



Determination 2019/024

Regarding the issue of a code compliance certificate for a new house at 13 Miro Place, Whitianga

Summary

This determination concerns the authority's request to reverse its decision to issue a code compliance certificate, on the grounds that the certificate was issued in error because the final inspection had identified that the building work was not compliant.

1. The matter 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, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to this determination are:

- the owners of the new house, F and L Prohuber ("the owners")
- Thames-Coromandel District Council carrying out its duties as a territorial authority or building consent authority ("the authority") and which applied for the determination.

1.3 The determination arises from the authority's decision to issue a code compliance certificate for construction of the owners' house. The authority now wishes to withdraw this certificate, saying it was issued in error and despite building control staff recording that the certificate was not to be issued until various non-compliant items were resolved.

1.4 The matter to be determined² is the authority's exercise of its powers of decision in issuing a code compliance certificate for building work carried out under building consent ABA/2016/713/A.

1.5 In making my decision I have considered the authority's submission and the other evidence in this matter.

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

² Under section 177(1)(b) and 177(2)(d) of the Act.

2. The building work and background

- 2.1 The owners' property is located at the northern end of Whitianga in a high wind zone. The 810m² section slopes to the south at a gradient of about 10° (before construction).
- 2.2 The three bedroom house has a partial lower level comprising a garaging/basement area cut into the slope and sitting on a concrete foundation slab. The main house is on the next level and is partially supported by timber poles embedded in concrete and by steel posts.
- 2.3 The house has timber framing and is clad in fibre cement weatherboards. It has aluminium joinery and long-run metal roofing. Figures 1 and 2 show details from the approved plans³.

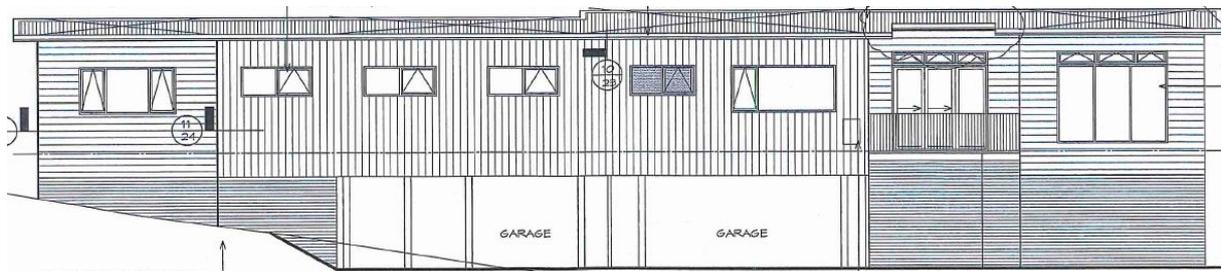


Figure 1: Detail of south elevation

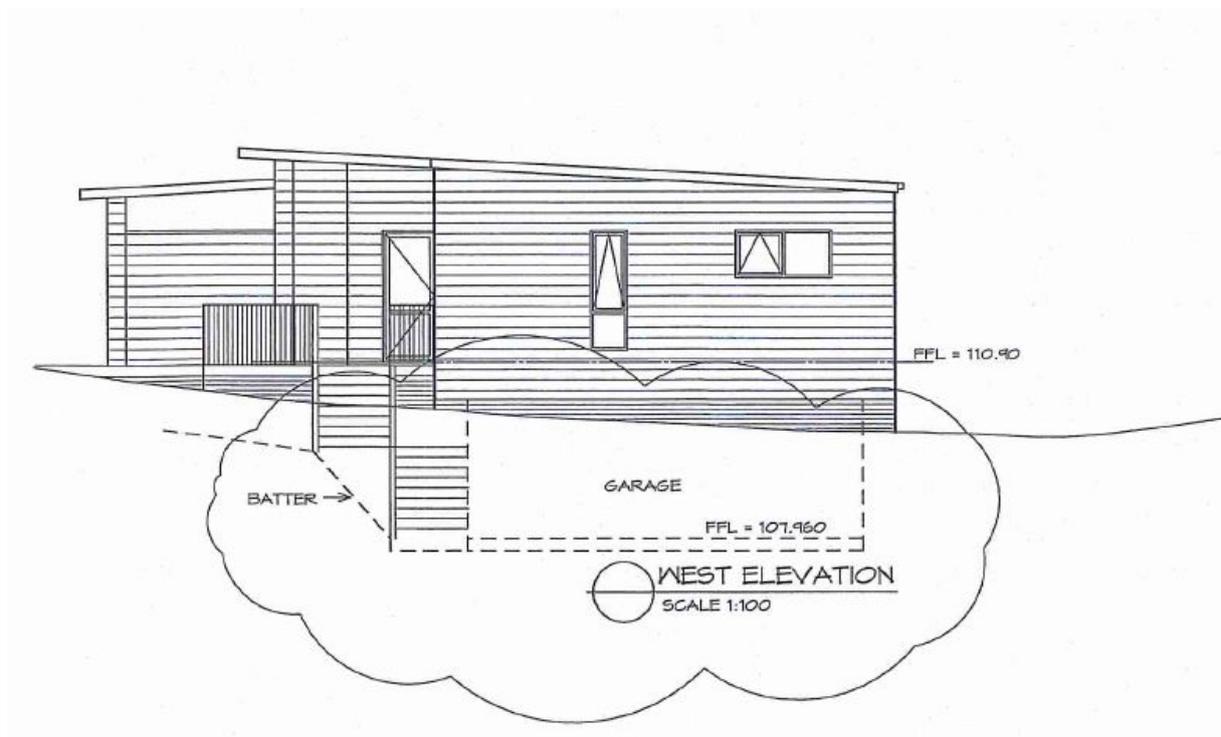


Figure 2: Detail of west elevation

³ Consented plans stamped ABA 20160713A by the authority – details from sheets 5 and 6.

- 2.4 On 26 August 2016 the owners' agent⁴ applied for building consent to construct the house. Documents supporting this application included:
- a producer statement design (PS1) from a chartered professional engineer ("the engineer") plus his calculations and specifications for a timber pole retaining wall and the house's beams, lintels, piles, pole bracing etc
 - a design for stormwater control from another engineer and his site soil test report dated 28 April 2016 for 'foundation soil design parameters for new dwelling'. This report concluded that the house's foundations and any retaining structures required design by a suitably qualified engineer, and also recommended that cut material would not be suitable fill in any areas with concrete foundations.
- 2.5 On 13 December 2016 the original plans and specifications were revised and resubmitted for building consent. Items removed from the plans included:
- the roof covering over the house's south-facing deck
 - the garage doors
 - three internal sliding doors
 - a retaining wall under the house.
- 2.6 The authority issued building consent ABA/2016/713 on 19 December 2016, based on the original plans and specifications, for:
- New 3 Bedroom 2 Level Dwelling with office, Media Room, 2 Bathrooms, Internal Garaging and Covered Deck
- 2.7 The consent includes an inspection schedule and required a chartered professional engineer (CPEng) to observe all site and foundation excavations once completed and before any concrete is poured, and to provide a Producer Statement (PS4) – Construction.
- 2.8 The table below summarises subsequent key events and is based on information supplied by the authority.

Date	Event
2 Feb 2017 ⁵	Authority issues building consent amendment ABA/2016/713/A for the revised plans.
May - Dec 2017	Authority completes various inspections and rechecks. Due to some erosion onsite following heavy rains, the engineer revises pole foundations and sub floor bracing.
Dec 2017	Owners move into the house.
15 Mar 2018	Authority carries out final building and plumbing inspection: this is failed pending receipt of various documents including producer statements.
20 Mar 2018	Owners' agent applies for code compliance certificate.
26 Mar 2018	Authority carries out final inspection recheck. This is failed as 'all paperwork still required'. However, site instruction says 'OK to issue

⁴ The owners appointed different agents at various stages of the process. I have not identified these changes in the determination for simplicity.

⁵ Plans are stamped as approved 24 January 2017

Date	Event
	[code compliance certificate] pending doc supply & approval’.
18 Jun 2018	Authority adopts new online consenting system. All consents including the owners’ consent are migrated to this system.
25 Jun 2018	Authority receives the outstanding documents for the owners’ house, including the engineer’s Producer Statement (PS4) – Construction review for revised pole foundations and bracing.
9 Jul 2018	Owners request uplift of code compliance certificate.
18 Jul 2018	Senior building control officer (BCO) conducts a peer review of the building file; identifies various concerns; block is placed on the authority’s online consenting system stating: DO NOT issue [code compliance certificate] once payment received. Another inspection to be carried out and outstanding items rectified before [code compliance certificate] can be issued.
17 Aug 2018	Senior BCO makes site visit to recheck the final building and plumbing inspection – this inspection is failed. The authority emails the owners with a list of items to be checked or resolved, advising: Final inspection was FAILED because of outstanding items that have been identified relating to [Clause] B1-Structure ⁶ , B2-Durability, E1-Surface water, E2-External moisture and E3-Internal moisture. These may be viewed at time of next inspection.
17 Aug 2018	The same day, the authority’s administration staff mistakenly issues the code compliance certificate.
5 Nov 2018	The Ministry receives the authority’s application for a determination.

2.9 The authority’s letter to the owners on 17 August 2018 advising of the failed inspection contained a lengthy list of outstanding items it said ‘must be addressed to meet the functional and performance requirements of the New Zealand Building Code’. Exterior items included the following (note that I have paraphrased and grouped these under relevant headings):

- **ground preparation, driveway, floor levels** - ground cut surrounding the basement not battered back at 45° as required and banks eroding; retaining walls to be considered to support these banks and prevent silt build-up; basement slab non-compliant and should be at least 225mm from the finished ground level; driveway ground levels ‘non-compliant and must be addressed with stormwater drainage to be considered’
- **bracing and sub floor** – an engineer must be engaged to assess construction of the sub floor, ie packing blocks on top of piles supporting bearers; sub floor bracing to be reassessed as this appears insufficient; engineer must assess sub floor steel beams and supports as not connected to any bracing walls and beams freestanding on top of columns; no suitable connections between the floor joists and the steel universal beam (engineer also to assess this); blocking

⁶ References to clauses in this determination are to clauses of the Building Code and references to sections are to sections of the Building Act, unless otherwise stated.

to be installed over steel beam and bearers at 1.8m centres as required by NZS 3604.2011⁷; engineer also to reassess the non-compliant timber brace in the basement area that is buried in the ground; subfloor insulation to be secured in all areas

- **cladding, junctions, other construction issues** – fascia/barge to wall cladding junctions are poorly formed and do not meet Clause E2; large gaps in cladding around ends of head flashing to be filled, sealed and painted to ensure compliance with Clause E2; external corner timber facings must extend to the bottom of the cladding rather than stop at the deck surface; deck to wall junctions on the southwestern side must be addressed as these are poorly formed and flashed; external stairs on North-eastern side exceed maximum tread gap of 100mm and have been installed against the posts so the base cladding cannot be installed; fascia barge on North-western side is buckled so should be removed and inspected; scribes alongside window jambs to be properly sealed
- **fixings and clamps** – galvanised fixing plates and screws to be type 304⁸ stainless steel and all fixings to be reassessed by the structural engineer; fixings for skylight roof pan flashing appear insufficient; more downpipe clamps needed so these are spaced at 1.8m maximum
- **plumbing and drainage** - overflow pipe from the hot water cylinder must drain to the building exterior, not under the sub floor.

2.10 The authority's list included the following interior items:

- floor tiles laid directly on the ply floor substrate, but should be laid on a tile and slate underlay and waterproofed (and a PS3 producer statement – construction supplied for this waterproofing)
- the top of the shower liner to wall junction to be sealed, and leaking junction between wall/shower liner and tray to be addressed.

2.11 The authority also identified a number of items that it said were not compliance issues but related to poor workmanship, and that these were simply being brought to the attention of the owners.

3. Submissions

3.1 With its application for a determination the authority provided a submission and summary of events dated 20 October 2018. It also provided copies of the:

- building consent application forms, building consent ABA/2016/713 issued 19 December 2016 and the amended consent ABA/2016/713/A issued 2 February 2017
- consented plans and specifications (original and amended), supporting documents and the certificate of title
- code compliance certificate application for ABA/2016/713/A dated 20 March 2018 and the code compliance certificate issued 17 August 2018 (marked by hand as 'Issued in error')
- inspection reports, site instruction notices and associated photographs

⁷ New Zealand Standard NZS 3604:2011 Timber-framed buildings

⁸ A specified grade of stainless steel

- correspondence and other relevant documentation including letters and producer statements from the engineer in response to requests for further information.
- 3.2 The authority said it was not satisfied on reasonable grounds that the completed building work complied with the building consent. It confirmed that the code compliance certificate should not have been issued and said all relevant parties had been informed of this.
- Officers are currently working through rectification of outstanding issues with the previous agent, the owners and their engineer.
- Once the building work is completed in accordance with the building consent, a code compliance certificate will be issued.
- 3.3 The authority said it sought the determination to rescind the code compliance certificate as it did not have the power to do so. It said a number of factors had led to the certificate's 'premature' issue:
- a BCO passing the final inspection relying on documentation received from the engineer on 25 June 2018
 - this decision being overridden by a senior BCO following a peer review, and a block being placed on the consent (disabling the ability to issue a certificate until outstanding items were rectified and inspected), but
 - administration staff failing to identify the block on the new online consenting system and issuing the certificate.
- 3.4 The authority said there had been various implementation issues with its new consenting system, especially relating to 'migrated consents' such as this one.
- 3.5 No submission was received from the owners in response to the application for determination.
- 3.6 A draft of this determination was issued to the parties for comment on 22 March 2019.
- 3.7 In a response received on 27 March 2019, the authority accepted the draft without further comment.
- 3.8 On 5 June 2019 the owner advised they were working towards resolution of outstanding issues, but made no comment on the draft determination.

4. Discussion

4.1 Withdrawal of a code compliance certificate

- 4.1.1 As stated in the High Court decision of *Suaniu v Hi-Qual Builders Ltd*⁹, the only way an authority can seek to withdraw a code compliance certificate is by applying for a determination regarding its decision to issue the certificate under section 177 of the Act.
- 4.1.2 This approach has been applied in previous determinations¹⁰. As there have been no changes to the Act or common law regarding this issue, it is my view that the decisions reached in these determinations apply equally to the present case.

⁹ Obiter dicta in *Suaniu v Hi-Qual Buildings Ltd*, HC Auckland CIV-2008-404-1576, 26 June 2008.

¹⁰ For example, Determination 2018/049 Regarding the issue of a code compliance certificate for three buildings (3 October 2018) and Determination 2016/054 The decision to issue a code compliance certificate in respect of earthquake repairs to a house (7 November 2016).

I consider that once a final administrative decision in the exercise of a statutory power has been made and communicated to the people to whom it relates it is irrevocable, and there is no provision in the Act permitting the authority to rescind the code compliance certificate.

4.2 The owners' building work

- 4.2.1 The building work covered by the building consent – ie construction of the new house – passed its final inspection once the relevant documents were received (on 25 June 2018) but then failed on a recheck (on 17 August 2018). On that date the authority identified a number of items it said were not code-compliant; although only specifying in a few cases the particular clause of the Building Code it considered the item did not comply with.
- 4.2.2 As far as I am aware, the parties do not dispute these conclusions. The authority has also advised that it is working through the outstanding items with the owners, their former agent and the engineer.
- 4.2.3 In this case, the pertinent date is 17 August 2018 which is when the authority re-inspected the owners' house, came up with a long list of concerns, and failed the final inspection on the grounds of non-compliance with various Building Code requirements.
- 4.2.4 The authority has subsequently confirmed it was not satisfied on reasonable grounds that the completed building work complied with the building consent, and has also acknowledged that issuing the code compliance certificate was due to an administrative error.
- 4.2.5 I have considered all the information provided to me including the consented plans and specifications, and a series of photographs taken by the authority's inspector onsite on 17 August 2018 highlighting various areas of non-compliance. While I have not verified each individual item on the authority's list, in my view there is sufficient evidence to conclude the completed building work did not comply with the consented plans and specifications when the code compliance certificate was issued. I also consider that, where this building work departed from the consent, there are areas where compliance was either not achieved, or was not adequately demonstrated, with the relevant requirements of the Building Code.
- 4.2.6 I agree with the authority that it did not have reasonable grounds to be satisfied that the building work had been completed in accordance with the building consent or that compliance with the Building Code had been achieved, and that therefore a code compliance certificate should not have been issued. Accordingly, I consider that it did not exercise its powers correctly under section 94(1) in issuing the code compliance certificate and this determination reverses that decision.
- 4.2.7 I note that the authority has already engaged with the owners and others involved to resolve the outstanding items. Once the authority is satisfied that the completed building work has been brought into compliance it can issue a new code compliance certificate.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority did not correctly exercise its powers of decision in issuing the code compliance certificate for building work carried out under building consent ABA/2016/713/A, and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 June 2019.

Katie Gordon
Manager Determinations