

Determination 2023/019

The proposed refusals to issue two code compliance certificates for building work to construct and alter a dwelling

29 Padnell Crescent, Paparangi, Wellington

Summary

The determination considers the authority's proposed decisions to refuse to issue code compliance certificates for two separate building consents for the construction, and subsequent alterations, to a detached dwelling. The determination considers the authority's reasons for the refusals and whether sufficient information has been provided to the authority for it to be satisfied the building work complies with the Building Code that applied at the time the building consents were granted.



The legislation discussed in this determination is contained in Appendix A. 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 (eg, 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, Peta Hird, Principal Advisor Determinations, 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 owners of the property, L and W Simpson, and CMG Trustees Ltd (“the owners”). The owners applied for the determination.
 - 1.2.2. Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the owners’ applications to have issued two code compliance certificates for the construction of a dwelling and later alterations to the dwelling. The authority is not satisfied that the building work complies with certain clauses of the Building Code, specifically, the weathertightness of the external envelope of the dwelling (Clause E2 External Moisture).²
- 1.4. The matters to be determined, under sections 177(1)(b) and (2)(d), are the proposed decisions by the authority to refuse to issue code compliance certificates for two building consents:
 - 1.4.1. number SR 33552 for the construction of the original dwelling
 - 1.4.2. number SR 85206 for later alterations to the same dwelling.
- 1.5. Both building consents were granted under section 34 of the Building Act 1991 (“the former Act”)³, and so the transitional provision for code compliance

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

² The authority’s letter to the owners dated 20 July 2022, and its subsequent submissions for this determination, suggest that Clauses B1 Structure, B2 Durability, and E3 Internal Moisture were also possibly at issue.

³ Section 34 Processing building consents - the territorial authority shall grant or refuse an application for a building consent.

certificates under section 436 of the Building Act 2004 (“the current Act”)⁴ applies. This means the building work is required to comply with the Building Code that applied at the time the building consents were granted.

- 1.6. The authority has not issued written notices to the owners under section 43(5) of the former Act⁵ to confirm its decisions to refuse to issue the code compliance certificates for both building consents. Instead, the authority has stated it has “suspended the applications for [the code compliance certificates] pending the further information and remedial items requested in the inspection outcome letter dated 20 July 2022 have been completed” by the owners. The owners dispute the information the authority is requiring is necessary for the purpose of granting the code compliance certificates.
- 1.7. To decide this matter, I will consider the reasons for the authority’s proposed refusal outlined in its letter to the owners dated 20 July 2022, including the requirement for a building surveyor’s report on the compliance of the external envelope of the building, structural elements, and tiled showers.

Issues outside this determination

- 1.8. I have not considered the decisions of the authority to grant building consents SR 33552 and SR 85206. Neither have I considered compliance of the building work carried out under those consents beyond what is required for me determine the matter.
- 1.9. I note amendments to building consents SR 33552 and SR 85206 have been granted by the authority to modify the start date of the durability periods in respect of clause B2, so they commence from the date of substantial completion. I have not considered the decision to amend the building consents in respect of clause B2. However, I have taken into account the modifications and the age of the construction now that the durability periods for some of the building elements have passed (eg the external wall and roof cladding systems installed under building consent SR 33552).
- 1.10. The authority also granted a third building consent in 2005 (number SR 123553) for building work to construct a new double garage with a self-contained studio unit above it. A code compliance certificate has been issued for this consent and it is not the subject of this determination.

⁴ Section 436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

⁵ Section 43 Code compliance certificate; 43(5) – Where a builder certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

1.11. The parties also discussed issues regarding the Building Code compliance of a timber barrier and retaining wall constructed part way along the west side of the driveway to the property. However, this issue was in the process of being resolved between the parties during the determination process, so I have not considered it further.

2. The building work

2.1. The owners' property is in a residential area of Wellington. The property is a large flat rear section accessed via a long driveway that is shared with one other neighbouring property. The owners' property includes a dwelling and a garage.

The first building consent

2.2. The original dwelling was constructed by the previous owners between 1997 and 1999, under building consent SR 33552 ("the first building consent").

2.3. The dwelling is part single and part double storey in height. The walls, first floor, and roof are constructed of timber supported on reinforced concrete foundations and floor slab.

2.4. It is not clear from the building consent documentation what the proposed means of compliance with the Building Code were intended to be. For example, some documentation refers to compliance with New Zealand Standard NZS 3604⁶, and New Zealand Standard NZS 1900 chapter 6.⁽⁷⁾⁽⁸⁾

2.5. The structural timber was specified to be 'Boric treated No. 1 framing Pinus Radiata'⁹, and 'all treated timbers shall be in accordance with the Timber Preservation Authorities Regulations'.¹⁰

2.6. The construction of the dwelling is relatively complex in nature with multiple roof pitches, valleys, gable ends, and one section of hip roof, as well as multiple roof-to-wall intersections, including at several chimneys.

⁶ One reference was to NZS 3604:1984 titled 'Code of practice for Light Timber Frame Buildings not requiring specific design' (superseded in 1990). A second reference was to NZS 3604:1990 also titled 'Code of practice for light timber frame buildings not requiring specific design' (superseded in 1999).

⁷ NZS 1900, Chapter 6: 1986 Model Building Bylaw titled 'Construction requirements for buildings not requiring specific design – Timber and Masonry'. This standard was withdrawn without replacement. NZS 1900 Chapter 6 was cited in NZS 3604:1984, but was not cited in NZS 3604:1990.

⁸ The building consent specifications also states, 'All timbers shall be as specified and graded accordingly to N.Z.S.S 169...', which appears to be an error.

⁹ No. 1 framing New Zealand Standard NZS 3602:1990 titled 'Code of practice for Specifying timber and wood-based products for use in buildings', Table 2 'Structural timber of framing for floors, walls and roofs...'. NZS 3602:1990 was current at the time the first building consent was granted and issued by the authority.

¹⁰ I have assumed this reference is to the Timber Preservation Regulations 1984.

- 2.7. The external walls of the dwelling are clad with fibre-cement boards, direct fixed to the wall framing over building paper. Polystyrene blocks have been fixed to the fibre-cement sheets to form projections in parts of the external finish. The walls are finished with two coats of external plaster applied over mesh, and this appears to extend down to ground level.¹¹ Timber or polystyrene mouldings have been fixed around the aluminium windows and doors.¹² There are timber sills to the windows.
- 2.8. The roof cladding is predominantly roof tiles.¹³ The roof eaves and gable roof projections vary in width between approximately 100mm and 300mm. The roof guttering is metal, and the downpipes are plastic.

The second building consent

- 2.9. Alterations to the interior and exterior of the dwelling were undertaken under a separate building consent, number SR 85206 (“the second building consent”).
- 2.10. The alterations included creating a new open space and bathroom at first floor level and changing the garage into a ‘rumpus’ room. The building work included (but was not limited to) alterations and additions to some timber external walls and raising an area of roof. The roof cladding was a butyl rubber roofing membrane system⁽¹⁴⁾ installed over an 18mm thick H3-treated plywood substrate, and the external cladding was a proprietary fibre-cement sheet product to be fixed over a 20mm deep cavity system.⁽¹⁵⁾⁽¹⁶⁾
- 2.11. The stated means of compliance with the Building Code regarding the construction of the structure was New Zealand Standard NZS 3604 ‘Timber Framed Buildings’¹⁷ and the external cladding was Acceptable Solution E2/AS1.⁽¹⁸⁾

¹¹ The building consent specifications also include references to masonry blockwork and brickwork, but it is not clear whether (or if) these were used in the as-built construction.

¹² I have received conflicting information regarding the type of material used around the jambs and heads of the windows and doors. However, I note the building consent plans refer to a 20mm thick polystyrene product.

¹³ The building consent specifications include references to both metal and concrete roof tiles. However, I have received conflicting information regarding the type of roof tiles that have been installed.

¹⁴ The building consent specifications includes a copy of the manufacturer’s installation instructions for the butyl rubber roofing membrane system.

¹⁵ Both cladding materials were the subject of an amendment to the second building consent that was granted by the authority on 5 March 2008.

¹⁶ A ‘worksheet’ completed by the authority when it was processing the application for the second building consent included hand-written notes from 3 March 2008. These referred to an authority’s building inspector who had stated, “what has been done so far is correct [and] compliant with codes”.

¹⁷ I have assumed the application for building consent was referring to the 1999 version of NZS 3604 as noted in a letter from the authority to the owners dated 5 March 2008.

¹⁸ *Compliance Document for New Zealand Building Code Clause E2 External Moisture*, Third edition, Amendment 3, dated 21 June 2007. This was current when the amendment to the second building consent was granted by the authority.

3. Background

The first building consent

- 3.1. On 10 July 1997, the first building consent for a ‘New Dwelling and Driveway’ was granted and issued by the authority.
- 3.2. Several inspections were undertaken by the authority during the construction of the dwelling. In Table 1, I have summarised the type of inspection and the associated outcomes but only of those inspections that I consider relevant inspections for the purpose of this determination.

Table 1: Site inspections by the authority for building consent SR 33552

Date of inspection	Inspection type	Inspection outcome
15 October 1997	Pre-clad	Okay “to clad back unit”. ¹⁹
11 December 1997	Pre-line	Moisture test okay.
9 January 1998	Pre-line	Part complete ²⁰ : Pipework under test, approved.
5 August 1999	Final	Okay to issue [Code compliance certificate] for new [dwelling]. See plumber. ²¹
28 April 2000	Final	Finish floor height and ground lines to comply. ²² Reinspect.
14 July 2022 ²³	‘Old Consents’	Listed six plumbing and drainage issues for the owners to resolve, along with a further list of seven items of documentation for the owners to supply to the authority (eg applications for a Code compliance certificate and amendment to modify Clause B2 Durability to December 1997). ²⁴ Surveyors report required.

¹⁹ It is not clear from the inspection record which part of the dwelling the authority was referring to as the ‘back unit’.

²⁰ The inspection report referred to the ‘lower level’ of the building, and to a gully and vent to be fitted to discharge pipe for a spa.

²¹ On 5 August 1999, a separate inspection record states, “several items to complete. Raise sanitary sewer gully drop and fronts”. It is not clear to me what the authority meant by “raise... gully drop fronts”. The same inspection record also refers to hot water taps, three washbasins, and seismic restraint and hot water cylinder, but it is not clear if these items were complete or incomplete, or if the construction complied with the building consent or the Building Code.

²² This appears to be referring to information in its letter to the owners dated 10 July 1997 which said: ‘The finished concrete slab floor level is to be a minimum of 150mm above finished paved ground level or 225mm above unprotected ground level. Refer [to] NZS 3604:1990 Appendix E [Concrete slab-on-ground floors for domestic loading] Fig E1 [Minimum heights of finished concrete slab-on-ground floors above adjoining finished ground level]’.

²³ The authority’s inspection records also include a further inspection conducted on 15 July 2022 with the same outcome as the one recorded for 14 July 2022.

²⁴ The items of building work to be completed by the owners, along with a list of documentation required, were confirmed in a letter from the authority dated 20 July 2022.

10 August 2022	'Old Consents'	Plumbing and drainage issues now resolved. Items of documentation still required, including surveyors report.
15 August 2022	Residential Final	Identified further issues with some of the plumbing and drainage and a shower fixture. Some documentation received from the owner, including (but not limited to) application for a Code compliance certificate and an amendment to modify clause B2. Surveyors report (weathertightness expertise) required.
17 August 2022	Residential Final	Plumbing, drainage, and shower issues now resolved. Surveyors report (weathertightness expertise) required.

The second building consent

- 3.3. On 13 February 2002, the owners applied for the second building consent.
- 3.4. On 20 February 2002, the second consent was issued in accordance with section 56 of the former Act by a building certifier (“the building certifier”)²⁵ for an ‘Alteration to [the] dwelling’. The building certifier was also engaged by the owners to undertake the inspections of the building work.
- 3.5. On or about 30 January 2008, the owners applied to the authority for an amendment to the second building consent. The amendment refers to a change in the roof and external wall cladding, and a change to the floor plan at first floor level. The amendment was granted by the authority on 5 March 2008.
- 3.6. Several inspections were undertaken by the building certifier and authority during the construction of the dwelling.²⁶ In Table 2, I have summarised the type of inspection and the associated outcomes of those inspections that I consider relevant for the purpose of this determination.

²⁵ Section 2 of the former Act states “Builder certifier” means a person approved as a building certifier by the authority under Part VII of the former Act.

²⁶ On 5 August 2004, the owners advised the authority in writing the building certifier had ceased operating (on a date not specified) and requested the authority undertake the remaining building inspections. On 19 August 2004, the authority sent a letter to the owners to confirm it would now undertake site inspections associated with building consent SR 85206.

Table 2: Site inspections by the authority for building consent SR 85206

Date of inspection	Inspection type	Inspection outcome
Inspection by the builder certifier		
28 February 2002	Pre-line	'Lower level' of building, 'timber moisture' indicated as okay.
Inspections by the authority		
20 August 2004 ²⁷	Multiple	<ul style="list-style-type: none"> Finished ground levels below the external wall cladding. Paved surfaces should be a minimum 150mm below the finished floor level of the dwelling. New chimney to be completed sealed and flashed. Owners to provide weathertightness detail above the heads of the joinery.
15 June 2007	Reinspect	<ul style="list-style-type: none"> Provide additional design details (eg junction between bay window and wall cladding). Chimney top to be flashed. Bottom edge of wall cladding to be sealed.
29 January 2008	Pre-wrap	<ul style="list-style-type: none"> Timber wall and roof framing completed. Butyl rubber roofing membrane laid. New apron flashing installed. H3.2 12mm thick plywood installed to wall. H3.2 18mm thick plywood installed to roof. Building wrap and tape installed. H3.1 treated wall framing. Items noted on 15 June 2007 now rectified.
27 March 2008	Post-line	<ul style="list-style-type: none"> External wall cladding installed to Manufacturer's specifications. Window frames installed. Ends of head flashings sealed. Stainless steel nails used. Sheets primed / sealed prior to coating. Approved to 'texture'.
17 and 21 October 2008	Pre-line	Plumbing
24 October 2008	Pre-line	<ul style="list-style-type: none"> Moisture content average 12%. Tape sighted around joinery penetrations. Air seals to be installed.
14 July 2022 ²⁸	Residential final	Work complete, except laundry tub to be secured and refit roof insulation within a roof space.

²⁷ The inspection report refers to a second sheet of notes which was not included in the documents submitted to me.

²⁸ The authority's inspection records also include a further inspection conducted on 15 July 2022 with the same outcome as the one recorded for 14 July 2022.

Date of inspection	Inspection type	Inspection outcome
		Supporting documentation required from the owners including (but not limited to) applications for a Code compliance certificate and amendment to modify Clause B2 Durability to October 2008. Surveyors report required.
10 August 2022	'Old consents'	Work is complete. Owner still to provide the same documentation listed on 14 July 2022.
17 August 2022	Residential final	Amendment to modify clause B2 received. Surveyors report required.

First and second building consents

- 3.7. In May 2022, the owners obtained a thermal imaging report from a company specializing as 'water damage technicians [and] building inspectors'.²⁹ The inspection was conducted using thermal imaging, infrared thermometers, and moisture sensors to assess the inaccessible areas of the building for moisture ingress and air leaks, and hygrometers to measure the temperature and relative humidity. The moisture sensors used were non-invasive, but capable of measuring moisture content 20mm deep through the plasterboard, window sills etc.
- 3.8. Other than general recommendations regarding ongoing maintenance (eg cleaning and painting) the report did not indicate the existing cladding system required any specific remediation to be undertaken. The thermal imaging report stated:
- 3.8.1. The monolithic cladding and cement board are direct fixed to the framing and met the requirements of the Building Code at the time it was constructed.
- 3.8.2. The inspection did not include invasive or destructive testing of materials or the removal of internal linings.
- 3.8.3. The dwelling is in a high wind zone.³⁰
- 3.8.4. There were no detectable readings of moisture entry and no signs of moisture detected using thermal imagery.

²⁹ It is not clear when a copy of the 'thermal imaging report' was provided to the authority. It appears to have been on or before 17 August 2022 based on an email sent on that date.

³⁰ I have received conflicting information regarding whether the dwelling is located in a 'high wind zone' (as noted in the bracing calculations attached to the first building consent) or 'very high wind zone' (as noted in the authority's records for the amendment to the second building consent).

- 3.8.5. The dwelling has experienced acceptable wear and tear for its age to date.
 - 3.8.6. The dwelling is not currently exhibiting signs of water entry.
 - 3.8.7. No issues were detected with the roof and wall claddings.
 - 3.8.8. No areas of concern were detected using thermal imaging.
 - 3.8.9. No high moisture readings were recorded around the doors and windows.
 - 3.8.10. The paint system on the wall cladding system was in good condition.³¹
 - 3.8.11. The dwelling is in a very good condition and has been very well maintained.
 - 3.8.12. With respect to a moisture reading assessment, it was found that the dwelling was a 'dry occupancy'³² at the time of the inspection, with equilibrium moisture content levels of between 9% and 14%, and no levels or areas of concern were noted.
- 3.9. Following the authority's inspection on 14 July 2022, for both the first and second building consents, the authority sent a letter to the owners dated 20 July 2022. The authority stated:
- 3.9.1. it needs to be satisfied that "the structural timber and associated elements are meeting the requirements of the building code, and that all elements have been installed in accordance with the building code"
 - 3.9.2. it "requires a report from a member of the New Zealand Institute of Registered Building Surveyors (with weathertightness expertise)"
 - 3.9.3. the report "will need to confirm that the performance requirements of the relevant building code clauses are being met for the external envelope of the dwelling and the tiled showers"
 - 3.9.4. it "requires that adequate testing (including invasive and destructive testing where necessary) is carried out by the Building Surveyor to support the conclusions in their report"
 - 3.9.5. a "repair schedule for any proposed remedial work is also required to be submitted to the [authority] for approval prior to any remedial work commencing".
 - 3.9.6. there were several items of building work the owners were required to complete for both building consents, including, some plumbing and drainage

³¹ The report did not clarify what paint system was applied to the external walls, and neither is this stated in the specifications for the first or second building consents.

³² The report stated a 'dry occupancy is where, moisture in [a room or dwelling] and out[side] is balanced'.

work, re-seal of a shower screen at a junction with a wall, securing of a laundry tub, and refitting of some roof insulation.

- 3.10. On 11 August 2022, the authority confirmed that it had now received some of the documentation requested previously (eg information regarding the waterproof membranes in some bathrooms for the first building consent). The authority also confirmed that the building work noted in the letter of 20 July 2022 had been completed for both building consents.
- 3.11. On 17 August 2022, the authority sent a further email to the owners to confirm it “will need a Registered Surveyors report as previously asked for as the report you supplied^[33] is not from a Registered Surveyor and does not verify the structure”. The authority also stated, the “building work is not approved for SR 33552 [and SR 85206] until the Surveyors...[report has] been provided for review and consideration”.
- 3.12. On 11 November 2022, the owners applied for the determination.

4. Submissions

The owners

- 4.1. The owners stated:
- 4.1.1. upon receipt of a Land Information Memorandum (LIM) report they had obtained from the authority dated 27 April 2022, they became aware no code compliance certificates had been issued for the first and second building consents. The LIM report stated,
- (1) “Where a Building Consent was issued more than 5 years ago and does not have a code compliance certificate (CCC) the Building Consent will be subject to the Old Consent Process^[34] to determine if a CCC can be granted”.
 - (2) “There is no record of Weathertightness issues [the authority] is aware of”.³⁵
- 4.1.2. the 15-year warranty periods required by the authority for the external cladding and roofing for the second building consent have now expired

³³ I take this to be the thermal imaging report obtained by the owners (refer to paragraph 3.7).

³⁴ The Wellington City Council website (<https://wellington.govt.nz>, accessed on 13 June 2023) states, “If your building consent is more than 5 years old, you’ll need to contact [the authority] to discuss as these situations are reviewed on a case-by-case basis”.

³⁵ The LIM also included several caveats as to the ‘complete’ status (or otherwise) of the “Weathertightness” section of the memorandum.

- 4.1.3. all matters relating to the plumbing have now been checked and approved by the authority
- 4.1.4. the thermal imaging report was “very favourable” and shows there is no moisture entering the “dry” dwelling
- 4.1.5. the authority should take into account its own inspections; the inspection records for the first building consent clearly show it is ‘okay’ to issue a code compliance certificate for the new dwelling
- 4.1.6. the authority’s requests for further information are not ‘reasonable’ because:
 - (1) the dwelling is 23 years old and of a high standard
 - (2) a thermal imaging report has been supplied but the authority is ignoring it
 - (3) both the pre-line and cladding inspections passed
 - (4) the only reason a code compliance certificate could not be applied for was because of the inability to get warranties, but the dates for these have now all passed.

The authority

- 4.2. The authority confirmed the code compliance certificates for the first and second building consents had not been issued, and stated:
 - 4.2.1. it has not refused to issue the code compliance certificates under section 95A³⁶, rather, the process has been suspended “pending the further information and remedial items requested in the inspections [outcome] letter dated 20 July 2022 have been completed”
 - 4.2.2. while the inspection notes for the first building consent states “Final” and “okay to issue” the code compliance certificate for the new dwelling, it also states “see plumber” which confirmed several items of plumbing work were still to be completed
 - 4.2.3. it had accepted the clause B2 modifications for both building consents (refer to paragraph 1.9)
 - 4.2.4. while it “agrees that the durability can be modified the performance requirements of [clause] E2 still need to be taken into account”

³⁶ Refusal to issue code compliance certificate. I note, it is section 436 of the current Act that is relevant in this case, consequently section 43(5) of the former Act applies.

- 4.2.5. it “requires a registered surveyor with weathertightness expertise to establish that the requirements of [clauses] E2.2 and E2.3.2 are being met due to a visual inspection that the [authority] undertakes not being sufficient to establish this”
- 4.2.6. it “does not consider relying on prior inspections, possibly years earlier, as being sufficient to establish reasonable grounds that the Building Code is met”.

5. Discussion

- 5.1. The matters to be determined are the proposed decisions by the authority to refuse to issue code compliance certificates for two building consents (first building consent SR 33552, and second building consent SR 85206). The authority is of the view that it cannot be satisfied on reasonable grounds, in the absence of the information it has requested, that some elements of the building work comply with the requirements of the Building Code that applied at the time that the building consents were granted and issued.
- 5.2. In respect of both building consents, the authority has stated:
 - 5.2.1. it needs to be satisfied that the structural timber and associated elements are meeting the requirements of the Building Code
 - 5.2.2. it needs to be satisfied that all elements have been installed in accordance with the Building Code
 - 5.2.3. it requires a report from a member of the New Zealand Institute of Registered Building Surveyors (with weathertightness expertise)
 - 5.2.4. the report will need to confirm that the performance requirements of the relevant Building Code clauses are being met for the external envelope of the dwelling and the tiled showers, including a requirement for ‘adequate testing’ (including invasive and destructive testing where necessary) to support the conclusions in the report
 - 5.2.5. it requires the registered surveyor to establish that the requirements of clauses E2.2 and E2.3.2 are being met due to a visual inspection that the authority undertakes not being sufficient to establish this.

The legislation

- 5.3. Both the first and the second building consents were issued under the former Act. This means the transitional provision in section 436 of the current Act applies.

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.

- 5.4. I have also considered the 'purposes' in section 3(b) and 'principles' in section 4(2)(q) of the current Act which promote the accountability and responsibilities of owners and building consent authorities to ensure the building work complies with the Building Code, and where a building consent has been issued, the building work complies with the building consent.
- 5.5. In this case, the two building consents were granted under section 34 of the former Act. Therefore, the test for the authority to issue the code compliance certificates is whether it is satisfied the building work complies with the Building Code that applied at the time the building consents were granted.
- 5.6. If a building consent authority decides to refuse to issue a code compliance certificate, under subsection 43(5) of the former Act, it is required to notify the applicant in writing, specifying the reasons why the application for the code compliance certificate is refused.
- 5.7. The authority advised it has not decided to refuse to issue the code compliance certificates and therefore it was not required to give written reasons. However, it is apparent from correspondence between the parties the authority considers it cannot issue the code compliance certificates unless its requests for further information are met. I have taken the reasons for requesting that information, and the nature of the information, to represent the authority's reasons for not issuing the code compliance certificates.

The Building Code

- 5.8. The authority identified two Building Code clauses at issue, specifically E2.2 and E2.3.2. At the time the first and second building consents were granted and issued by the authority in July 1997 and February 2002, the following applied:

Functional requirement

E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.

Performance

E2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

- 5.9. At the time the amendment to the second building consent was granted and issued by the authority in March 2008, 'shall' in clauses E2.2 and E2.3.2 had been replaced by 'must', and E2.3.2 stated 'roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements, or both'.

Reasons for refusal to issue code compliance certificates

The extent of the obligation to give reasons

- 5.10. Reasons for refusing to issue a code compliance certificate have been discussed in previous determinations. I hold the same view as set out in Determination 2020/005³⁷ regarding what is expected of an authority when giving reasons for a refusal, and I reiterate the following key points:

5.10.1. 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 to be done to obtain the relevant certificate. The reasons provided by the authority will concern those elements of the building work the authority does not believe comply with the Building Code.³⁸

5.10.2. It is important that an owner is given sufficiently explicit, specific, clear, and valid reasons why compliance has not been achieved, so the owner can consider the work required to remedy the situation.

³⁷ Determination 2020/005 Regarding the refusal to issue a code compliance certificate for a 22-year-old house. (7 May 2020). See section 5.2 "The authority's regulatory actions".

³⁸ In this case, I am considering compliance with section 436 of the current Act, rather than section 94. As such, I have specifically excluded reference to compliance of the building work with the relevant building consents.

- 5.10.3. An inspection by the authority will provide information that can make the written notice more meaningful and helpful so the owner can understand why the authority had decided not to issue the code compliance certificate.
- 5.11. Various court decisions have also discussed statutory provisions requiring reasons, noting that:
- 5.11.1. the extent of the obligation to give reasons is dependent on the function and the purpose for which reasons are required³⁹
- 5.11.2. reasons provided must be “proper, adequate and intelligible”⁴⁰
- 5.11.3. the reasons must be appropriate to the nature of the decision-making⁴¹
- 5.11.4. the reasons must be adequate to enable proper consideration of the decision on appeal or review⁴².
- 5.12. In the High Court case of *Hollander v Auckland Council*⁴³ the court stated:
- [53] Context is important in determining the extent to which it is necessary for reasons to be given. If the purpose for which reasons are required were to enable a party to determine whether to pursue a right of general appeal, the reasons must identify each material issue (legal and factual) relevant to that decision...
- [54] The extent of the obligation to give reasons will also be dependent on the functions cast on the particular tribunal responsible for making the relevant decision. In common with the approach taken to application of the principles of natural justice, where Parliament has established a special procedure, the extent of reasoning required to support a decision will be moulded to fit the purpose of the process.
- 5.13. The obligations to give reasons for refusing to issue a code compliance certificate also needs to be considered in respect of the authority’s obligations under section 22(1) of the Local Government Official Information and Meetings Act 1987 (“LGOIMA”).
- 5.14. A generalised refusal which does not identify sufficiently explicit, specific, clear, and valid reasons why building work may not comply with the Building Code, is not sufficient for an authority to meet its obligations under section 436(3)(b)(i) of the current Act and 45(5) of the former Act (similar to section 95A of the current Act).
- 5.15. Providing adequate reasons for a decision is fundamental to fair decision making, and helps to ensure legitimacy, openness, and public accountability for decisions.

³⁹ *Hollander v Auckland Council* [2017], Heath J, CIV 2016-404-2322 NZHC 2487, dated 11 October 2017.

⁴⁰ *Chan v Minister of Immigration* HC Auckland CP80/89, 08 May 1989 at 14.

⁴¹ *R v Awatere* [1982] 1 NZLR 644 (CA) at 649.

⁴² *Singh v Chief Executive, Department of Labour* [1999] NZAR 258 (CA) at 263.

⁴³ *Hollander v Auckland Council* [2017], Heath J, CIV 2016-404-2322 NZHC 2487, dated 11 October 2017.

5.16. In this case, the authority has stated the process for issuing the code compliance certificates has been suspended “pending the further information and remedial items requested in the inspections [outcome] letter dated 20 July 2022 have been completed”. In terms of reasons for refusing to issue the code compliance certificates, I have considered each of the issues raised in that letter in the paragraphs below.

Structural timber and associated elements

- 5.17. The authority stated, “it needs to be satisfied that the structural timber and associated elements are meeting the requirements of the Building Code”.
- 5.18. The authority did not clarify whether it was referring to all, or some, of the structural timber used in the construction of the dwelling (eg for the external and internal walls, first floor, or roof), and neither did it confirm what it meant by ‘associated elements’.
- 5.19. Further, the authority did not state which clause(s) of the Building Code were relevant, or why it could not reach a decision on compliance taking into consideration inspections the authority had previously undertaken during construction (refer to tables 1 and 2) and more recent observations of in-service performance.

All elements

- 5.20. The authority stated it needs to be satisfied “that all elements have been installed in accordance with the building code”.
- 5.21. It is not clear from that statement whether the authority was referring to the installation of ‘all’ of ‘the structural timber and associated elements’ or everything else used in the construction of the dwelling.

Report from a registered surveyor

- 5.22. The authority stated it “requires a report from a member of the New Zealand Institute of Registered Building Surveyors (with weather tightness expertise)” and the report “will need to confirm that the performance requirements of the relevant building code clauses are being met for the external envelope of the dwelling and the tiled showers”, and required “that adequate testing (including invasive and destructive testing where necessary) is carried out by the Building Surveyor to support the conclusions in their report” .
- 5.23. It is not clear why the authority considers a registered Building Surveyor is required to investigate the building, other than it appears to be based on the age of the building and not the actual performance of the building.

- 5.24. In its letter dated 20 July 2022, the authority has not identified or provided evidence of any findings of aspects of the building work it considers does not comply with the Building Code, or specific areas of high risk for which more information may be required. The authority referred in general terms to the performance requirements of the external envelope of the dwelling and the tiled showers but did not state which clauses of the Building Code were relevant or why it believed the building work did not comply.
- 5.25. The authority later said it does not have sufficient evidence to establish the ongoing compliance of the external envelope with Clause E2 External Moisture, specifically, clauses E2.2 and E2.3.2.
- 5.26. However, the authority has not identified any specific areas of concern regarding the 'external envelope', nor has it provided any evidence to suggest that the external wall and roof cladding systems have not performed or continue to perform as intended (taking into account the age of the building elements in respect of their durability periods and any further information available to authority from its inspection(s) and the in-service performance of the building).
- 5.27. Further, the authority has stated it requires a report from a registered Building Surveyor. This imposes a specific restriction on the owner for who they may engage to assist them when the same service could be provided by other professionals with the appropriate competency, training, experience, and expertise to conduct the relevant investigations and draft a report accordingly. Similarly, just because the building is of a certain age it does not necessarily follow that destructive investigation or invasive testing is required, particularly if non-compliance is not apparent or the authority has not identified specific areas that would warrant closer scrutiny.
- 5.28. While it is the responsibility of an owner to provide the relevant information necessary for an authority to be satisfied that the building work complies, it is appropriate for the owner to decide how that information is obtained and presented to the authority and who (if anyone) they may engage to assist in that process.

The tiled showers

- 5.29. The authority did not identify the relevant performance clause(s) of the Building Code or specify the areas of concern in relation to the construction or ongoing compliance of the building work with the Building Code.
- 5.30. I note that on 15 August 2022 the authority had identified some concerns with a shower fixture. However, it appears this was subsequently remediated by the owners, and on 17 August 2022 this was 'passed' by the authority (refer to table 1). Therefore, in the absence of any other evidence that indicates any ongoing issues with the compliance of the tiled showers with the Building Code, I have not considered this item further.

Completion of the building work

- 5.31. The authority's letter to the owners dated 20 July 2022 identified several items of building work the owners were required to complete for both building consents (refer to tables 1 and 2 and paragraph 3.9.6).
- 5.32. However, I note the authority's inspection record dated 10 August 2022 confirmed the building work identified in its 20 July 2022 letter had been completed. Therefore, I have not considered this further.

Documentation

- 5.33. The authority's letter to the owners dated 20 July 2022 identified several items of documentation it required (for example, applications for the two Code compliance certificates⁴⁴).
- 5.34. Except for the building surveyor's report noted above, it appears all the other documentation was provided by the owners to the authority in August 2022.⁴⁵ Therefore, I have not considered this other documentation further.

Conclusion regarding the reasons for refusal

- 5.35. I am of the view that the reasons for the proposed refusal given by the authority for both the first and second building consents as expressed in its letter of 20 July 2022 were not sufficiently explicit, specific, or clear to enable the owners to understand and consider what was necessary to rectify the situation.
- 5.36. The authority did not adequately describe the specific areas or aspects of the building work it believed did not comply with the Building Code, including (but not limited to) the lack of clarity on which clauses of the Building Code are relevant.
- 5.37. The authority has undertaken several inspections, including in July and August of 2022. However, its letter to the owners dated 20 July 2022 expressed concerns about compliance in very general terms and did not provide sufficient information to enable the owners to understand and take the necessary steps to obtain the code compliance certificates.
- 5.38. It is clear the owners have been able to address those items of concern raised by the authority that were specific and detailed, such as the last items of building work that needed to be completed (refer to paragraph 3.9.6) and the provision of some documentation.
- 5.39. In conclusion, the reasons were not adequately specified for proposing to refuse to issue code compliance certificates for the building work carried out under building

⁴⁴ Form 6 of the Building (Forms) Regulations 2004.

⁴⁵ This excludes some information about the timber pole retaining wall and barrier referred to in paragraph 1.11.

consents SR 33552 and SR 85206. It is for the authority to make new decisions taking into account the findings of this determination.

The authority's inspections

- 5.40. The authority conducted several inspections for both building consents over an extended period (refer to tables 1 and 2), but has stated it “does not consider relying on prior inspections, possibly years earlier, as being sufficient to establish reasonable grounds that the Building Code is met”. I disagree. I am of the view that an authority can rely on previous inspections, subject to any other evidence that may contradict the findings of an earlier inspection.
- 5.41. The Act does not impose a statutory time frame for an owner to complete building work that is the subject of a building consent once that work has started.⁴⁶ That being the case, an authority's inspections could be spread across an extended period of time. However, that does not mean compliance decisions made by an authority at specific stages in the construction process are necessarily invalidated or cannot be relied on just because of the passage of time.
- 5.42. Nevertheless, it is also possible there may be instances where a compliance decision made by an authority in one inspection may be overturned because of a subsequent inspection⁴⁷ or after a period of in-service performance.
- 5.43. In this case, I have received no evidence to suggest the authority's prior inspections could not be relied on for either building consent. For example, the building work to construct the structural framing and external cladding under the second building consent was inspected by the authority between January and October 2008 and 'passed' as compliant. The authority has subsequently reinspected the building work in August 2022 and identified no issues or provided any evidence that the external envelope, including the supporting structure, are not continuing to perform as intended.
- 5.44. The parties have also made submissions on the relevance of the authority's final inspection of 5 August 1999 for the first building consent. The authority confirmed it was okay to issue the Code compliance certificate for the dwelling but noted (at the same time) there were 'several items to complete' associated with some plumbing (refer to table 1). The authority had identified some plumbing work was incomplete and therefore it was unable to issue the code compliance certificate. It is not clear when the plumbing work identified on 5 August 1999 was done, but the authority did confirm on 17 August 2022 that all the remaining building work (including the

⁴⁶ An owner is required (under section 43(1) of the former Act, as well as section 92(1) of the current Act), to apply to the authority for a code compliance certificate after all the building work required by the building consent has been completed.

⁴⁷ For example, a framing inspection could confirm the external wall and first floor construction complies at a point in time, but a later pre-line inspection may 'fail' if the structural integrity of the framing is compromised by notches or holes that have subsequently been cut into framing members (for example to allow for services to pass through them).

plumbing and drainage) had been completed.

- 5.45. However, the authority's inspection record dated 28 April 2000 stated, 'Finish floor height and ground lines to comply. Reinspect' (refer to table 1 and footnote 22). This implies the authority had identified something needed 'to comply' in terms of the finished floor height and the surrounding ground, and there was a requirement for it to be reinspected.⁴⁸ I have received no evidence to confirm this element of the building work does now comply or if it has been reinspected by the authority.⁴⁹ Based on the information received, it appears this is a matter that remains outstanding.

What happens next?

- 5.46. The owners have already provided applications for the code compliance certificates for the first and second building consents to the authority, and the parties have also reached agreement to modify Clause B2 Durability to start from the dates the building work was substantially completed for both building consents (refer to paragraph 1.9).
- 5.47. The authority must make decisions regarding the issue of code compliance certificates. In doing so, it must consider all the information available to decide whether it is satisfied that the building work concerned complies with the Building Code that applied at the time the two building consents were granted.
- 5.48. The Building Code is performance based, and evidence of how the building has performed since the building work was carried out (ie its in-service performance) is a relevant consideration. In making a new decision, the age of the building and the time that has lapsed since the building work was substantially completed also relevant. For example, the external wall and roof cladding systems associated with the first building consent have already been in-situ for more than 15-years⁵⁰.
- 5.49. If the authority is not satisfied that the building work complies with the Building Code that applied at the time both building consents were granted, it is obliged to give written notice of its refusal and reasons. In accordance with the findings of this determination and previous court decisions, the reasons need to be clear about the aspects of the building work the authority is not satisfied comply, including the specific performance clause(s), and why it has reached that view.

⁴⁸ The authority did not identify which Building Code clause(s) was relevant. I have assumed it is compliance with clause E2.3.3 that applied in July 1997, ie 'walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness, or damage to building elements'.

⁴⁹ Neither the authority's inspection records from 2022, or its letter to the owners dated 20 July 2022, refer to floor heights or ground levels.

⁵⁰ Clause B2.3 (c) that applied at the time the building consents were granted.

5.50. It is then for the owners to gather evidence on the building's in-service performance or other information about the areas of concern identified by the authority to support their applications. It is for the owners to decide how they will gather that evidence/information.

5.51. To assist the parties, I have provided comment on the sort of information that is relevant to consider and that could be provided in this case to enable the authority to reach decisions about compliance. The items listed below are not intended to be exhaustive.

Historical information

5.51.1. Compliance of the building work with the relevant building consent plans and specifications, including the associated amendment to the second building consent.

5.51.2. The documentation already held by the building owner and provided to the authority (for example, the applicator and materials warranty information regarding the butyl rubber membrane roofing system installed etc).

5.51.3. The prior inspections by the authority and building certifier.

5.51.4. Completion of the building work in accordance with any manufacturer's instructions that were relevant at the time.

5.51.5. Completion of the building work in accordance with any documents referred to in sections 49 and 50(d) of the former Act that were available at the time the building consents were granted, such as E2/AS1 (the documents referred to are only one means of establishing compliance with the Building Code).⁵¹

5.51.6. Completion of the building work in accordance with any relevant standard or code of practice that applied at the time the building work was carried out (for example the editions of NZS 3604).

5.51.7. The type of materials used, and whether they were treated to resist the effects of environmental and ground conditions (for example, species of timber and treatment specified).

5.51.8. Any photographs available taken during the construction.

New or more recent information

5.52. As well as taking into account evidence from the recent inspections in July and August 2022, the authority has an opportunity to conduct a further inspection(s)

⁵¹ The 'documents' referred to here are similar to the Acceptable Solutions and Verification Methods referred to in sections 19(1), 20(2), 22 and 23 of the current Act.

and consider the following items as evidence of past and ongoing performance, bearing in mind the time that has now elapsed since the building work was substantially completed. The items below are not intended to be exhaustive.

- 5.52.1. The general condition and maintenance of the dwelling, including the exposed painted surfaces.
 - 5.52.2. Any evidence of moisture ingress or dampness visible on internal surface finishes such as wall linings, skirtings, and floor coverings.
 - 5.52.3. Results of non-invasive moisture meter readings, including at or near to high-risk junctions and around doors and windows.
 - 5.52.4. The presence and effectiveness of flashings at key locations such as at window heads (for example, as detailed on the plan number 4 of the first building consent).
 - 5.52.5. Any signs of excess damage, degradation, or deterioration of the external wall cladding such that external moisture penetrating the walls could cause undue dampness, or damage to building elements, or both.
- 5.53. The authority could also consider the relevant findings in the thermal imaging report from May 2022.
- 5.54. If the authority identifies specific aspects of the building work that raise concerns about compliance with the Building Code that applied at the time the building consents were granted, then it will be for the authority to clearly state the reasons for those concerns and include reference to the relevant Building Code clauses.
- 5.55. If any additional building work is necessary, it will be for the owners to decide how it will be undertaken and liaise with the authority regarding any approvals and inspections that may be necessary.
- 5.56. The authority can then make new decisions in respect of the applications for both code compliance certificates, taking into account all the available information.
- 5.57. I note the parties are working towards an amendment to the first building consent to construct a barrier along a section of the driveway to the property (refer to paragraph 1.11), and this will be relevant to the authority's decision whether to issue the code compliance certificate.

6. Decision

In accordance with section 188 of the Building Act 2004, I determine the reasons were not adequately specified for proposing to refuse to issue code compliance certificates for the building work carried out under building consents SR 33552 and SR 85206.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 August 2023.

Peta Hird

Principal Advisor Determinations

APPENDIX A Legislation

The Building Act 1991 (former Act)

43 Code compliance certificate

- (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
- (2) Where applicable, the owner shall include that advise either-
 - (a) Any building certificates issued by building certifiers under section 56 of this Act to the effect that any items of the building work comply with specified provisions of the building code; or
 - (b)
- (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that-
 - (a) The building work to which the certificate relates complies with the building code; or
 - (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.
- (4)
- (5) Where a builder certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.
- (6)
- (7)