



## Determination 2012/011

# Regarding the exercise of powers in refusing to issue a code compliance certificate for a 13-year-old house and garage at 18 Downing Place, Tauranga

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The parties to the determination are:
- the building owner, R H Cao (“the applicant”) acting through an agent
  - Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate for the 13-year old house.
- 1.4 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

### 2. The building work and background

- 2.1 The building work consists of a dwelling with enclosed garage. A building consent (No 98/1371) was issued by the authority for the building work sometime in May 1998 under the Building Act 1991 (“the former Act”). The consent was presumably based on a building certificate issued by a building certifier (“the certifier”), however I have not seen a copy of that certificate.
- 2.2 The certifier carried out twelve inspections between 1998 and 1999. The certifier job records, that I have seen, indicate that one inspection remained outstanding. The

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

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

applicant's submission (refer paragraph 3.4.4) confirmed that this item had now been fixed.

- 2.3 In an email to the applicant dated 13 October 2011, presumably in response to the applicant seeking a code compliance certificate, the authority stated:

It would appear from the inspection records that the exterior cladding has been substituted from that specified on the approved plans in 1998. It is unlikely that [the authority] would issue a Code Compliance Certificate or a Certificate of Acceptance as all inspections were overseen by a Private Building Certifier not by [the authority] the Certifier is no longer in business.

My advice to you is that you engage a Registered Building Surveyor to do a full assessment of the cladding or you have the option of applying to the Department of Building and Housing for a Determination.

[The authority] is unlikely to issue the [code compliance certificate] as it is unable to establish that the cladding continues to comply with Clause E2 and B2 of the NZ Building Code.

- 2.4 In a letter to the applicant dated 2 November 2011, the authority reiterated its refusal to issue a code compliance certificate, noting that:

The reason for this refusal is that [the authority] can not confirm that the dwelling complies with Clause B2 structure or Clause E2 External Moisture as the cladding has been substituted from [fibre-centre sheets] with plaster system to [fibre-cement rigid sheathing] with wall tiles. This means that the [authority] cannot be satisfied the building work complies with the building consent as required by Section 94 of the Building Act 2004.

This letter is to be considered as the notice required by Section 95A of the Building Act 2004.

- 2.5 The Department received an application for a determination on 17 November 2011.

### **3. The submissions**

- 3.1 The applicant provided no submission in direct support of the application but provided some drawings and the correspondence from the authority.

- 3.2 The authority made no submission in response to the application. The Department sought further information in respect of any inspections undertaken by the authority. In an email response on 5 December 2011 the authority stated that (in summary):

- this was a 'private certifier consent'
- the authority has never received any fee's for this consent if the owner is will to pay for an inspection then we may consider inspecting the dwelling
- from the job history it appears that the building does not meet the requirements of the Building Code as it is not clad with the materials specified in the consent
- it is the authority's view that a dwelling clad with fibre-cement sheet and tiles would not meet the building code.

The authority also noted that it was 'reluctant to expose its self to the risk' of undertaking an assessment as to compliance of the building. (I note here that

perception of risk is not an appropriate reason to take this position and I do not believe that this is acceptable.)

- 3.3 A draft determination was issued to the parties on 18 January 2012. The draft concluded that the authority had incorrectly exercised its powers in refusing to issue a code compliance certificate without providing adequate reasons for the refusal in accordance with section 95A of the Act, thus requiring the authority to make a new decision under section 94 and 95 of the Act.

### **3.4 Post draft to parties actions of the authority**

- 3.4.1 On 25 January 2012 the authority carried out a visual inspection of the building and issued a notice to fix dated 27 January 2012. The particulars of contravention or non-compliance on the notice to fix included non-compliance with Clauses E2 and B2; in particular:

- inadequate ground clearance
- flashings over curved windows do not extend past exterior mitre joints of the window extrusions
- the authority was unable to establish whether windows face-fixed to the cladding were sealed
- the authority could not establish the presence of saddle flashings at the solid handrail junction to wall connections

- 3.4.2 The notice to fix stated that the cladding system has been substituted and that there was no detail in the consented plans for the embedded head flashings to the windows. The notice to fix concluded by recommending that the applicant:

obtain a fully (sic) building survey form (sic) a registered (sic) Building Surveyor to establish what is required to bring the dwelling into compliance with the NZ Building Code.

- 3.4.3 The authority accepted the draft without further comment in a response dated 26 January 2012.

- 3.4.4 The applicant accepted the draft determination in a letter to the Department dated 9 February 2012, and in addition responded to the issue of the notice to fix. The applicant said that:

- the inspections undertaken by the certifier at the time of construction all passed except the final inspection; the one outstanding item has now been fixed
- the reasons for the authority refusing the code compliance certificate were not accepted
- the building 'is structurally sound and the cladding is performing'
- the authority has not done 'any testing' to verify that the building is not performing.

## **4. The exercise of the authority's powers**

### **4.1 The application of section 95A**

4.1.1 Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:

... must give the applicant written notice of—

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

4.1.2 In its letter of 2 November 2011 to the applicant, the authority provided no explanation for its refusal to issue a code compliance certificate beyond its observation that the cladding had changed. It is important that an owner be given clear reasons why compliance has not been achieved so the owners can either then act on those reasons, or apply for a determination if the reasons are disputed.

4.1.3 The provisions of section 95A apply irrespective of the background to involvement of a building certifier: if an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which is likely to include a detailed assessment of the work concerned. In cases involving a building certifier an authority may suggest an owner apply for a certificate of acceptance where the issue of the code compliance certificate is refused.

4.1.4 As the building consent was issued under the former Act, the issuing of a code compliance certificate is subject to the requirements of section 436 of the current Act. Accordingly, the house and garage have to comply with the requirements of the Building Code that was in force at the time the building consent was granted in order for a code compliance certificate to be issued.

4.1.5 In this instance, at the time the applicant sought a code compliance certificate, I do not consider the authority met its obligation in respect of section 95A as it did not place itself in a position where it could make an informed decision about the Building Code compliance of the house.

### **4.2 The establishment of compliance**

4.2.1 In regard to this house, the evidence as to compliance is able to be gathered from the building certifier's inspection records, the performance of the exterior envelope over the past twelve years, and a visual assessment of remaining building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance.

4.2.2 This methodology has been used and articulated in a number of determinations such as 2011/116. The draft determination noted that the authority was able to apply a similar methodology in reaching a decision and that had an inspection of the house been carried out the authority should have been able to identify any defects requiring attention without the applicant needing to apply for a determination.

4.2.3 The draft determination noted that the authority should inspect the house for code-compliance and if items of non-compliance were found issue a notice to fix. I also

note that if it is the case that the authority can not be satisfied on reasonable grounds that the building work complies with the Building Code, the appropriate action to take is to issue a notice to the applicant under section 95A of the Act, given reasons for the refusal of the code compliance certificate.

- 4.2.4 The authority has subsequently undertaken a visual inspection of the building and issued a notice to fix listing a number of building elements that are of concern in regards to weathertightness of the building envelope (refer paragraph 3.4.1).

## **5. Commentary on the notice to fix**

- 5.1 The applicant responded to the draft determination and also made comments about the issue of the notice to fix subsequent to the draft determination being issued. While outside the scope of this determination, I have provided comments, as follows, to assist the parties.
- 5.2 Under sections 163 to 168 of the Act, a notice to fix can be issued by an authority if the authority considers on reasonable grounds that a specified person is contravening or failing to comply with the Act or its regulations. A notice to fix also must require the person to remedy the contravention or to comply with the Act or its regulations. Section 164(2)(a) states an authority must issue a notice to fix requiring the specified person to remedy the contravention of, or to comply with, the Act or the regulations.
- 5.3 I note that the authority should link the defects observed to the performance requirements of the Building Code rather than general code clauses. For example, given the proximity of the edge of the cladding to the ground level, the authority has established reasonable grounds to conclude that this design feature may not meet the requirements of Clause E2.3.3 ('Walls, floors, and structural elements in contact with or close proximity to, the ground, must not absorb or transmit moisture in quantities that could cause undue dampness, damage to buildings, or both.').
- 5.4 I also note that the authority has required the applicant to support a report from a building surveyor. I believe this is a reasonable requirement in this instance. I note, however, that obtaining a report cannot in itself remedy a breach of the Act or its regulations.
- 5.5 I also observe that notices to fix are important regulatory instruments and should not contain basic spelling errors.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that, at the time the applicant sought a code compliance certificate, the authority incorrectly exercised its powers in refusing to issue the code compliance certificate without providing adequate reasons for the refusal in accordance with section 95A of the Act.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 February 2012.

John Gardiner  
**Manager Determinations**

## APPENDIX A: THE RELEVANT LEGISLATION

A1 The relevant provisions of the Act are:

**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.