elements.
>
> These issues plus the lack of certificates, Producer Statements and drainage details were reasons for [the authority] to refuse the code compliance certificate.

4.3 The draft determination

4.3.1 Copies of a draft determination were forwarded to the parties on 18 October 2011. The draft also required the parties to indicate an agreed date when the building elements complied with the durability provisions of Clause B2.

4.3.2 The authority did not accept the determination and in a submission received by the Department on 7 November 2011 gave its reasons as:

- The depth of the concrete foundations has not been properly verified and the comment made by the second engineer (see paragraph 3.8) that it was "unlikely" that the base of the foundations were at 600mm below adjacent finished ground levels has thrown doubt as to their founding.

- Some of the piles may be considered to be within the 5 metre set-back noted in the October 2001 geotechnical report. In the opinion of the authority, the requirements of this report had not been adhered to.

- There are questions arising regarding whether the timber framing as installed meets the requirements of a "very high" or "specific design" wind zone.

- There is a lack of engineering inspections of the foundations and no engineering P4 certificate has been produced.

- In general terms, the authority had concerns regarding the lack of inspections, a full PS4 certificate, as-laid plans, and electrical and gas certificates.

4.3.3 The applicant accepted the determination and indicated October 2005 as being the date that compliance with Clause B2 was met. The applicant's agent also drew attention to the head flashings which has an up-stand behind the cladding although this is not immediately obvious from a visual inspection

4.3.4 The applicants' agent also commented on the authority's submission concerning the draft determination as follows:

- The second engineer's comment regarding the founding of the foundations was only an opinion and was not confirmed on site. In addition the "partial" PS4 produced by second engineer confirmed the status of the foundations and masonry walls. Had the engineer had any doubts as to the foundations, he would not have issued the PS4

- The building certifier had carried out four inspections during the building's construction. The applicant had also excavated beside the garage foundations, which confirmed that they are to the depth recommended by the original geotechnical report.

- It had been the authority's practice over a number of years to consider the Tarapatiki Drive area as being in a "very high wind zone" rather that one requiring specific design. Neither the second engineer nor the expert had expressed concerns regarding the bracing of the dwelling and the agent was of the opinion that the 90mm x 46mm framing spaced at 400mm centres met the requirements of NZS 3604: 1999.

5. The expert's report

5.1 As mentioned in paragraph 1.5, 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 Building Surveyors. The expert inspected the house on 3 August 2011, and furnished a report that was completed on 19 September 2011.

5.2 General

5.2.1 The expert assessed the building work and noted that generally, it appears the dwelling has been constructed in accordance with the council approved plans and specifications.

5.2.2 The expert also noted that some aspects of the dwelling do not reflect the guideline recommendations provided in the product manufacturer's literature, and/or applicable industry trade standards.

5.2.3 The expert was of the view that 'the dwelling has generally been constructed to a good standard, is in good condition, and has been well maintained'.

5.3 The external envelope

5.3.1 The expert noted that both cladding systems 'appear well fixed and aligned', and are installed over a ventilated and draining cavity system. Non-invasive and invasive moisture readings were taken and no evidence of elevated moisture levels or indications of any leaks were found. The expert undertook visual inspections of the interior and external envelope of the building, and noted that '[t]he interior is well finished' and that there is no evidence of exterior moisture ingress.

5.3.2 Commenting specifically on the main roof of the building, the expert observed that '[a]ll barge flashings are well fixed and penetrations appropriately flashed' and that the roof is generally in good condition. The expert further noted that the gutters and roof/gutter overlap are good.

5.3.3 Commenting specifically on the butynol-lined flat roofs of the entrance porch and inglenook feature, the expert noted that the roof over the entrance porch has sufficient fall and that the butynol 'appears to be in overall good condition'. In addition, the outlet pipe is well sealed and the water head has overflow provision.

5.3.4 The expert further noted that parapet wall/cladding junctions rely on silicone sealant only for weathertightness but that these junctions are well protected by a 900mm soffit overhang. (See also applicants' response to draft in paragraph 4.3.3).

5.3.5 With regard to the flue penetrations of the solid fuel heater, the expert observed that no over-flashing has been fitted and no perimeter drip edge has been provided. Further, '[t]he butynol at the corner is peeling off … [t]here is opportunity for wind driven rain to penetrate between the butynol and the aluminium capping'.

5.3.6 With regard to the methods of construction and weathertightness of the external envelope of the building, the expert made the following observations:

- The fibre cement weatherboard cladding:

  … penetrating water originating from any of the three upper windows of the lounge would be allowed to continue behind the flashing and onto the joinery head from where it potentially could enter the dwelling. However, it must be noted, the three subject windows are located close to the underside of a 900mm soffit overhang and thus well protected from extreme conditions.

- The silver anodised aluminium weatherboard feature panels, generally protected by eaves with little joinery:

  … The head flashings are planted onto the front of the cladding and rely on sealant only for weathertightness. …

5.3.7 The expert also observed that the timber decks and the walls of the building have adequate spacing between them to allow water to drain freely.

5.4 Other code requirements

5.4.1 Commenting compliance of the building work with other relevant clauses of the Building Code, the expert noted the following (code clauses shown in brackets):

- The house and garage show no evidence of structural stress or excessive movement. (B1)
- The building is sufficiently elevated that even in an extreme adverse weather event 'conditions allow natural run-off of surface water'. In addition, roof water is collected via externally fitted gutters and downpipes, and a drainage channel has been installed in front and along part of the side of the garage. No evidence of any failure could be found. (E1)
- The bathroom and en-suite are adequately ventilated, and that 'the wall surfaces and spaces containing sanitary fixtures and appliances are impervious and easily cleaned'. (E3)
- 'The tiling carried out by the owner who is a qualified builder is of a high standard', and that invasive and non-invasive testing gave no indication of water proofing failure. (E3)
- Markings on the glass doors of both showers indicate that the doors comply with NZS 4223: Part 3: 1999. (F2)
- Smoke alarms have been installed within three metres of all bedroom entrance doorways. (F7)
- All hygiene facilities are conveniently located and are in good working order. (G1)
- The laundry is appropriately located and meets the functional and performance requirements of the Building Code. (G2)
- The kitchen area meets the functional requirements of the Building Code. (G3)
- The ventilation of the building meets the requirements of the Building Code. (G4)
- Water supply to the building is good. (G12)
- Foul water from the building is conveyed to a septic tank and irrigation system, which was last serviced in May 2011. The expert stated that 'there is no evidence of surface saturation or foul-water odours. It would appear the system as installed is performing satisfactorily and under normal circumstances and regular service, as intended, will likely continue to perform satisfactorily'. (G13)

5.4.2 In regards to Clause F4 Safety from Falling; the expert noted that part of the timber deck on the south elevation of the building exceeds one metre in height and does not have a barrier along its outer edge.

5.4.3 Regarding Clause H1 Energy Efficiency; the expert was unable to observe insulation in the roof of the building due to lack of crawl space. The expert did, however, note that the building passed a pre-line inspection in August 2004, and that according to the inspection sheet, all insulation had been installed. In addition, the expert

commented that '[t]he insulation would have met the R rating requirements applicable at the time'.

5.5 A copy of the expert's report was provided to the parties on 20 September 2011.

Matter 1: The external envelope

6. Weathertightness

6.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regard to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

6.2 Weathertightness risk

6.2.1 The house has the following environmental and design features which influence its weathertightness risk profile:

Increasing risk

- the envelope complexity is moderately complex with multiple cladding types
- the building is sited in a specific design wind zone
- there are two parapets abutting the butynol-lined roof above the entrance to the building

Decreasing risk

- there are eaves of over 600mm providing shelter to most of the cladding
- the building is single storey
- the deck is free standing and at ground floor level
- the majority of the roof-to-wall junctions are conventional design and protected by wide eaves
- the claddings are fixed onto a 20mm draining and ventilating cavity system.

6.2.2 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 6.2.1 show the house has a low to medium weathertightness risk rating.

6.3 Weathertightness performance

6.3.1 Taking into account the expert's report, although the claddings on the building generally appear to have been installed in accordance with good trade practice I conclude that remedial work is necessary to the areas outlined in paragraph 5.3.5.

6.4 Weathertightness conclusion

6.4.1 I consider the expert's report establishes that the current performance of the external envelope of the building is adequate because it is preventing water penetration through the cladding. Consequently I am satisfied that the external envelope complies with Clause E2 of the Building Code.

6.4.2 However, the external envelope of the building is 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 claddings of the building are likely to allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.

6.4.3 The faults identified in the external envelope are minor and discrete in nature and have not led to a systemic failure of the cladding of the building. I am therefore of the view that satisfactory rectification of the items outlined in paragraph 5.3.5 will result in the external envelope being brought into compliance with Clause B2.

6.4.4 I emphasise that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular flashing (in this case the head flashing which is affixed to the fibre-cement weatherboards over the building wrap, and the 'stick on' lead flashing to the aluminium weatherboard cladding) has been established as being code-compliant in relation to this particular building does not mean that the same system will be code-compliant in another situation.

6.4.5 Effective maintenance of flashings and claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements (for example, Determination 2007/60).

Matter 2: The remaining code clauses

7. Discussion

7.1 The authority has expressed doubts regarding the foundations and some of the piling; based on the lack of inspections and some concerns raised by the second engineer as to the "likely" founding of the foundations and the lack of a full PS4 certificate.

7.2 I note that both the second engineer's report and the "Partial" PS4 that he has issued have verified that there is no evidence of failure over the seven years that the building has been constructed. The applicant's own investigations indicate to some extent that the foundations are at the required depth. Likewise, there are no concerns raised by the second engineer about the piling adjacent to the sloping areas.

7.3 I also accept the applicants' agent's submissions as to the bracing of the building; again noting that there is no evidence of distortion nor have any concerns been raised by either the expert or the second engineers in respect of the bracing requirements.

7.4 Taking these observations into account and based on the information provided to the determination I consider there are reasonable grounds to conclude that the building complies with Clause B1 as regards the foundations, piling, and bracing.

7.5 The expert has noted that part of the deck on the south elevation of the building does not have a barrier along its outer edge, despite the deck being more than one metre above ground level (see paragraph 5.4.2). I therefore conclude that the building work does not comply with Clause F4 Safety from Falling of the Building Code.

7.6 I consider that the expert's report and the other evidence supplied to the determination provide me with reasonable grounds to conclude that the building work complies with the remaining relevant clauses of the Building Code.

Matter 3: The durability considerations

8. Discussion

8.1 The authority has concerns regarding the durability, and hence the compliance with the Building Code, of certain elements of the building work, taking into consideration the age of the building work completed in 2004.

8.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") from the time of issue of the applicable code compliance certificate (Clause B2.3.1).

8.3 In previous determinations (for example Determination 2006/85) I have taken the view that a modification of this requirement can be granted if I can be satisfied that the building complied with the durability requirements at a date earlier than the date of issue of the code compliance certificate, that is agreed to by the parties and that, if there are matters that are required to be fixed, they are discrete in nature.

8.4 Clause B2.3.1 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") from the time of issue of the applicable code compliance certificate. These durability periods are:

- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
- 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
- the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.

8.5 In this case the delay between the completion of the building work in 2004 and the applicant's request for a code compliance certificate in 2011 has raised concerns that various elements of the buildings are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date. However, I have not been provided with any evidence that elements did not comply with Clause B2 at the date of substantial completion.

8.6 In response to the draft determination, the applicants have noted that in discussions with the authority they suggested October 2005 was an acceptable date for durability compliance. I note that the authority has not nominated any date in its submission

nor has it queried the date proposed by the applicants. Accordingly, I am prepared to accept that October 2005 is the appropriate date and have amended this determination accordingly.

8.7 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.

8.8 I continue to hold that view, and therefore conclude that:

(a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by an owner

(b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if code compliance certificates for the building work had been issued in 2004.

8.9 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

9. The appropriate certificate to be issued

9.1 Having found that the building work can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate for the building consent (No. ABA/2004/0604).

9.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a building consent authority may, on application, issue a certificate of acceptance. In the case of the building work completed under this consent, the owners are seeking a code compliance certificate for the building consent.

9.3 In this situation, where I have reasonable grounds to conclude that the building work can be brought into compliance with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.

10. What is to be done now?

10.1 The authority should issue a notice to fix that requires the owner to bring the building into compliance with the Building Code. The notice should identify the defects listed in paragraphs 5.3.5 and 5.4.2 and refer to any further defects that might be discovered in the course of investigation and rectification. The notice should not specify how those defects are to be fixed and the building brought into compliance

with the Building Code, as that is a matter for the owners to propose and the authority to accept or reject.

10.2 In response to the notice to fix, the owners should produce a detailed proposal describing how the defects are to be remedied. The proposal should be submitted to the authority for approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination. In regards to the provision of appropriate as-built drawings and gas and electrical certificates, I note that the consent was issued under the Building Act 1991 and that the authority must be satisfied as to compliance with the Building Code, as opposed to compliance with the consent if issued under the Act. However I consider that the applicants should provide the authority with the appropriate documentation where it is available.

10.3 Once the matters set out in paragraphs 5.3.5 and 5.4.2 have been rectified to its satisfaction, the authority may issue a code compliance certificate in respect of building consent No. ABA/2004/0604 amended as described in paragraph 8.

11. The decision

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

- the building work does not comply with Clause B2 of the Building Code insofar as it relates to Clause E2
- the building work does not comply with Clause F4 of the Building Code

and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

11.2 I also determine that:

a) all the building elements installed in the building, apart from the items that are to be rectified as described in this determination, complied with Clause B2 as at 31 October 2005.

b) the building consent is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that Clause B2.3.1 applies from 31 October 2005 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in paragraph 5.3.5 of Determination 2011/106.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 December 2011.

John Gardiner
Manager Determinations