



Determination 2021/053

Regarding the refusal of a code compliance certificate for a retaining wall subject to earthquake damage at 13 Moores Road, Akaroa

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”)², for and on behalf of the Chief Executive of the Ministry.
- 1.2 The applicant is Christchurch City Council (“the authority”), carrying out its duties and functions as a territorial authority, and the other parties are P and J Smart, the owners of the property (“the owners”). I have also identified the Earthquake Commission (“the EQC”) as a person with an interest in this determination.
- 1.3 The matter for determination³ is whether the authority was correct in its decision to refuse to issue a code compliance certificate for the retaining wall. The authority is not satisfied that the building work complies with Clauses B1 and B2 of the Building Code (First Schedule, Building Regulations 1992).
- 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 owners purchased the property in June 2006. Following heavy rain in July 2008 the front of the property was affected by a moderate sized slip which necessitated the owners having a retaining wall built.
- 2.2 The authority issued building consent No. 10091242 for ‘a retaining wall and associated subsoil water disposal channel and fields’ on 24 March 2009 under the Act.

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

² After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

³ Under sections 177(1)(b) and 177(2)(d) of the Act

- 2.3 The wooden retaining wall is just over thirty-one metres in length and approximately three metres in height at its maximum. The EQC contributed approximately 2.5% to the cost of the wall.
- 2.4 On 10 August 2010 the authority carried out a final inspection, which passed noting that the work was completed and was compliant with both the building consent and the Building Code. The inspection record requested that the owners complete an application for a code compliance certificate and provide a producer statement (construction review) from the engineering consultant.
- 2.5 On 16 August 2010 the owners provided to the authority the completed application for a code compliance certificate and a Producer Statement Construction Review (PS4) dated 10 August 2010 from the Chartered Professional Engineer (“the engineer”) who had designed and undertaken construction monitoring of the foundation post holes of the wall. According to the background provided by the owners, at the final inspection, the authority’s building inspector advised the owners that all the authority’s requirements had been met and that a code compliance certificate would be issued as soon as all of the necessary documentation had been completed, a process which was at that time taking approximately five weeks.
- 2.6 On 4 September 2010 the property was subject to the effects of a 7.1 magnitude earthquake in the region.
- 2.7 On 4 October 2010 the authority undertook a further final inspection, which failed. The inspection record notes
- Post earthquake inspection
Cracks in ground are obvious evidence of movement which is exerting extra pressure on the retaining wall, please follow up with [the EQC and advice when rectified.
- 2.8 According to a description provided by the owners, the wall has bowed out in two areas by approximately 25cm, and whereas all the wooden posts should have been leaning forwards by about ten degrees, some are now upright and some are leaning very slightly backwards.
- 2.9 On 14 December 2010 the authority wrote to the owners stating that another final inspection was required once quake damage had been repaired in order for a code compliance certificate to be issued.
- 2.10 On 15 December 2010 the owners responded to the authority, noting that the retaining wall did sustain some damage during the September earthquake and subsequent aftershocks, and that the owners were waiting for an assessment by the EQC.
- 2.11 On 21 February 2012 the owners wrote to the authority stating that in their opinion the code compliance certificate should be issued as the wall was built to specification and it complied with the Building Code at the time of the authority’s inspection on 10 August 2010. The owners acknowledged that the retaining wall had subsequently been damaged in the earthquake.
- 2.12 On 16 April 2012 the Ministry received an application for a determination from the authority.

3. Submissions

- 3.1 The authority included in the application for determination that the matter to be determined was whether the authority should issue a code compliance certificate 'if [the authority] inspected the [retaining wall] on a certain date (August 2010) and then a significant change occurs from an unexpected natural event, in this case an earthquake?'. The retaining wall had suffered damage, and the authority was of the view the structure no longer met the requirements of Clause B1 Structure and Clause B2 Durability.
- 3.2 The authority also queried whether it was unreasonable to carry out another inspection after the earthquake to ascertain if the work still complies with the Building Code.
- 3.3 The authority forwarded copies of:
- inspection records
 - the application for a code compliance certificate
 - the producer statement – construction review from the engineer
 - building consent and approved documents
 - correspondence between the parties
- 3.4 A draft determination was issued to the parties for comment on 27 April 2012.
- 3.5 The owners forwarded a submission dated 24 April 2012, in response to the application, which was received by the Ministry after the draft determination had been issued. The owners' submission set out the background to the determination (which I have included in paragraph 2) and made the following points:
- The EQC's literature suggests that the wall is covered by the EQC; however at the first inspection by the EQC, which was 15 months after the earthquake, the engineer suggested the wall would not be covered.
 - The engineer's report has not yet been received.
 - The EQC's case officer dealing with the file expressed surprise that a code compliance certificate had been withheld, as the wall met the appropriate criteria at the final inspection.
 - If the authority had processed the paperwork quicker, a code compliance certificate would have been issued prior to the earthquake.
- 3.6 The owners did not accept the draft determination and made a submission dated 3 May in response, which made the following points:
- When the authority did the final inspection it was noted the work had been done in accordance with the Building Code and building consent. The building inspector said the code compliance certificate would be issued as soon as the paperwork was processed.
 - Re-inspecting the wall after the earthquake, when the authority had already agreed to issue the code compliance certificate was well intentioned but misguided and wrong.
 - If the authority continues to refuse to issue the code compliance certificate, is it going to revisit the decisions it made prior to the earthquake and retrospectively retract those certificates? The code

compliance certificate should be issued as the wall passed its inspection on the 10 August 2010 when examined prior to the earthquake.

- This decision will also have implications for people who have constructed new houses but had not received their code compliance certificate at the time of the earthquake.

3.7 I sought further information from the owners in an email dated 8 May 2012, in order to understand the owners' view of the significance of the code compliance certificate in relation to any claim for the damage to the wall, and the position being taken by the owners' insurer and the EQC. The owners responded in an email dated 8 May 2012, and made the following points:

- The EQC literature states that retaining walls that are necessary for the support of buildings that are within 60 metres of them are covered, and a technical advisor from the EQC has confirmed this.
- Despite numerous letters and emails, nothing has been received from the EQC and conflicting opinions have been given by the various assessors who have inspected the property.
- The retaining wall is not covered by household insurance (which specifically excludes retaining walls).

3.8 The owners also explained their view of the importance of the code compliance certificate in respect of their claim, noting that

- it was their view that the wall will be covered by the EQC, and that the claim is more likely to reach a satisfactory conclusion if a code compliance certificate is issued, as this would provide the necessary proof that the wall had been built to plan, using the appropriate requirements.
- if a code compliance certificate is not issued, it will be more difficult to make a satisfactory claim and there may be a lesser settlement.

3.9 The authority accepted the draft determination without comment in a response dated 18 May 2012.

3.10 I forwarded a copy of the draft determination to the EQC to provide an opportunity for the EQC to make a submission or comment, which it declined.

3.11 I took account of the submissions received in preparing a second draft determination, which I provided to the parties and the EQC for comment on 18 June 2012.

3.12 The owners accepted the second draft determination in a response dated 6 July 2012. The owners noted that they

... are disappointed that the conclusion of the draft determination is that [the authority] acted correctly in refusing to issue ... a code compliance certificate and we feel that although the decision is evidently correct in law, it is totally unjust. However, we are reassured that the [Ministry] has expressed the view that the lack of a code compliance certificate should not deleteriously affect our EQC claim relating to the wall as the [authority] possesses adequate evidence to confirm our wall had been built to the appropriate specifications.

3.13 The authority accepted the second draft without comment on 12 July 2012.

- 3.14 In a letter dated 12 July 2012 I provided the EQC a further opportunity to respond. The EQC did not choose to comment on the second draft determination.

4. Discussion

General

- 4.1 In terms of section 94(1)(a) of the Act, an authority can only issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 4.2 In Determination 2008/30 I concluded that in addition to compliance with the building consent, confirmation of a building's compliance with the Building Code was required before an authority could issue a code compliance certificate. I am still of that opinion.
- 4.3 In that and subsequent determinations in which I have taken that approach, the matters concerned involved the adequacy of consent documentation to establish compliance with the Building Code or variations from the approved documents.

Application of the legislation in this instance

- 4.4 There is no dispute between the parties that the building work was completed in accordance with the building consent at the time of the authority's inspection of 10 August 2010. Nor is there any dispute that the earthquake of 4 September 2010 has resulted in damage to the retaining wall itself, and has also adversely affected the adjacent land.
- 4.5 The authority is of the opinion that the wall has suffered damage and the ground conditions have changed, which brings into doubt the wall's compliance with the Building Code. It appears no detailed assessment of the retaining wall has been undertaken, and I consider that the authority has insufficient information before it to be satisfied on reasonable grounds that the retaining wall now complies with Clause B1 Structure and/or Clause B2 Durability insofar as it relates to Clause B1.
- 4.6 In this instance, although the building work was carried out in accordance with the approved plans, the retaining wall suffered subsequent damage and the ground conditions have changed, and the building work as it stands now no longer conforms to the building consent, and in addition, is unlikely to comply with the Building Code. I therefore consider the authority was correct in its decision to refuse to issue a code compliance certificate.
- 4.7 In my view, in considering an application for a code compliance certificate, the authority will need to consider whether the engineer is able to re-validate the Producer Statement Design (PS1) and Producer Statement Construction Review (PS4), taking the effects of the earthquake into account. If this is achievable, the owners will need to apply to the authority for an amendment to the building consent, which acknowledges the post-earthquake conditions.

Inspection after a significant event

- 4.8 The authority has also asked whether it was unreasonable to carry out another inspection after the earthquake to ascertain if the work still complies with the Building Code (refer paragraph 3.2).

- 4.9 In my view such an inspection is a necessary course of action to take in such circumstances to confirm compliance. The event may have lead to damage of the consented structure, but it may also have changed the basis on which the consent was issued; as may be the case if the ground conditions have been altered.

Significance of a code compliance certificate for an insurance claim

- 4.10 The owners are of the view that they are only likely to obtain a satisfactory claim if they first obtain a code compliance certificate for the wall.
- 4.11 Although I do not have jurisdiction in this area, with reference to the Earthquake Commission Act 1993 and the EQC literature, it appears to me that the tests required to be applied by the EQC relate to whether the owners have complied with any requirements of laws or bylaws and whether the appropriate standards of construction were met.
- 4.12 Although a code compliance certificate may be one way of meeting the tests for the appropriate standards of construction, I do not believe that this is the only way.
- 4.13 I note that in this case, it was the final process of issuing a code compliance certificate that was not completed. However, the authority's inspection notes, the building consent documentation, including the Producer Statement Design PS1 from the engineer, and the construction review documentation from the engineer, all provide evidence that the building work was constructed in accordance with the building consent and the Building Code.
- 4.14 I reiterate that notwithstanding that it was only the final process of issuing a code compliance certificate that was not completed, in my view an authority would be wrong to issue a code compliance certificate for building work where there is evidence of non-compliance with the relevant building consent, even if this non-compliance is as a result of a natural disaster.

5. The Decision

- 5.1 In accordance with section 188 of the Building Act 2004, I determine that the retaining wall does not comply with Building Consent No. 10091242, and accordingly I confirm the authority's decision to refuse to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 2 August 2012.

John Gardiner

Manager Determinations