



## Determination 2014/010

# Regarding the refusal to issue a code compliance certificate for a 10-year-old house at 111 Pinegrove Road, Darfield

### 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are
- the owners of the house, M Gordon and D Clark (“the applicants”)
  - Selwyn District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the 10-year-old house for the reason that it could not be satisfied on reasonable grounds that the building work complies with requirements of the Building Code (First Schedule, Building Regulations 1992) that was current at the time the building consent was issued. The authority included in its reasons for refusal its concern regarding the period of time that elapsed between the issue of the consent and when the practical completion inspection was carried out.
- 1.4 The matter to be determined<sup>2</sup> is therefore the exercise of the authority’s powers of decision in refusing to issue the code compliance certificate. In making this decision I have considered:

#### **Matter 1: The compliance of the outstanding items**

Whether the outstanding items noted in the authority’s email of 23 August 2013 to the Ministry (refer paragraph 4.5) comply with the relevant clauses of the Building Code that was current at the time the consent was issued. I consider this in paragraph 6.1.

#### **Matter 2: The durability considerations**

Whether the delay between the practical completion of the building work in 2004 and the inspection in 2011 is grounds for refusal. I consider this in paragraph 6.7.

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<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

1.5 In making my decision, I have considered the submissions from the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.

1.6 The legislation referred to in this determination is set out in Appendix A.

## 2. The building work

2.1 The building work consists of a single-storey detached house situated on an open rural site with exposure to very high winds. The house is of a traditional design, approximately 240m<sup>2</sup> in size, constructed on a concrete slab foundation, with brick veneer cladding, a corrugated steel roof and aluminium windows. It has a broad veranda on its northern side, with the veranda roof supported by wooden posts. The house was constructed and largely completed during 2003 and 2004.

## 3. Background

3.1 The authority issued a building consent (No. 031019) for the building work on 13 October 2003 under the Building Act 1991 (“the former Act”). The authority carried out various inspections during construction from November 2003 through to March 2004, at which time there were issues still to be resolved.

3.2 On 22 June 2011 the authority carried out a ‘practical completion’ inspection, which identified the following items to be completed:

(1) Owner to have all Exterior Joinery Head sealed to soffit. (2) Complete CCC Application/Energy Certificate and return to [the authority].

The inspection notice also recorded under ‘notes summary’:

[Note] Final inspection dated 22/12/2004 had Outstanding issues to Rectify (5 items) Those items now completed. Have proceeded to recheck all issues required for a Final Reinspection. ...

The ‘notes summary’ listed some 16 items that had been checked including:

Stormwater discharge @ downpipes... Safty (*sic*) glass placement, Windows @ showers.

3.3 The applicants applied for a code compliance certificate on 15 May 2012.

3.4 On 7 June 2012 the authority carried out a further practical completion inspection. In the notice for this inspection, the authority’s officer noted the supply of an electrical certificate as the one outstanding item ‘yet to be completed’. The authority’s officer also noted that the other outstanding issue from the previous practical completion inspection (the sealing of the exterior joinery heads) was now complete, and that a ‘general inspection [of the] remainder of dwelling [was] also completed’. An issue regarding the decay of the veranda posts, raised by the owner, was also noted.

3.5 The applicants emailed the outstanding electrical certificate to the authority on 26 September 2012 and again, at the authority’s request, on 15 November 2012.

- 3.6 In December 2012, the rotting 100x100mm veranda posts were replaced with 150x150mm H5 treated posts. The completion of this work was confirmed in a letter dated 22 January 2013 from the supplier of the posts.
- 3.7 On 23 January 2013, an officer of the authority visited the applicants' property to carry out the final inspection of the building work; however, a disagreement arose onsite about the extent of the inspection required and the owner wished to have the other owner present. The inspection did not go ahead. Later the same day the applicants requested another inspection appointment but this was refused by the authority.
- 3.8 The authority sent the applicants a letter dated 23 January 2013 in which it refused to issue a code compliance certificate for the building work. The reasons given were that:
- ...[the authority] was not able to confirm if compliance (*sic*) and can not, therefore, be satisfied on reasonable grounds that the building work authorised by building consent 031019 complies with the relevant performance requirements of the New Zealand Building Code in force at the time that building consent was issued/granted.
- In addition, due to the extended period of time which has elapsed between the date on which the building consent was granted, and the later date on which the practical completion inspection was carried out (being over 9 years), [the authority] considers that it is unable to meet its statutory obligation in terms of section 94 of the NZ Building Act 2004.
- 3.9 An application for a determination was received by the Ministry on 17 July 2013.

## 4. The submissions

- 4.1 The applicants provided a covering letter dated 12 July 2013 with the application, which set out the background to the dispute. The applicants noted that they believed there were two issues outstanding; being sealing around the windows, and the verandah posts. In the applicants' view the 'full inspection' that the authority intended to carry out on 23 January 2013 was not required. The applicants noted that on requesting a further inspection they 'were refused another appointment'.
- 4.2 The applicants provided copies of:
- the inspection notices relating to the building work
  - the authority's letter of 23 January 2013 refusing to issue the code compliance certificate
  - the letter from the supplier of the new veranda posts confirming that they had been replaced
  - the gas certificates for the installation of the LPG gas cylinders.
- 4.3 The authority made a submission dated 25 July 2013 in response to the application. The submission provided details of the authority's inspections of the building work, and gave the authority's version of the events on 23 January 2013 and its letter of later that day refusing to issue the code compliance certificate. The submission also stated that:
- [The authority] stands by its decision to refuse to issue the Code Compliance Certificate for Building Consent 031019 because we are not satisfied on

reasonable grounds that the building complies with the New Zealand Building Code current at the date at which the building consent was issued nor the consented plans and specifications.

- 4.4 On 12 August 2013 the Ministry sought clarification from the authority as to what building elements the authority considered to be outstanding in terms of compliance.
- 4.5 The authority responded by email on 23 August 2013, noting that the purpose of its inspection on 23 January was ‘to enable the authority to document the resolution of outstanding issues’ with which it could then be satisfied on compliance. The authority provided a summary of ‘outstanding matters’ as follows:
- Verification of compliance for installation of below ground storm-water disposal system (no BCA inspection carried out) (E1 – Surface Water)
  - Verification of correct nailing pattern on bracing panels as referenced at inspection dated 02/02/04 (B1 – Structure)
  - Verification that LPG gas cylinders are in compliant location as referenced at inspection dated 24/02/04 (G11 – Gas as an energy source)
  - Verification that correct grade of glass installed in shower as referenced at inspection dated 22/12/04 (F2 – Hazardous materials)
  - Verification that tiling is complete as referenced at inspection dated 22/12/04 (E3 – Internal moisture)
  - Verification that the remediated verandah posts have been installed (ie. correct stress grade, timber treatment level and structural fixings) (B1 – Structure and B2 Durability)
- 4.6 The authority explained that, because more than 5 years had elapsed since the date of issue of the building consent, it was the authority’s standard practice to carry out a ‘desk top review’ of the file. In the current case, this review had identified ‘anomalies with the inspection records’, which meant that the items listed above were outstanding. The purpose of the site visit of 23 January 2013 was to check the compliance of these identified items.
- 4.7 The applicants responded by email on 23 August 2013, noting that the issue of the verandah posts had not been raised by the authority during construction inspections and that it was the applicants who had noticed slight decaying in 2012 and contacted the suppliers to have the posts replaced. The applicants attached a copy of a building inspection notice dated 22 June 2011 (refer paragraph 3.2) and stated that the outstanding issues were ‘rechecked and passed’ that day.
- 4.8 Given that the items identified by the authority (see paragraph 4.5 above) were largely issues where the authority was unable to form a view on compliance, as opposed to them being non-compliant, the Ministry emailed the parties on 25 September 2013 to request that the parties arrange a final inspection in order for the authority to form its view on compliance of those items. The Ministry also sought clarification from the authority as regards those items identified by the authority that had appeared to have been inspected in 22 June 2011 and passed.
- 4.9 The authority responded by email on 27 September 2013, noting that the building inspector who carried out the inspection on 22 June 2011 ‘could not recall whether his comments were (*sic*) a record of compliance or non-compliance’, and that the authority had decided to view those elements ‘to confirm the level of compliance’.

4.10 In regards to the Ministry's request that an inspection be carried out, the authority submitted that:

... the matter for determination is solely in relation to whether the authority correctly exercised its powers of decision when it refused the code compliance certificate ... because it was "not satisfied on reasonable grounds" that the work complied with the building consent and certain clauses of the ... Building Code.

The [authority] refused to issue the [code compliance certificate] for BC 031019 in accordance with Section 95A of the Building Act 2004. Therefore, we consider that BC 031019 is no longer "operative" and the BCA does not have authority to access the dwelling for the purpose of the carrying out an inspection in relation to that consent.

4.11 In response to a request from the Ministry, the authority also supplied copies of

- the building consent and its associated specifications and drawings
- the project information memorandum
- various producer statements
- an electrical certificate of completion for the building work, dated 7 August 2012.

4.12 A draft determination was issued to the parties for comment on 12 December 2013.

4.13 The applicants accepted the draft without further comment in a response received on 6 January 2014.

4.14 The authority did not accept the draft determination and provided a submission dated 14 January 2014 that commented on both the draft and the expert's report. The authority submitted (in summary):

#### **The expert's report**

- 'The installed bracing system ... is a proprietary system [manufacturer's name] that must be installed strictly in accordance with the manufacturer's installation instructions in order to meet its in service durability requirement of 50 years.' The authority considered the manufacturer should be a party to the determination.

(I note here that section 176 of the Act sets out the meaning of 'party' for the purposes of a determination; the manufacturer in this case would not be a party.)

- The expert has commented on the fact that the building is 10 years old and has been subject to earthquakes with no evidence of failure evident, but did not comment on whether the building has undergone earthquake repair work prior to his inspection, and if so the extent of those repairs.
- There is no qualification by calculation or other documentation for the expert's view that the construction details of the replaced verandah posts are a compliant alternative solution. The expert has also not commented that the building is in an area subject to 'snow loading of 0.99kPa'. From the photographs in the expert's report, the authority noted:
  - the excessive check-in of the verandah post at the beam connection

- possible incorrect bolt type and size, and incorrect washer.

### **The draft determination**

- The determination should not consider whether the work was compliant but only whether the authority was correct in its decision to refuse to issue the code compliance certificate ‘because it was denied the ability to carry out an inspection to verify compliance with the building code’.
- The extracts from documentation supplied by the authority in response to the determination process has been reproduced out of context or paraphrased in a manner that diminishes the intended meaning.
- The authority understands the Ministry’s view that a consent remains operative until the code compliance certificate is issued and that the authority’s refusal to issue the code compliance certificate does not render the consent inoperative; with this in mind, what is the purpose of section 95A of the Act?
- The authority’s interpretation of section 166(1) is that a notice to fix can be issued outside the time in which the consent is operative as long as the notice pertains to the building work carried out whilst the consent was operative, such as the premature failure of a building element due to decay.

## **5. The expert’s reports**

### **5.1 The original report**

- 5.1.1 As mentioned in paragraph 1.5, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert inspected the house on 16 October 2013, providing a report completed on 28 October 2013. The parties were provided with a copy of the report on 4 November 2013.
- 5.1.2 The expert described the workmanship on the house to be ‘of a good standard’ and confirmed that there had been no obvious departure from the consented plans. He checked the code compliance of all of the matters identified by the authority as requiring verification (refer paragraph 4.5), and confirmed that the glazing to shower and windows, the surface water disposal system, the completed tiling to wet areas, and the replacement veranda posts were compliant.
- 5.1.3 The expert checked the nailing pattern to two randomly-selected bracing panels: the fixings were observed to be at 150mm centres. The expert observed that the bracing calculations in the consent documents indicate that the bracing as installed exceeded the requirements of the Building Code. No earthquake or wind damage was noted.
- 5.1.4 With respect to the LPG gas cylinders, the expert confirmed that these were in a compliant location in relation to any opening windows. However, he noted that although the applicants had supplied copies of the gas certificates for this work, there was no record of these certificates or the gas fitter who completed the work in the records of the Plumbers, Gasfitters and Drainage Board.

(I note that the gas certificate was signed by a person who was approved as a certifying gasfitter by the Plumbers, Gasfitters, and Drainlayers Board<sup>3</sup> at the time the certificate was produced in 2004.)

## 5.2 The addendum report

- 5.2.1 In response to the authority's submission dated 14 January 2014, the expert was asked to revisit the property to review the fixing of the verandah posts and to determine what earthquake repairs had been undertaken. The findings from the expert's visit were provided to the parties in an addendum report sent to the parties on 29 January 2014. In a separate email to the Ministry, also dated 29 January, the expert advised that no damage had been observed to the brick veneer cladding.
- 5.2.2 The expert spoke to the person who had installed the verandah posts and confirmed the posts were 150x150mm, H5 treated. The posts have been fixed with small galvanised steel 'L' brackets and coach screws to the underside of the verandah beam. The expert recommended that a proprietary surface-mounted bracket be installed to each post and beam connection, and that appropriately-sized washers be fitted to the bolts to the existing fixing bracket to the base of the posts.
- 5.2.3 The applicants advised the expert that the only earthquake damage to the linings was hairline cracks above doors and windows. No lining fixings had 'popped'.
- 5.2.4 The authority responded to the expert's addendum report in a letter dated 31 January 2014. The authority said:
- '... the structural support to the verandah is insufficient ...' to meet the Building Code, and '... the building had sustained earthquake damage and underwent un-qualified repair strategy ...'
  - the outcome of the determination 'should be changed in favour of the [authority] ...and that the authority correctly exercised its powers when it refused to issue the CCC on 23 January 2013.'

## 6. Discussion

### 6.1 The compliance of the outstanding items

- 6.1.1 I accept the expert's findings that, with the exception of the fixings to the verandah posts, all of the matters identified by the authority as requiring verification are code-compliant. Two of these items (surface water and safety glass) were also noted as being compliant in the authority's inspection dated 22 June 2011.
- 6.1.2 I do not accept the authority's position that the plaster linings 'must be installed strictly in accordance with the manufacturer's installation instructions' in order to satisfy the requirements of the Building Code.
- 6.1.3 The bracing schedule (and plan) for the building shows the required and proposed bracing units. The building has a regular plan with an even provision and distribution of wall bracing elements. The total bracing units achieved for earthquake and wind loading are 53% to 116% in excess of what is required for compliance. The expert verified the fixings pattern to two randomly-selected bracing

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<sup>3</sup> Refer Public Register of certifying gasfitters at: [www2.pgdb.co.nz/PGDB/PublicRegister.aspxregister](http://www2.pgdb.co.nz/PGDB/PublicRegister.aspxregister)

panels, which he found to be satisfactory. The expert has found that the building has not suffered any ill-effects from recent earthquake events, and that damage that had occurred was cosmetic. The brick veneer has not suffered any apparent damage.

- 6.1.4 I do not accept the authority's position that the earthquake repair work was sufficiently significant to bring into doubt the building's compliance with Clause B1.
- 6.1.5 The new 150x150mm H5 treated verandah posts are a replacement of the original 100x100mm posts.
- 6.1.6 While the replacement posts are more than twice the cross-sectional area and will be substantially stronger than the original posts, I accept that the fixings to the verandah posts may not be compliant; however, I have insufficient information on which to form a view on compliance. While the fixings as installed are not solutions taken from the Compliance Documents that of itself does not mean the fixings are non-compliant.
- 6.1.7 The authority has questioned the compliance of the work with respect to a 0.99kPa snow load. Wind uplift is the determinate loading on the verandah posts: the live (downward) load from snow will have been taken account of in the sizing of the verandah beams detailed in the approved consent. I note that NZS 3604:2011 requires no specific provision for snow loads less than 1kPa.

## 6.2 The status of the building consent

- 6.2.1 The authority has stated that it considers the building consent is no longer 'operative', because the authority has refused to issue a code compliance certificate for it, and that as a result the authority is not legally able to carry out a further inspection in relation to that consent.
- 6.2.2 I have previously considered this issue in Determination 2013/63 to which this authority was a party, and found that this approach is incorrect. I continue to hold this opinion. As stated in 2013/63<sup>4</sup>:
- 8.3 There is no basis for suggesting, as the authority has done, that a refusal to issue a code compliance certificate brings a building consent to an end. This would result in the untenable situation that an owner would have to apply for a new building consent every time the authority refuses to issue a code compliance certificate, and would require an owner to apply for a building consent just to carry out the final work required to obtain a code compliance certificate.
- 8.4 If the authority's position was accepted it would also make it unclear on what basis a notice to fix could be issued following a refusal to issue a code compliance certificate, as section 166(1) provides that a notice to fix can only be issued while a building consent is operative.
- 6.2.3 I have also set out in previous determinations, including Determination 2013/63, the circumstances in which a building consent ceases to have effect; the decision of the authority to refuse to issue a code compliance certificate is not among them.
- 6.2.4 Essentially, a building consent will remain in force and 'operative' until such time as it ceases in accordance with the provisions of the Act. There are a number of ways in which this can happen including:

<sup>4</sup> Determination 2013/063: Regarding the refusal to issue a code compliance certificate for a 12-year-old house with stone veneer cladding at 79 Genesis Drive, West Melton

- the building consent lapses in accordance with section 52 if the building work to which it relates does not commence within 12 months after the date of the issue of the consent
- the building consent is amended or replaced by a subsequent building consent that covers all of the work in the building consent
- a code compliance certificate is issued in respect of the building work carried out under the building consent
- a determination reverses the decision of an authority to issue the building consent.

### **6.3 The purpose of section 95A**

6.3.1 The authority has questioned the purpose of section 95A. If an owner requests a code compliance certificate and it is refused then an authority is obliged to follow the provisions of section 95A, which in the normal course of events is likely to follow a detailed inspection of the building work concerned. Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:

... must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

6.3.2 The requirement that an authority provide reasons in writing for refusing to issue a code compliance certificate provides an owner with notice of the work required in order to obtain a code compliance certificate: the issue of the section 95A notice does not render the building consent inoperative. The reasons provided by the authority will concern the areas of the building work where the authority does not believe the building work complies with the building consent (or the Building Code if the consent was issued under the former Act). The notice provides an owner with the opportunity to consider the work required to remedy the situation.

6.3.3 While an authority must be satisfied on reasonable grounds that the building work complies with the Building Code that was current at the time the consent was issued before issuing a code compliance certificate, the reasons under section 95A are simply the reasons for the refusal, and do not have to satisfy any particular evidential threshold in terms of failure to meet the requirements of the Act or Building Code.

6.3.4 The notice containing the reasons will be placed on the property file and will be disclosed in any LIM. This will serve to ensure that the authority's position with respect to compliance and the lack of a code compliance certificate will be apparent to any prospective purchaser.

### **6.4 The authority's exercise of powers**

6.4.1 The application for determination was in respect of the authority's refusal to issue the code compliance certificate.

6.4.2 The authority has submitted that the determination should only consider 'whether the [authority] was correct in its decision to refuse to issue the Code Compliance Certificate because it was denied the ability to carry out an inspection to verify compliance' on 23 January 2013. The authority's letter arising from the attempted

inspection said the work was unable to be inspected, and it was therefore unable to confirm compliance (refer paragraphs 4.14 and 3.8). There could be circumstances when it is appropriate for an authority to refuse a code compliance certificate because it is unable to carry out the necessary inspections of the building work. However, that does not appear to be the case here. While the authority had initially been denied access to the building it appears there was some misunderstanding between the applicants and the authority about the nature and scope of the inspection the authority proposed to undertake. This appears to have been resolved shortly afterwards as the applicants invited the authority to undertake a further inspection but the authority declined. In the face of this invitation to carry out an inspection the authority can hardly maintain its position that it has been denied access to the building and was required to refuse the code compliance certificate.

- 6.4.3 Further, in an email to the authority the Ministry suggested that an inspection be undertaken to enable the authority to clarify its view of the outstanding non-compliant items. The authority responded saying the consent was no longer operative and it was therefore unable to undertake further inspections (refer paragraphs 4.8 and 4.10).
- 6.4.4 For the reasons set out herein it is my view that the consent was operative and the authority was able to undertake another inspection. The reasons set out in its letter dated 23 January 2013 for refusing the code compliance certificate do not satisfy section 95A, as the reasons given are based on its inability to inspect the work, rather than identifying matters that were not compliant.
- 6.4.5 While I have found that the authority was correct to refuse to issue the code compliance certificate because there is insufficient evidence to show that the work complies with the Building Code, I do not consider the authority was correct in its exercise of powers in refusing to issue the code compliance certificate for the reasons provided.

## **6.5 The authority's inspection process**

- 6.5.1 The authority advises that a review of the job file had identified 'anomalies with the inspection records' which required the items to be rechecked, and this was standard practice for work where more than 5 years had elapsed since issue of the consent. The authority also advises that it could not tell from the record of the inspection carried out on 22 June 2011 whether the work inspected was compliant or not.
- 6.5.2 I do not consider this acceptable, or a reasonable interpretation of the 22 June 2011 inspection: the inspection record makes a clear distinction between work that has been passed as compliant and work that has not. Inspection records must provide a clear and accurate record of the status of completed work.
- 6.5.3 The authority contends that in this case it is required to assess whether the work complies with the Building Code and the building consent (my emphasis). In respect of a consent issued under the former Act, the transitional provisions of section 436 require the authority only to assess whether the work complies with the Building Code that was in force at the time the consent was issued; it is not also required to assess whether the work complies with the requirements of the approved consent.

## 6.6 Notices to fix

- 6.6.1 The authority contends that under the provisions of section 166(1) a notice to fix can be issued outside the time for which the consent is operative, so long as the notice is in respect of work carried out while the consent was operative such as the premature failure of a building element due to decay. In my view this interpretation is incorrect.
- 6.6.2 Section 166(1) applies to building work where the relevant authority considers that the building work has not been, or is not being, carried out in accordance with the Act or the building consent. Under section 166(1)(a) a notice to fix will only apply to 'to building work required during the period in which a building consent is operative'. Once a code compliance certificate is issued then a building consent is no longer in effect, and a notice to fix cannot be issued in respect of the consented work.
- 6.6.3 As discussed in previous determinations<sup>5</sup>, once a code compliance certificate has been issued for building work an authority is unable to take any regulatory action in respect of that work unless:
- the building is dangerous, earthquake-prone, or insanitary in terms of section 124; or
  - the owner decides to alter the building, change its use, or change its intended life in terms of section 114(2); or
  - the decision to issue the code compliance certificate is reversed by Determination.
- 6.6.4 In regards to a building continuing to satisfy Clause B2: an authority issues a code compliance certificate on the reasonable expectation that the durability periods provided for in Clause B2.3.1 will be achieved with normal maintenance. The undertaking of normal maintenance is the responsibility of the owner and not the authority.

## 6.7 The durability considerations

- 6.7.1 I note that in its letter of 23 January 2013 refusing to issue a code compliance certificate the authority gave as one of its reasons 'the extended period of time' that had elapsed between when the building consent was granted and the practical completion inspection carried out. Although the authority has not subsequently relied on this reason in its submissions, I wish to comment on it here.
- 6.7.2 I have previously canvassed the issue of delay between the issue of a building consent and the request for a final inspection or code compliance certificate in many previous determinations, including determinations involving the authority<sup>6</sup>. The authority is fully aware of its ability to amend the building consent, on application by the owner, so that the durability periods in Clause B2.3.1 (refer Appendix A) commence from when the work was substantially complete, and not from the date when the code compliance certificate is issued.

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<sup>5</sup> For example Determinations 2010/053 and 2013/011

<sup>6</sup> For example, Determination 2012/063

6.7.3 In these circumstances, it is for the parties to agree on the appropriate date for a modification of Clause B2.3.1. The authority can make such a modification itself without the intervention of the Ministry.

## **7. What is to be done now?**

7.1 The applicants should verify the compliance of the fixing of the verandah posts, providing a solution to the authority for its approval if the fixings are found to be non-compliant. The applicants should also apply for a modification of the consent in respect of Clause B2.3.1 as discussed in paragraph 6.7.

7.2 A code compliance certificate can be issued once any required remedial work to the fixing of the verandah posts has been completed, and after modification of the durability periods as described above.

## **8. The decision**

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

- the authority was incorrect in its exercise of powers refusing to issue the code compliance certificate for the reasons provided
- there is insufficient evidence to be satisfied on reasonable grounds that the verandah posts comply with Clause B1 Structure, and according I confirm the authority's decision to refuse to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 February 2014.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A: The relevant legislation

A1 The relevant provisions of the current Act are:

### **94 Matters for consideration by building consent authority in deciding issue of code compliance certificate**

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
  - (a) that the building work complies with the building consent; and
  - (b) that,—
    - (i) in a case where a compliance schedule is required as a result of the building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or
    - (ii) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being altered in, or added to, the building in the course of the building work are capable of performing to the performance standards set out in the building consent.

### **436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
  - (a) remains in force as if this Act had not been passed; but
  - (b) must be read as if—
    - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
    - (ii) section 43(4) were omitted.

A2 The relevant provisions of Clause B2 Durability include:

- B2.3.1 Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:
- (a) the life of the building, being not less than 50 years, if:
    - (i) those building elements (including floors, walls, and fixings) provide structural stability to the building, or
    - (ii) those building elements are difficult to access or replace, or

- (iii) failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building.
- (b) 15 years if:
  - (i) those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or
  - (ii) failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance.
- (c) 5 years if:
  - (i) the building elements (including services, linings, renewable protective coatings, and fixtures) are easy to access and replace, and
  - (ii) failure of those building elements to comply with the building code would be easily detected during normal use of the building