

# Determination 2025/061

**The refusal to issue a code compliance certificate and to issue a certificate of acceptance in relation to the construction of a lean-to.**

**141 Moana Avenue, Moana, Nelson**

## **Summary**

This determination considers the authority's decisions to refuse to issue a code compliance certificate for alterations to a house and to refuse to issue a certificate of acceptance in relation to the construction of a lean-to. The determination considers the reasons given for the refusals, and whether they meet the respective requirements of sections 95A and 99A.



**Figure 1: The lean-to during construction, as at 11 January 2023.**

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”).

The Act and the Building Code (Schedule 1 of the Building Regulations 1992) are available at [www.legislation.govt.nz](http://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](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. A and G Cleland, and BK&P Trustees Limited, the owners of the property who applied for this determination (“the owners”)
  - 1.2.2. Nelson City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. The matters to be determined, under section 177(1)(b) and (2)(d) and (3)(b), are the authority’s decisions to refuse to issue the code compliance certificate<sup>2</sup> on 31 May 2024, and the refusal to issue a certificate of acceptance<sup>3</sup> on 23 December 2024.
- 1.4. In deciding this matter, I will consider the reasons for the refusals given by the authority, and whether the requirements of sections 95A and 99A have been met.

## 2. Background and building work

- 2.1. On 27 May 2022, the authority granted building consent to the owners for alterations to an existing two-storey dwelling with an attached garage.
- 2.2. The approved building consent plans and specifications describe the following building work:
  - 2.2.1. Layout changes to the kitchen, dining, and living areas on the ground floor to create an open plan living area, new bedroom, and new ensuite.
  - 2.2.2. Two additions to the ground floor to expand the living area and an extension to the workshop, connecting it to the entryway foyer and attached garage.

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

<sup>2</sup> In relation to building consent reference number BC220095.

<sup>3</sup> Reference number CA240035.

- 2.2.3. A new proprietary extruded polystyrene plaster cladding system (“the proposed EPS cladding system”) to the areas of the northern and western ground floor elevations being altered as part of the above building work.
- 2.3. On 25 November 2022, during a “Building wrap – cavity” inspection, the authority noted that the scope of the cladding work had been increased to include the eastern and southern elevations of the ground floor and that updated plans would be required for a minor variation if the cladding was changed as discussed with the builder on site.
- 2.4. On 11 January 2023, during an “Proprietary cladding” inspection, the authority noted that additional building work, not described in the approved building consent plans and specifications, was being carried out. This included, among other things, an “addition to garage ...”. As well, the inspection photos recorded that the proposed EPS cladding system had been substituted for a proprietary autoclaved aerated concrete plaster cladding system (“the AAC cladding system”).
- 2.5. It is the “addition to garage”, which I will refer to as the lean-to, that is primarily in dispute between the parties. The lean-to is a single storey structure, attached to the garage on its eastern elevation, and replacing an existing attached shed<sup>4</sup> of similar size and location. The lean-to is approximately 8m<sup>2</sup> in floor area, with a concrete slab foundation, timber framed walls clad with the AAC cladding system, and corrugate iron roofing.
- 2.6. On 16 March 2023, the owners applied for an amendment to the building consent<sup>5</sup>. The scope of the amendment included the cladding product substitution, changes to the foundations of the workshop extension, and the construction of the lean-to. The authority refused to grant the amendment on 8 November 2023, on the basis that the “proposed work” had already been completed.
- 2.7. On 24 September 2023 the owners applied for a code compliance certificate for the alterations carried out to the house. This was followed by four “final inspections”, carried out by the authority across October and November 2023.
- 2.8. The authority approved a minor variation to the building consent<sup>6</sup>, described on the approved application form as being for the change from the EPS cladding system to the AAC cladding system and a new detail for the garage door head flashing. The approved plans also included:
- 2.8.1. A note on the northern elevation stating: “[lean-to] not part of this [building consent]. A [certificate of acceptance] is required”. The minor variation did not include any details showing junctions between the building work for the lean-to and the building work described in the building consent.

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<sup>4</sup> I note the existing shed was not shown on the plans for the alterations.

<sup>5</sup> Reference number BC220095A.

<sup>6</sup> It is unclear if the approval was at the first “final inspection” on 4 October 2023, or on 27 September 2023 as recorded on the plans.

- 2.8.2. A section drawing showing a change to the foundations of the workshop extension, from timber foundations as described in the original building consent, to concrete slab on grade.
- 2.9. The authority's "final inspection" records note that further updated plans, showing the additional areas where the AAC cladding had been installed to the southern and eastern elevations of the ground floor, had been accepted alongside the minor variation. However, I have not been provided with a copy of those further plans.
- 2.10. At the fourth final inspection, carried out on 10 November 2023, the authority recorded the following:

All consent conditions met:

Construction Monitoring reports required from [the structural engineer] prior to final inspection being passed.

CB, Construction Monitoring reports with [the structural engineer's] PS4 have been received and accepted and this item now passed in the office.

CB, 07/11/2023 Awaiting formal amendment to be issued.

CB, 10/11/2023 Formal amendment has been declined.

General notes:

The BCA is not satisfied on reasonable grounds that the building work complies with the building consent.

CB, 10/11/2023 Following on from an internal audit after the final inspection has been undertaken, the following items need to be addressed.

The formal amendment for additional [lean-to] attached to existing garage has been declined due to the works already being completed. There will need to be a Certificate of Acceptance applied for this additional [lean-to] attached to the garage.

The additional [AAC cladding] to rear facade of existing dwelling and front of garage to be submitted as a Minor Variation.

- 2.11. Following this final inspection the parties corresponded regarding the disputed building work, the refused amendment to the building consent, and a potential certificate of acceptance, with the authority stating in an email dated 15 April 2024:

Due to the construction of the [lean-to] having implications for the weathertightness of the cladding to the dwelling's garage, [the authority] will not be able to issue the [code compliance certificate] until such time as the [certificate of acceptance] has been approved.

- 2.12. On 31 May 2024, the authority refused to issue the code compliance certificate. In its letter the authority stated:

We have a legal obligation [the letter included a footnote referring to section 93] to decide whether we can issue a code compliance certificate ... or not, two years after a consent is granted.

As your final inspection did not pass, we have made the decision not to issue [the code compliance certificate] for now.

Once the failed items from the final inspection have been rectified: [the letter then gave details of booking in a further final inspection].

- 2.13. On 11 November 2024, the owners applied for a certificate of acceptance for the construction of the lean-to, as described in paragraph 2.5. The authority issued requests for information on 6 December 2024, with the owners responding on 17 December 2024. Further requests were issued on 18 December 2024, with the owners responding on 20 December 2024.
- 2.14. On 23 December 2024, the authority refused to issue the certificate of acceptance. Stating that the application had been refused under section 99A, the authority gave the following reasons in its letter (“the CoA refusal letter”):

Under section 49 of the Building Act 2004 the Building Consent Authority is not satisfied on reasonable grounds that the provisions of the Building Code have been met for the following reasons:

Construction and materials are not adequately described or specified, drainage as-built plan conflicts with the reporting provided, alternative solutions are not shown to comply with the Building Code, verification of compliance with the Building Code has not been adequately described.

### 3. Submissions

#### The owners

- 3.1. The owners submit, in relation to the refusal to issue the code compliance certificate, that the authority “did not exercise its powers correctly” and the “refusal reasons provided by [the authority] were insufficiently specific to satisfy statutory requirements”.
- 3.2. In relation to the refusal to issue the certificate of acceptance:
- 3.2.1. the owners’ submission outlined their understanding of the reasons for refusal and provided responses to the “six main issues” they considered were outstanding
  - 3.2.2. the owners submitted the refusal to issue the certificate of acceptance was “generic and lacked sufficient detail under section 99A”, and the “reasons did not clearly identify specific-non-compliance issues or remedies required with reference to the New Zealand Building Code”.

## The authority

- 3.3. The authority submits, in relation to the refusal to issue the code compliance certificate:
- 3.3.1. the “building consent documentation ... does not include any reference to the inclusion or consideration of the [lean-to]”.
  - 3.3.2. In addition to the disputed building work regarding the lean-to, the foundations for the workshop extension have been changed “to be a solid concrete foundation and slab floor as opposed to the timber pile foundations authorised by the building consent”.
  - 3.3.3. The authority “was and is still not satisfied on reasonable grounds that the work completed on site, complies with [the] building consent”.
  - 3.3.4. The final inspection states the reasons for the authority’s refusal to issue the code compliance certificate, which the authority summarised as being “the requirement for a certificate of acceptance to be applied for an issued, for the construction of the [lean-to]”. Once the certificate of acceptance has been issued, the authority stated they could “be satisfied on reasonable grounds that compliance with the Building Code has been achieved”.
- 3.4. Regarding the refusal to issue the certificate of acceptance:
- 3.4.1. Because the authority has refused to issue the code compliance certificate, section 91(4) requires the owners to apply for a certificate of acceptance.
  - 3.4.2. The authority’s submission highlighted aspects of the foundations and wall and roof cladding where they considered “compliance with the [Building Code had] not been demonstrated”. The authority submitted that the answers provided in response to the requests for information did not establish compliance with the Building Code.
  - 3.4.3. The authority quoted Determination 2023/036<sup>7</sup>, which sets out that “a certificate of acceptance cannot be issued if the building work within that scope does not comply with the Building Code”. The authority submits that because “evidence of compliance” had not been established, the certificate of acceptance was refused.

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<sup>7</sup> Determination 2023/036 *The issuing of a certificate of acceptance for building work in the roof space of a house* at [4.12].

## 4. Discussion

### The refusal to issue the code compliance certificate

4.1. The test for issuing a code compliance certificate is set out in section 94. Section 94(1)(a) provides that an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.

4.2. Section 95A applies where an authority refuses to issue a code compliance certificate. It provides:

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

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

4.3. Numerous previous determinations have considered the requirements for notices issued under section 95A.<sup>8</sup> In summary:

4.3.1. An authority must provide reasons in writing for refusing to issue a code compliance certificate.

4.3.2. A generalised refusal, or a refusal which does not adequately indicate the specific non-compliance is not sufficient for an authority to meet its obligations under section 95A.

4.3.3. The reasons provided by the authority must identify the areas of building work that the authority does not believe comply.

4.3.4. It is important that an applicant, in this case the owners, are given sufficiently explicit, specific, clear and valid reasons why compliance has not been achieved, so they can consider what is required for a certificate to be obtained.

4.4. The reason given by the authority in the refusal letter states, “as your final inspection did not pass, we have made the decision not to issue [the code compliance certificate] for now.” The letter also refers to rectifying “failed items from the final inspection”. It is not clear if a copy of the final inspection referred to was attached to the letter.

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<sup>8</sup> See, for example, Determination 2022/007 *Regarding the proposed or purported refusal by an authority to issue two code compliance certificates and grant two certificates of acceptance for building work in respect of alterations to an existing building, timber deck, and several retaining walls* (30 May 2022) at [6.11]–[6.14].

- 4.5. Where an authority relies on other documents to inform an applicant of reasons for refusal, the notice of refusal under section 95A needs to be specific about which correspondence (or parts of) the authority is referencing and those reasons must clearly apply the relevant provision, in this case section 94. This ensures that the basis for the decision is valid and made clear to the applicant.
- 4.6. In this instance the events leading up to the authority's refusal to issue the code compliance certificate involved several inspections, including four "final" inspections, and multiple exchanges of correspondence between the parties on a range of matters. The refusal letter is not specific in which final inspection it is referring to, or what specific aspects of that inspection the authority considers did not comply with the building consent.
- 4.7. Taking the notes contained in the 10 November 2023 inspection report, which was the latter of the series of "final inspections", to be the basis for the authority's decision to refuse the code compliance certificate, I comment on the "failed items" from that report below.
- 4.8. Under "all consent conditions met", the inspection report records a series of status updates regarding the provision of a producer statement from the structural engineer, which appear to be resolved. It also includes comment that the amendment to the building consent, which concerned construction of the lean-to as well as the cladding product substitution and changes to the foundations of the workshop extension, was refused. The refusal of the amendment of itself does not concern the test under section 94 and I note some of the changes proposed in the amendment application were subsequently approved by way of a minor variation.
- 4.9. The "general notes" go on to state that the owners will need to apply for a certificate of acceptance in relation to the construction of the lean-to. However, neither the letter nor the inspection report indicates why resolution of the unconsented building work to the lean-to affects the issuing of the code compliance certificate for the alterations to the house. For example, there is no suggestion that building work detailed in the approved plans for the alterations had been altered in some way to accommodate the lean-to and whether the building consent required amendment to accurately reflect those changes. As noted in paragraph 2.11, the authority provided some further comment in an email to the owners, but this was not referred to in the refusal letter.
- 4.10. The "general notes" from the final inspection report also state that a minor variation to the building consent will need to be submitted for the increased scope of cladding work. As outlined in paragraphs 2.8 and 2.9, a minor variation was granted for changes to the cladding work described in the building consent, though there is conflicting information about whether that minor variation included the increased scope of the cladding work to the southern and eastern elevations on the ground floor. Given this minor variation, and considering the ambiguity in its scope of work, the refusal lacks clarity about what building work needs to be addressed to resolve this "failed item".



- 4.11. In its submissions, the authority also commented that the foundations for the workshop extension had changed from those outlined in the original building consent. As outlined in paragraph 2.8.2, a change to concrete slab on grade foundations for the workshop extension is recorded in the approved plans for the 4 October 2023 minor variation.
- 4.12. In conclusion, as the letter giving written notice of the authority's decision to refuse to issue the code compliance certificate is not explicit or specific in its references to earlier correspondence, and the reasons given in the "failed items" from the inspection report of 10 November 2023 are not specific or clear in how they relate to the test outlined in section 94(1)(a) or the building work and issues they are referring to, I consider that the written notice of refusal does not meet the requirements set out in section 95A(b).
- 4.13. I note the refusal letter also states that the authority was required by section 93 to make its decision on whether to issue the code compliance certificate two years after the building consent was granted.<sup>9</sup> However, the provision in section 93(2)(b) requiring a decision to be made two years after the building consent was granted only applies when an application for a code compliance certificate has not been made. It does not apply in this case because the owners had made an application on 24 September 2023.
- 4.14. Having refused to issue the code compliance certificate, the authority submits that the owners were required make the subsequent application for a certificate of acceptance by section 91(4). However, section 91(3) sets out that the requirement for an owner to apply for a certificate of acceptance, after a code compliance certificate is refused, only applies where that decision is made by a building consent authority which is not a territorial authority, and no other building consent authority will issue one. In this case, the authority is both a building consent authority and territorial authority, so the requirement of section 91(4) does not apply.

### **The refusal to issue the certificate of acceptance**

- 4.15. Section 96(1)(a) and (2) provides that an authority may issue a certificate of acceptance for building work where a building consent was required but was not obtained, "only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code".
- 4.16. Previous determinations<sup>10</sup> have outlined considerations for issuing a certificate of acceptance, noting that the following types of building work can be differentiated:

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<sup>9</sup> As outlined in paragraphs 2.1 and 2.12, the building consent was granted on 27 May 2022 and then code compliance certificate was refused on 31 May 2024.

<sup>10</sup> See, for example, Determination 2024/006 *The refusal to issue a certificate of acceptance for building work associated with a dwelling* (27 February 2024) at [4.1]-[4.8] and [4.16].

- 4.16.1. Building work the authority has been able to ascertain, on reasonable grounds, complies with the Building Code, based on inspection, judgement, and/or supporting information and documentation. A subset of this is work which the authority has been able to inspect, which can be listed in the certificate of acceptance for the purposes of limiting the authority's liability to the same extent.<sup>11</sup>
- 4.16.2. Building work the authority has not been able to ascertain complies with the Building Code, because the authority has not been able to inspect the building work and there is insufficient supporting information or documentation to establish compliance. This work can be excluded from the certificate of acceptance.
- 4.16.3. Building work which the authority considers does not comply with the Building Code. A certificate of acceptance cannot be issued if there is building work which does not comply with the Building Code because the provision in section 96(2) is not met.
- 4.17. The fact that an authority might be unable to ascertain Building Code compliance for some elements of the building work is not the same as the authority finding that building work does not comply. It is important this distinction is clearly communicated to an applicant so that they understand their options and/or obligations in relation to the building work. Where building work's compliance with the Building Code cannot be ascertained, an applicant may choose to obtain and/or provide further evidence. In contrast, where an authority finds the building work does not comply with the Building Code, an applicant will need to resolve the status of that building work to be able to obtain a certificate of acceptance.
- 4.18. Section 99A applies where an authority refuses to issue a certificate of acceptance. It provides:
- If a territorial authority refuses to grant an application for a certificate of acceptance, the territorial authority must give the applicant written notice of—
- (a) the refusal; and
- (b) the reasons for the refusal.
- 4.19. Section 99A uses similar wording to sections 50 and 95A<sup>12</sup>, accordingly I consider similar principles apply, ie that the reasons for refusing to issue a certificate of acceptance must be explicit, specific and clear, setting out those aspects of the building work the authority considers does not comply with the Building Code. A generalised refusal or one that does not adequately identify the specific matters of non-compliance is not sufficient for an authority to meet its obligations under section 99A.

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<sup>11</sup> Section 99(2) and (3).

<sup>12</sup> Section 50 sets out the requirements when an authority refuses to grant an application for a building consent.

- 4.20. The reasons given by the authority in its letter refusing to issue the certificate of acceptance first state, with reference to section 49, that it was “not satisfied on reasonable grounds that the provisions of the Building Code have been met”.
- 4.21. The authority has erred in its reference to section 49, which relates to the granting of a building consent and differs from the relevant provision in section 96.
- 4.22. Further reasons given for the refusal include references to “construction and materials”, “alternative solutions”, and a need to verify compliance without specifying what building work those references relate to or the relevant performance requirements of the Building Code. The reasons do not make it clear to the applicant where the authority has not been able to ascertain the compliance of specific building work versus the specific building work the authority considers does not comply, nor which particular performance requirements of the Building Code in either regard.
- 4.23. Prior to the refusal, the owners provided a response to requests for information from the authority. The authority submits that these responses did not “[provide] evidence of compliance with the [Building Code]”. However, the refusal letter does not refer to any specific prior written correspondence (such as the request for information or response), nor identify which specific requests the authority considered were outstanding.
- 4.24. Because the letter giving notice of the authority’s decision to refuse to issue the certificate of acceptance includes reasons that are not valid with respect to the reference to section 49, and it is not explicit or specific in its references to building work in question and relevant performance requirements of the Building Code the authority considers it does not comply with, I conclude the letter does not meet the requirements set out in section 99A(b).

## 5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine that:
- 5.1.1. the authority’s reasons for refusing to issue the code compliance certificate in relation to building consent BC220095 did not meet the requirements of section 95A(b). I therefore reverse the decision, and it is for the authority to make a new decision taking into account the findings in this determination.
- 5.1.2. The authority’s reasons for refusing to issue certificate of acceptance CA240035 did not meet the requirements of section 99A(b). I therefore reverse the decision, and it is for the authority to make a new decision taking into account the findings in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 December 2025.

**Peta Hird**

**Lead Determinations Specialist**