

Final Determination

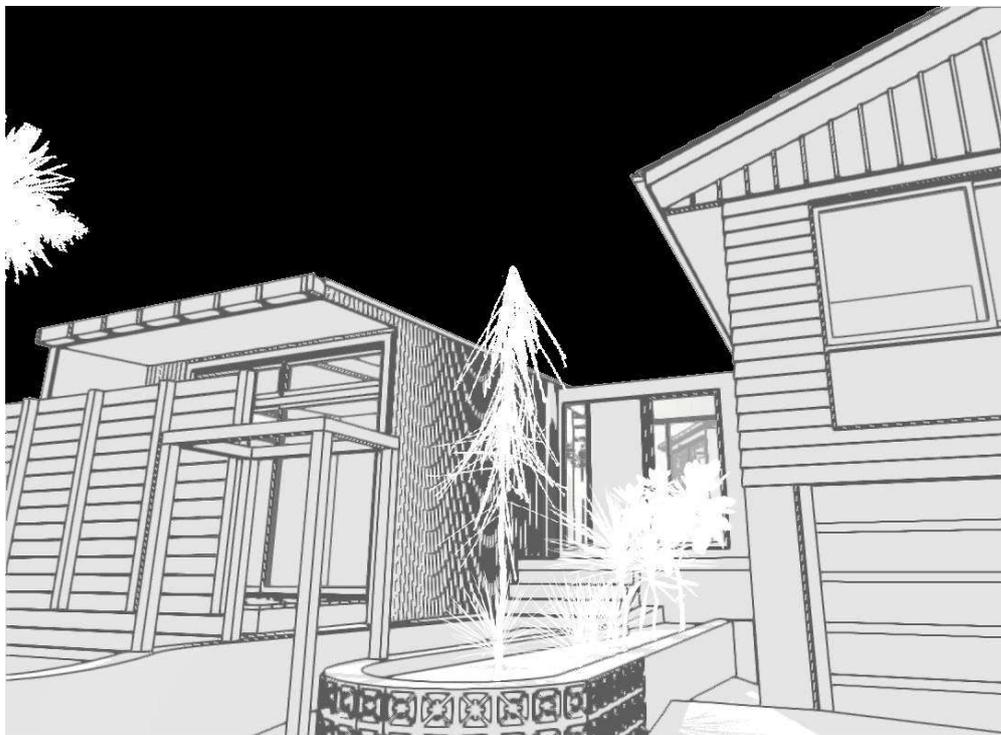
Date: 5 April 2022

Regarding the authority's refusal to grant an extension of time in which to issue a code compliance certificate

27 Nandana Drive, Glen Eden, Auckland

Summary

This determination considers whether the authority was correct in its decision to refuse to grant an extension of time to issue a code compliance certificate for alterations and additions to an existing dwelling. The determination discusses the process of considering an extension of the timeframe in which an authority must decide whether to issue a code compliance certificate under section 93 of the Building Act 2004.



In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. The owner of the house, K Fenning (“the owner”) who was also the licensed building practitioner for the design aspects of the building work.
 - 1.2.2. Auckland 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 grant an extension of time to issue a code compliance certificate (“CCC”) for additions and alterations to an existing dwelling.²
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(c), is therefore whether the authority was correct in its decision to refuse to grant an extension to the timeframe in which it must decide whether to issue a code compliance certificate.

Matters outside this determination

- 1.5. I have not considered the fees and charges issued by the authority. While fees and charges were raised by the owner in conjunction with the application for determination, it is not a matter on which I am able to make a determination³.
- 1.6. I have not considered the authority’s decision to grant the building consent (authority reference number BCN10287180).

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² When I use the term ‘extension of time’ in this determination I am referring to a ‘further period that may be agreed between the owner and the building consent authority concerned’, as per section 93(2)(b)(ii).

³ The matters on which a determination can be made are those outlined in section 177.

- 1.7. At the request of the owner, I have not considered the authority's refusal to issue the CCC.
- 1.8. I have not considered any other aspects of the Act or the Building Code, nor have I considered the Building Code compliance of the proposed building work.

2. Background

- 2.1. The authority issued building consent BCO10287180 on 25 June 2019 for additions and alterations to the owner's property. The building work includes:
 - 2.1.1. An extension to the existing dwelling, specifically to the bedroom, bathroom and lounge.
 - 2.1.2. Minor alterations such as installing new bay windows and increasing an external door opening.
 - 2.1.3. Relocating various rooms of the dwelling – the dining room, lounge and kitchen to the north side of the dwelling, and two bedrooms and a study to the south side of the dwelling.
- 2.2. The authority and the owner have both confirmed the building work has started.
- 2.3. Some inspections have been completed, however the authority noted that none have been booked since 24 February 2021. In an email dated 7 December 2021, the owner implied there were only "civil" works outstanding, from which I infer that the only outstanding inspections relate to this work.
- 2.4. On 25 May 2021, the authority sent a letter to the owner, reminding them that they need to apply for a code compliance certificate. The letter stated that as per section 93 of the Act,⁴ a decision to issue a CCC either needs to be made within two years or "extended by way of an approved extension of time". The authority gave the owner five options⁵ (in summary):
 - 2.4.1. **Option 1:** If the building work is incomplete or unfinished, let the authority know so it can meet its statutory obligations under section 93 of the Act. It notes that if the CCC is refused, the authority will reconcile fees on this account.
 - 2.4.2. **Option 2:** If the building work is complete however an inspection has not been carried out, to book an inspection online on the authority's website.

⁴ Section 93 of the Act outlines the time in which a building consent authority must decide whether to issue a CCC.

⁵ I note that none of the options included an agreement between the parties for a further period of time, that was available under section 93(2)(b)(ii).

- 2.4.3. **Option 3:** If the building work is complete and a final inspection has been approved, to apply for a CCC online.
- 2.4.4. **Option 4:** If the building work is complete but the final inspection was not approved, first complete the remedial work. Then, book a final inspection within 10 days of the date of this letter.
- 2.4.5. **Option 5:** If most of the building work is complete but the owner is not proceeding with the remaining building work, let the authority know so it can amend the building consent application and delete the work that has not been completed. Once the building consent has been amended, apply for a CCC.
- 2.5. On 8 July 2021, the owner emailed the authority to apply for “an extension of time for this consent”. There is no record that confirms the authority responded directly to this enquiry, despite the owner asking the authority how to proceed.
- 2.6. The authority also sent a letter of refusal to issue a code compliance certificate on 12 August 2021. The letter stated that the reason for the decision was that the authority was “unable to inspect the completed building work and/or finalise the building consent application and as such unable to be satisfied on reasonable grounds that the building work will comply with consented plans”⁶.
- 2.7. On 2 December 2021, the authority responded to the owner’s queries. The authority stated:
- As the building work has started and inspections held, we cannot offer an extension of time. The law states that council must make a decision to issue or refuse to issue CCC on the 2-year anniversary of when your consent was issued.⁷
- Until you have fully completed the work in accordance with the building consent, council cannot issue CCC, and therefore a decision will be made to ‘Refuse to Issue CCC’ in accordance with [section 93] which all councils must abide by.
- 2.8. The Ministry received an application for a determination on 8 December 2021.

3. Submissions

The owner

- 3.1. The owner holds the view (in summary):

⁶ The owner sent a further email to the authority shortly after receiving the letter of refusal noting that the owner wished to apply for an extension of time for the building consent.

⁷ I note this interpretation is incorrect, as section 93(2)(b)(ii) states that a further period may be agreed between the owner and the building consent authority.

- 3.1.1. that they requested an extension of time prior to receiving the refusal to issue a code compliance certificate. The owner received no correspondence surrounding an extension prior to the refusal of the CCC.
- 3.1.2. that it is reasonable for the authority to issue an extension for an additional year as that is comparable to the time lost in delays.
- 3.2. The owner also stated (in summary):
 - 3.2.1. Covid alert levels and restrictions have been the main cause of the delay. They responded to the authority's submission by outlining the timeline for COVID-19 lockdowns and restrictions, both countrywide and in Auckland.
 - 3.2.2. There have been limitations on builders and consultants making scheduling and timing 'very hard'. This resulted in two months with no work being completed.
 - 3.2.3. There have been effects on the product supply chain which further delayed work; 'a total of [four] months delay in the project could be justified'.

The authority

- 3.3. The authority holds the view (in summary):
 - 3.3.1. As per section 93(2)(b)(i) of the Act, building consent authorities are required to make a decision on whether to issue a code compliance certificate two years after the date a building consent is granted.
 - 3.3.2. Should a building owner request an extension, the authority will consider the request based on the factors cited for the delay in the building work.
 - 3.3.3. The authority notes the reason for the extension request by the owner is COVID-19 lockdowns. The authority is "very aware of the delays that Covid has caused the construction industry and its supply chain over the past two years", and that applicants for building consents have had to deal with complexities when completing construction within the two-year period after granting the building consent.
 - 3.3.4. While the authority accepted COVID-19 lockdowns as an acceptable reason to justify extensions in 2020, it has stopped considering lockdowns as the "sole reason" to justify extensions.
 - 3.3.5. The authority notes that it did provide some "inaccurate information" to the owner, stating:

It appears our staff member was confused between the lapsing process⁸ and the two year decision process. It didn't accurately reflect our decision on the extension itself.

3.3.6. The authority maintains it was correct not to agree to an extension of time.

4. Discussion

4.1. This determination arises from the decision of the authority to refuse to grant an extension to the timeframe in which to issue a code compliance certificate for additions and alterations to an existing dwelling.

The legislation

- 4.2. Section 92(2)(a) of the Act requires an owner to apply for a code compliance certificate "as soon as practicable after the building work is completed".
- 4.3. Section 93 sets out the time in which building consent authorities must decide whether to issue or refuse a code compliance certificate. It states:

93 Time in which building consent authority must decide whether to issue code compliance certificate

(1) A building consent authority must decide whether to issue a code compliance certificate for building work to which a building consent relates within—

- (a) 20 working days after the date specified in subsection (2); or
- (b) any further period after the date specified in subsection (2) that may be agreed between the owner and the building consent authority concerned.

(2) The date referred to in subsection (1)(a) and (b) is—

- (a) the date on which an application for a code compliance certificate is made under section 92; or
- (b) if no application is made, the expiry of—
 - (i) 2 years after the date on which the building consent for the building work was granted; or
 - (ii) any further period that may be agreed between the owner and the building consent authority concerned.

(3) Subsection (1) applies whether or not an application for a code compliance certificate is made under section 92.

(4) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application for a code

⁸ I understand this to be a reference to the lapsing of a consent under section 52, where work has not commenced within 12 months of the date of issue of the building consent. Section 52 is not relevant to this particular consent.

compliance certificate, and, if it does so, the period is suspended until it receives the information.

- 4.4. Section 94 of the Act covers matters for the building consent authority to consider when deciding whether or not to issue a code compliance certificate. These matters are also useful when considering whether or not to grant an extension of time under section (93)(2)(b)(ii).

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...

The refusal to grant an extension of time

- 4.5. Determination 2014/012⁹ considered an authority's decision to refuse to grant an extension of time to decide on the issue of a code compliance certificate. It stated:
- The requirement that an owner seek an extension of time to complete building work provides an important record of the reasons why building work has not been completed and provides an authority with an appropriate regulatory mechanism for encouraging an owner to complete any outstanding building work as promptly as possible.
- 4.6. I consider that an authority's decision to agree to any further period of time under section 93(2)(b)(ii) should take into account, among other things:
- 4.6.1. the reasons why a code compliance certificate cannot be issued two years after the date of the issue of the building consent, and
- 4.6.2. the possible consequences of any proposed new timeframe on the work complying with the building consent.
- 4.7. The authority should consider any relevant circumstances when deciding whether to agree to any further period of time, including (but not limited to):
- 4.7.1. an inability to obtain contractors, specialist consultants, and design professionals on the required schedule
- 4.7.2. a significant delay caused by material shortages
- 4.7.3. an unexpected rise in costs from required design changes

⁹ Regarding the exercise of an authority's powers in refusing to grant an extension of the period during which it must decide to issue a code compliance certificate for building work. Issued 21 February 2014, at [4.8].

- 4.7.4. an event, or series of events, that prevent a contractor's attendance on site
- 4.7.5. a need for an amendment to the building consent to alter the scope of works
- 4.7.6. a change in property ownership.
- 4.8. The individual circumstances of the delays should be considered, and further information requested by the authority if needed to assess the accuracy or merits of any delay outlined by the owner. It is for the owner to present case-specific and relevant reasons, in sufficient detail, to the authority in order that an agreement may be reached on any further period to issue a code compliance certificate.
- 4.9. I note that an authority is not obliged to grant an extension of time simply because a request has been made, and it should not be for an indefinite period. The authority should consider the impact of any extended timeframe on the building work complying with the building consent. This could include consideration of the durability of materials installed, whether any of the work proposed in the plans and specifications included time-sensitive provisions and any other aspect of the proposed timeframe that might impact on the building work complying with the building consent.
- 4.10. Section 93(4) provides for the authority to request 'further reasonable information in respect of the application for a code compliance certificate'. While the authority is waiting for this information, the period laid out by the legislation is suspended until the authority receives the additional information.
- 4.11. In this case, the authority has stated correctly that further applications for a code compliance certificate can be made after a refusal.¹⁰ However, an agreement for an extension of time between the authority and the owner avoids the need for that formal refusal and may be appropriate where the owner is taking practical steps to complete the works but needs additional time to do so.
- 4.12. The authority took a proactive approach by reminding the owner of the two-year timeframe in its letter dated 25 May 2021. However, it also needed to consider the extension request and individual circumstances that may have prevented the building work from being completed within the timeframe given in section 93(2)(b)(i).
- 4.13. In this case, detailed reasons for seeking the extension were provided by the owner in a submission on 10 February 2022 as part of their determination application. The owner's initial request did not specify these reasons for seeking an extension but did ask the authority for information on how to proceed with the extension. It appears the authority did not respond to this request.

¹⁰ This is discussed in detail in Determination 2011/044 – Regarding the refusal to issue a code compliance certificate due to the time lapsed since the issue of the building consent for a house. Issued 16 May 2011.

- 4.14. The authority outlined its refusal to agree to an extension of time on 2 December 2021, which followed their refusal to issue the CCC, on 12 August 2021. The authority initially stated their refusal to agree to an extension of time was because the building work had started, and inspections had been held. However, the authority has subsequently acknowledged this was incorrect and has provided a submission expanding on its reasons for refusal in response to the application for determination.
- 4.15. I agree with the authority that its original reason for refusing an extension of time to apply for the CCC, given in its email of 2 December 2021, was incorrect. Section 93(2)(b)(ii) does not limit extensions to those situations where the work authorised by a building consent is yet to begin.
- 4.16. The authority has submitted that the reasons outlined in its email of 2 December 2021 “didn’t accurately reflect [its] decision on the extension”. It provided further information on its reasons for refusal in response to the application for determination. In this case, the authority appears to have taken a blanket approach to projects impacted by delays associated with the COVID-19 pandemic. However, an assessment of a request for an extension of time should be made with regard to the circumstances of the particular request, considering factors such as those outlined in paragraphs 4.6 and 4.7. It must be made on a case-by-case basis, not by adopting a blanket or generalised approach.

5. Conclusion

- 5.1. The owner raised concerns about the authority’s decision to refuse to grant an extension to the timeframe in which the authority must make a decision on whether to issue a code compliance certificate. I consider the refusal was not correct and that the authority’s decision should be reversed.
- 5.2. When making a decision on whether to grant an extension, the authority should consider the case-specific circumstances of any delay, the proposed new timeframe for completion, and the impacts of the new timeframe on the building work complying with the building consent. The authority should not take a generalised or blanket policy approach to an owner asking for an extension of time under section 93(2)(b)(ii).
- 5.3. If the owner still wishes to seek an extension to the time in which the authority must decide whether to issue a CCC, an updated request should be prepared by the owner, and the authority should make a decision on this request considering the matters outlined in this determination.

6. Decision

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the authority was incorrect to refuse to grant an extension to the time in which the

authority must decide whether to issue a code compliance certificate under section 93(2)(b)(ii) for building consent BCO10287180. Accordingly, I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 5 April 2022.

Katie Gordon

National Manager, Building Resolution