



Determination 2013/015

The refusal to issue a code compliance certificate and the simultaneous issue of a notice to fix for a 14-year-old house at 25 Gilbert Place, Torbay, Auckland

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are
- the building owners, P and J Aish, and G Walson (“the applicants”), acting via an agent
 - Auckland Council, including in its previous capacity as North Shore City Council, (“the authority”)² carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to fix for the 14-year-old house because it is not satisfied that the building work complies with the requirements of certain clauses of the Building Code³ (First Schedule, Building Regulations 1992) that was current at the time the building consent was issued. The authority’s concerns primarily relate to the weathertightness of the exterior building envelope of the house.
- 1.4 The applicants dispute that the notice to fix should be issued on the grounds that: they believe the building consent is no longer ‘operative’ in terms of section 166(1)(a) and the building is therefore an existing building for which a notice to fix can not be issued, and that no breach of the ‘Act and/or its regulations and/or code clauses’ were identified. The applicants are also of the view that the authority did not

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 The building consent and inspections were issued/undertaken by North Shore City Council, which was later transitioned into the Auckland Council. The term “the authority” is used for both

³ In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

properly provide written notice of refusal of the code compliance certificate in terms of section 95A.

1.5 The matters to be determined⁴ are therefore

- whether the authority correctly exercised its powers in the provision of its reasons for refusing to issue the code compliance certificate
- whether the authority correctly exercised its powers in issuing the notice to fix. In deciding this matter I must consider:
 - whether the authority was within its powers in issuing a notice to fix
 - whether the authority has correctly identified the particulars of the notice to fix.
- whether the authority made the correct decision to refuse to issue a code compliance certificate

1.6 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

1.7 The relevant legislation referred to in this determination is set out in Appendix A.

2. The building work and background

2.1 The building work consists of a two-storey house with enclosed garage. The house comprises concrete floor slab and light timber framing, and is clad with fibre-cement sheet cladding and brick veneer, with aluminium window and door joinery, and concrete tile roofing with eaves to some elevations. The house is complex in plan and form, and includes a number of features of high risk in terms of weathertightness, including: complex roof to wall junctions, a two storey glazed curved wall, two cladding types, skylights, internal gutters, small areas of flat roof, limited or no eaves on some elevations, and a top-fixed balustrade to a large deck. The specification calls for 'Boric treated' timber.

2.2 On 17 September 1997 the authority issued building consent no. E12414 for the building work under the Building Act 1991 ("the former Act"). This building consent was later changed to No. BR1237397.

2.3 The authority undertook inspections during construction but no final inspection was called for or carried out. The building work was substantially complete and the house occupied from sometime in 1998. No code compliance certificate was sought until 2011.

2.4 On 31 August 2011 the authority carried out an inspection as part of its process to enable a code compliance certificate to be issued. As a result of the inspection the authority wrote to the applicants in a letter dated 18 October 2011; the letter outlined the requirement for the authority to be satisfied that the building complied with the Building Code before it could issue a code compliance certificate, and stated:

⁴ Under sections 177(1)(b), 177 (2)(d), and 177(2)(f) of the Act

...[the authority] is not satisfied that your house complies with the building code in a number of respects. A Notice to Fix under sections 164 & 165 of the Building Act 2004 is attached to this letter. This sets out those areas that [the authority] has currently identified whether it has been unable to satisfy itself of Building Code compliance.

2.5 The notice to fix

- 2.5.1 The notice to fix was issued on 19 October 2011.
- 2.5.2 Paragraph 1.0 of the notice to fix identified the ‘particulars of contravention or non-compliance’ as building work which has not been undertaken in accordance with the requirements of
- the building consent
 - the Building Code; in respect of Clauses B1 Structure, B2 Durability, E1 Surface Moisture, E2 External Moisture, and F4 Safety from falling
 - the Building Act 2004; in particular sections 17, 40(1) and 44(1).
- 2.5.3 Paragraph 2.0 of the notice to fix identified the ‘details of the contravention’; which included a detailed list under the following headings:
- Issues Related to Cladding.
 - Items not installed per the manufacturers specifications (in relation to the cladding).
 - Items not installed in accordance with the ‘relevant acceptable/alternative solutions approved under the building consent’ (the possibility that surface water entering was entering a foul water drainage (Clause G13)).
 - A policy statement on the drainage and ventilation of external claddings.
- 2.5.4 Paragraph 3.0 of the notice to fix noted changes to the building consent (the cladding).
- 2.5.5 Paragraph 4.0 of the notice to fix noted other building related issues (internal moisture related to plumbing fixtures, and decaying carpets adjacent external walls).
- 2.5.6 Paragraph 5.0 of the notice to fix noted the durability requirements of the Building Code as they applied to the building elements.
- 2.5.7 Paragraphs 6.0 to 9.0 of the notice to fix identified the actions required ‘to remedy the contravention or non-compliance’; which included
- lodgement of a proposed scope of works, in writing and prepared by a suitably qualified expert, outlining how each area of non-compliance was to be addressed or remedied
 - apply for a ‘waiver’ of the requirements of Clause B2 to the effect that the requirements of Clause B2 would commence from substantial completion and not the date of the code compliance certificate
 - the date the notice must be complied with (14 November 2011)

- the requirement that the owner ‘must confirm in writing by 14 November 2011’ their ‘intention to apply for a determination’ from the Ministry.
- 2.5.8 Under the heading ‘further particulars’ the notice also stated that ‘all building work must cease immediately until [the authority] is satisfied that you are able and willing to resume operations in compliance with the Building Act ...’
- 2.6 I note that the authority’s records indicate a pre-lodgement meeting was held with the authority to discuss a partial re-clad. I am not aware of any subsequent building work or application for building consent.
- 2.7 The applicants then engaged the agent, who contacted the authority by email on 23 January 2012 in regards the issue of the notice to fix. The agent referred to section 166(1)(a) of the current Act and noted that in his view as there was no evidence of building work since completion in 1998 it would ‘seem to make the dwelling an existing building and [the] building consent clearly not “operative” now.’ The agent noted the affects of the notice to fix in terms of the applicants’ desire to sell the property and requested that the authority ‘remove the notice to fix from the file’ and replace the notice to fix with a written notice under section 95A.
- 2.8 On 31 January 2012 the authority responded by email to the agent, stating that the authority ‘could not be satisfied on reasonable grounds that the building in question was built in accordance with the Building Code, was not performing as intended nor that it would continue to perform for the expected durability periods’. The authority referred to the transitional provisions and the provisions of the current Act in respect of notices to fix, and stated that it ‘must issue a notice to fix’ when it is unable to grant a code compliance certificate. The authority acknowledged the applicants’ concerns but advised that the notice to fix must stay in force and in the format it currently is, ‘until the issues identified have been successfully resolved’.
- 2.9 The Ministry received an application for a determination on 18 September 2012.

3. The submissions

3.1 The initial submissions

- 3.1.1 The agent provided an outline of the background to the matter, a copy of the notice to fix and covering letter from the authority (refer paragraph 2.4), and a copy of emails between the agent and the authority. In a covering letter the agent submitted that (in summary):
- the authority had failed to provide a written notice of refusal to issue the code compliance certificate with reasons as required by section 95A
 - the notice to fix was incorrectly issued as the authority did not have powers under section 164 to 168 to issue the notice to fix and there is no offence outlined in the Building Act for an existing building deemed not to comply with the Building Code (unless it is unsafe or insanitary under section 124).
- 3.1.2 The agent accepted that consent was “open” until a code compliance certificate was issued, however, the agent ‘question[ed] whether a consent was “operative” for a

completed building’. In respect of existing buildings, the agent noted that while a code compliance certificate satisfies the performance of a regulatory function it is not determinate of a built date, and while a building with a code compliance certificate is an existing building, a building without a code compliance certificate can be an existing building also.

- 3.1.3 The authority acknowledged the application and provided a copy of the property file on CD Rom, but did not make a submission in response. The property file included
- an annotated photo file from the inspection of 31 August 2011
 - minutes of a pre-lodgement meeting held on 17 November 2011 to discuss a partial reclad and associated works to address the notice to fix.

3.2 The first draft determination

- 3.2.1 A first draft determination was issued to the parties for comment on 13 November 2012. That draft concluded that the authority correctly exercised its powers in the provision of its reasons for refusing to issue the code compliance certificate, in issuing the notice to fix and refusing to issue the code compliance certificate, but that the authority had not correctly identified the particulars of the notice to fix.
- 3.2.2 The authority accepted the draft determination without comment in a response dated 27 November 2012.
- 3.2.3 The agent did not accept the draft determination, and made specific comments about the sections of the draft determination, which I have considered, and also made the following comments (in summary):
- The finding that the two decisions and processes under section 95A and section 164 are distinct should be enforced in the determination’s decision.
 - There are four items that it could be accepted ‘there is prima-facie proof of possible breaches’ (head sill and jamb flashings, chimney roof junctions lack cladding clearance, mould to underside of soffits, plumbing to dishwasher) however, these items do not ‘reach the threshold of the degree of certainty and reasonable grounds required to issue a [notice to fix] because no evidence has been offered for the allegation of failure ...’
 - The unproven alleged breaches ‘do not come close to the level of seriousness envisaged by the legislators when granting the authority such punitive power under the [notice to fix] provisions and accordingly there were never “reasonable grounds” to issue the [notice to fix] in the first instance. Without first issuing the [section] 95A letter, an opportunity has been denied the owners to address those issues ...’
 - The transitional provisions in section 436 only apply to the ‘consideration and determination of the application for the [code compliance certificate]. The refusal or issuing must still be done under the Building Act 2004. If this is not the case then a [notice to rectify] would be required to be issued under [section 43 of the former Act].’
 - The draft determination ‘fails to provide a sound basis for why a building consent 14 years old can be considered operative when no building work has

been done for perhaps [the last] 12 years, and it is agreed the work was carried out was in accordance with the building consent as issued'. While a code compliance certificate "closes" a consent, it is 'not the only point of closure as otherwise building work done without consent [under Schedule 1 of the Act] could never achieve "closure".'

- The matter for determination is not about the compliance of the house 'but whether [an authority] could issue a [notice to fix] when no substantive breach of the Act was identified/proven and without a section 95A notice [being issued] first. ... In this case [an notice to fix] was issued for failure to be satisfied and not for a contravention of the Act'.

3.3 The second draft determination

3.3.1 A second draft determination was issued to the parties for comment on 28 January 2013. The discussion section was expanded in response to the submissions received. The second draft concluded that the authority incorrectly exercised its powers in issuing the notice to fix, but maintained the view that the authority correctly exercised its powers in respect of the refusal to issue the code compliance certificate and the provision of its reasons.

3.3.2 Further submissions were received in response to the second draft determination and there was correspondence between the parties relating to the matters being determined. I have summarised the points raised in the submissions and correspondence below.

The authority

3.3.3 The authority responded to the second draft determination in an email dated 14 February 2013. The authority disagreed with the conclusion reached regarding the issue of the notice to fix, and the authority stated its view that it had

... exercised [its] obligations under section 164 insofar as [the authority] correctly identified the Code Clause Failures on a Building which has a current, "open" consent. Further that [the authority] provided the applicants with a means to remedy.

3.3.4 A further email from the authority on 15 February 2013 to the agent, the authority stated that 'there are failures in the building envelope' and 'areas of decay within structural members' of which the extent is yet to be determined. The authority reiterated to the agent its view that further investigation would be required in order for remediation to be carried out to then allow for the issue of a code compliance certificate.

3.3.5 On 4 March the Ministry sought further information from the authority as to the comment made regarding decay within structural members. The authority responded with two photographs taken from its photo file (refer paragraph 3.1.3) of a wall to barrier junction and a roof to wall junction. The authority's email referred the photos as relating 'only to B1' and stated that 'the building is "at risk" as a result of numerous failures in the external envelope' and that the authority has 'no doubt moisture is entering this building'.

The agent

- 3.3.6 The agent made a submission in response to the second draft by email on 14 February 2013, reiterating points raised in the application and previous submissions. I have summarised the additional points raised as follows:
- The evidence required to establish a breach of the Building Code is more than ‘the possibility of’ a non-compliance. For example; a leak, as a breach of Clause E2, should be shown to cause ‘undue dampness or damage to a [building] element’.
 - All building work requires maintenance in order to ensure ongoing compliance.
 - A letter refusing to issue a code compliance certificate should reference section 95A ‘so there is no doubt as to what the [regulatory] instrument is’.
 - The house is nearly 15 years old and ‘allowing for wear and tear has now demonstrated that it satisfies the minimum “sufficient” durability period for code compliance for [the building] envelope’
- 3.3.7 The agent also disagreed with the reasons given in the second draft determination that the consent was “operative”. The agent distinguished between what he considered to be “operative”, as ‘indicating unfinished or incomplete work still being progressed’, and that at the cessation of construction work a consent may still be “open” but no longer “operative”.
- 3.3.8 The applicants made a submission in an email to their agent on 20 February 2013, emphasising the impact of the notice to fix and the financial burden that would be incurred to remedy the items listed in the notice. The applicants stated that there were no problems with moisture ingress and indicated that permanent moisture probes had been installed (I note that no information in relation to the moisture probe readings has been provided to the determination). The applicants stated their view that the building work complied at the time the construction was completed and expressed concern that the notice to fix was requiring that they bring the house into compliance with ‘current standards’ (see paragraph 3.5.1).
- 3.3.9 In email correspondence to the authority dated 20 February 2013, the agent queried the authority’s reference to decay and restated his view that it was not appropriate to issue a notice to fix ‘for simply not knowing that work is code compliant’.

3.4 The third draft determination

- 3.4.1 A third draft determination was issued to the parties on 6 March 2013. The third draft was issued to seek confirmation from the agent on whether a hearing would be sought; the conclusions and decision reached in the third draft were unaltered from the second.
- 3.4.2 The agent responded by email on 15 March 2013, stating that the applicants were in general satisfied with the decision. The agent reiterated his view that there was ‘no request [in the application for determination] for evidence that the dwelling was or wasn’t compliant’ and that in his view the first bullet point in the decision was superfluous.

3.4.3 The authority responded by email on 19 March 2013, noting that it still disagreed in principle with the decision regarding the issue of the notice to fix instead of notice under section 95A, because there was 'sufficient evidence of non-compliance and failure', but that the authority accepted the draft in order to avoid further delays for the applicants.

3.4.4 The agent responded to the authority's submission in an email on 19 March 2013, noting that the applicants did not 'want a decision that is issued in haste', and that if the authority was of the view that it had 'met the evidential threshold' for a notice to fix then this should be clearly stated.

3.5 My response to points raised (but not considered elsewhere)

3.5.1 In response to the applicant's comments paragraph 3.3.8 regarding compliance at the time the work was consented; section 436 of the Act requires an authority to assess a building consent issued under the former Act against the provisions of the Building Code that were in force at the time the consent was issued. I note that in respect of the cladding, the provisions of Clause E2 External moisture have not changed significantly in the period since the consent was issued.

3.5.2 The agent contends (paragraph 3.3.6) that the cladding has met the requirements of the Building Code in that it has met the 15 year durability period prescribed in Clause B2. In my view this can only be the case if it can be shown that the cladding has performed adequately for the full 15-year period; I have received insufficient information to form a view on this matter.

4. Discussion

4.1 The refusal to issue a code compliance certificate in respect of a building consent issued under the former Act

4.1.1 The transitional provisions of the Act apply when an application for a code compliance certificate is received in respect of a building consent issued under the former Act. The transitional provision in section 436 of the Act requires the authority to consider such an application under the former Act, and section 436(3)(b) of the Act modifies the test for issuing a code compliance certificate by requiring an authority to issue a code compliance certificate 'if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code that applied at the time the building consent was granted'.

4.1.2 It is important to note that section 436 only applies to an application for a code compliance certificate and that section 43 of the former Act is continued in force only for that purpose and not for any other purpose (section 436(3)). The broad intent of the transitional provisions in the Act (with some specific exceptions in areas such as section 436(3)(b) noted above) is that uncompleted building work under the former Act at the time the current Act came into force would be carried over to the current Act and the provisions of the current Act would apply. For example, section 433 provides that a building consent granted under the former Act must be treated as if it were a building consent granted under the current Act. Similarly, a notice to

rectify issued under the former Act is to be treated as if it were a notice to fix issued under section 164 of the current Act.

- 4.1.3 The effect of section 433 is to provide that building work carried out pursuant to a building consent issued under the former Act is to be treated as building work carried out under a building consent issued pursuant to the current Act and to which the provisions of the current Act, such as the power to issue a notice to fix under section 164 of the Act, will apply.
- 4.1.4 I note there is a reference in section 43(6) of the former Act to the issue of a notice to rectify following a refusal to issue a code compliance certificate. While section 436 provides that section 43 of the former Act continues in force, in my view, this only applies in respect of an application for a code compliance certificate, not to the consequences that may follow a refusal to issue a code compliance certificate. I also note that section 43(6) of the former Act refers to the issue of a notice to rectify 'in accordance with section 42 of [the former] Act', but that latter provision is not continued in force by the transitional provisions in the Act, nor is it supported by any of the other provisions of the former Act that would be necessary for that provision to have effect, such as section 80 of the former Act that establishes the relevant offence for failing to comply with a notice to rectify.
- 4.1.5 In its letter dated 18 October 2011, the authority stated that it could not be satisfied that the building work complied with the Building Code in a number of respects. The letter enclosed a notice to fix which went into further detail as to the items the authority considered did not comply, and stated that the notice 'sets out those areas that the [authority] has currently identified where it has been unable to satisfy itself of Building Code compliance'.
- 4.1.6 The agent's submissions raised a number of concerns regarding the way in which the authority interpreted and applied the requirements of section 95A to provide reasons for refusing to issue the code compliance certificate and the power to issue a notice to fix under section 164. I consider the agent has raised some important issues regarding these provisions and I have discussed generally these provisions below before proceeding to consider the way in which they have been applied here.

4.2 The relationship between the requirement to give reasons (section 95A) and the issue of a notice to fix (section 164)

- 4.2.1 The processes described under sections 95A and 164 are distinct and should be treated as such by an authority. The purpose of each provision and an authority's powers under each provision are different.
- 4.2.2 If an owner requests a code compliance certificate and it is refused then an authority is obliged to follow the provisions of section 95A, which in the normal course of events is likely to include a detailed inspection of the building work concerned. 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.

- 4.2.3 The requirement that an authority provide reasons in writing for refusing to issue a code compliance certificate under section 95A provides an owner with notice of the work required in order to obtain a code compliance certificate. The reasons provided by the authority will concern the areas of the building work where the authority does not believe the building work complies with the building consent (or the Building Code if the consent was issued under the former Act). The notice provides an owner with the opportunity to consider the work required to remedy the situation.
- 4.2.4 While an authority must be satisfied on reasonable grounds that the building work complies with the building consent before issuing a code compliance certificate, the reasons under section 95A are simply that, the reasons for the refusal, and do not have to satisfy any particular evidential threshold in terms of failure to meet the requirements of the Act or Building Code. The notice containing the reasons will be placed on the property file and will be disclosed in any LIM. This will serve to ensure that the authority's position with respect to compliance and the lack of a code compliance certificate will be apparent to any prospective purchaser.
- 4.2.5 An authority has the power to issue a notice to fix where the authority considers on reasonable grounds an owner is contravening or failing to comply with the Act or Building Code (section 164(1)(a)). A notice to fix is an enforcement notice that requires a person to carry out work to remedy a breach of the Act or Code (section 164(2)(a)), specifies a time period for doing so (section 165(1)(b)) and may be enforced by a prosecution for failing to comply with the notice (section 168). The offence is a serious one involving a fine of up to \$200,000 and reflects the main purpose of a notice to fix, which is to ensure compliance and provide effective penalties for those that do not comply.
- 4.2.6 In my view, an authority will not normally issue a notice to fix at the same time as issuing written notice under section 95 unless the particular circumstances warrant it. The issue of a notice to fix should not necessarily be seen as an expected sequential step in the regulatory process following the issue of a notice under section 95A. In addition, the processes under sections 95A and 164 should not be dealt with by simply rolling them together, automatically issuing a notice to fix and including the reasons for the refusal in the notice to fix, without considering why it is necessary to issue a notice to fix.
- 4.2.7 The common practice for authorities inspecting building work during the construction phase is to identify any work that does not comply with the consent and/or the Building Code and to issue a site notice requiring the work to be remedied. If the site notice is not complied with, a notice to fix will usually be the appropriate response. Similarly, on a final inspection when an authority refuses to issue a code compliance certificate the usual response should be the provision of a notice with reasons for the refusal under section 95A. Then, if an owner fails to carry out the work that will be the appropriate time for an authority to consider whether to issue a notice to fix.
- 4.2.8 There will of course be some circumstances when it will be appropriate to issue a notice to fix at the same time as refusing to issue a code compliance certificate. For

example, if the breach is significant, the building work is unsafe or is likely to become unsafe, or there have been repeated breaches by the owner of the Act or Building Code. However, in these circumstances, there are particular requirements of the Act in respect of the issue of a notice to fix that must be satisfied. For example, an authority must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened will require some specific evidence in support of that belief before a notice to fix can be issued.

- 4.2.9 Finally, I note that in this case, the authority's covering letter to the notice to fix sought to assure the owners that the authority would not be seeking to prosecute them for a failure to comply with the notice, but just asked the owners to advise the authority of their intentions regarding the areas of non-compliance. As a general observation, I do not consider it is appropriate for an authority to issue a notice to fix and also advise the owner the authority does not intend to enforce it. The sanctions available for non-compliance with a notice to fix are an essential purpose of the notice, which is to ensure non-compliant building work is remedied. The issue of a notice to fix accompanied by an express disavowal that it will be enforced simply invites the question whether the notice is being issued for the proper purpose.

4.3 The power to issue a notice to fix in respect of an operative building consent

- 4.3.1 The agent submitted that as the building work was completed in 1998 and because no further building work has been carried out, the building consent can no longer be said to be "operative" for the purposes of section 166(1)(a). The agent also submitted the building is an existing building and acquired that status when the building work was completed or it was "built" and there is no power to issue a notice to fix in respect of the compliance of an existing building with the Building Code.
- 4.3.2 I do not agree with agent's submissions for the following reasons. First, a building consent will remain in force and "operative" until such time as it ceases in accordance with the provisions of the Act. There are a number of ways in which this can happen including:
- the building consent lapses in accordance with section 52 if the building work to which it relates does not commence within 12 months after the date of the issue of the consent
 - the building consent is amended or replaced by a subsequent building consent that covers all of the work in the building consent
 - a code compliance certificate is issued in respect of the building work carried out under the building consent
 - a determination reverses the decision of an authority to issue a building consent.
- 4.3.3 Second, while a building consent remains in force it is lawful for a person to carry out the building work covered by the building consent, and when building work is being carried out an authority must have the power to issue a notice to fix for work that is contrary to the building consent or carried out under the building consent

contrary to the Building Code. If an owner thinks they have completed the work required under a building consent and the building has in their view become an 'existing building' this does not mean an authority can no longer issue a notice to fix in respect of that work.

- 4.3.4 Third, there is nothing in the Act or the former Act to prevent an "existing building", which I take to mean one that is substantially complete, also being the subject of an operative building consent. The status of a building being substantially complete and being subject to a building consent is not mutually exclusive.

4.4 The particulars of the notice to fix

- 4.4.1 Paragraph 1.0 and 3.0 of the notice to fix refer to the building work not having been completed in accordance with the building consent. I note that for building consents issued under the former Act, the test to be applied by the authority is whether the building work complies with the Building Code that was in force at the time the consent was issued.
- 4.4.2 The headings at paragraphs 2.1 and 2.2 of the notice to fix refer to items not having been installed as per the manufacturer's specifications and not having been installed in accordance with the relevant 'acceptable/alternative solutions approved under' the building consent. I note that Acceptable Solutions are non-mandatory and compliance with Acceptable Solutions is not the only method of compliance nor can it be required. Non-compliance with an Acceptable Solution does not mean non-compliance with the performance requirements of the Building Code.
- 4.4.3 Departures from the consented documents, the Acceptable Solutions or alternative solutions detailed in the approved plans, and departure from a manufacturer's specifications are not, of themselves, breaches of the Act or its regulations. While I acknowledge that such departures may give rise to concerns about the compliance of the as-built construction, the notice to fix identified few confirmed breaches of the Act or its regulations.
- 4.4.4 Paragraph 1.0 of the notice to fix also refers to breaches of sections 17, 40(1) and 44(1) of the Act. I note that sections 40 and 44 relate to the requirement for building consent to be obtained and when consent should be sought. The construction of the house was consented and there is no other reference or detail in the notice to fix in regards to further building work having been carried out without consent; as such I consider the references to sections 40(1) and 44(1) to have no relevance to this particular case and they are therefore incorrectly included in the notice.
- 4.4.5 The notice to fix identified non-compliance with Building Code Clauses B1 Structure, B2 Durability, E1 Surface moisture, E2 External moisture, and F4 Safety from falling. However, no further reference or particular building element that contravened Clause B1 or F4 was identified in the notice. Paragraph 2.2 concerns compliance with Clause G13 Foul water, yet this clause is not referenced in Paragraph 1.0. I have not seen any evidence as to the specific reasons for the authority considering that the building work is not compliant with Clause F4, as such I consider the references to Clause F4 have been incorrectly included in the notice.

- 4.4.6 The authority has also stated that the building work does not comply with Clause B1 and has provided two pictures from the authority's photo file to support this position (refer paragraph 3.3.5). The commentary⁵ provided with the pictures in the photo file is, in my view, a description of a position arrived at under section 95A but does not identify a breach of the requirements of the Building Code. The commentary is also more closely related to compliance with Clause E2 and not Clause B1.
- 4.4.7 Paragraph 2.0 of the notice to fix also identifies a number of building elements that the authority considers do not provide adequate resistance to penetration by, and the accumulation of moisture from the outside. The items listed were apparent to the authority in its inspection of 31 August 2011 and detailed in the authority's photo file record of that inspection. I accept these items provide sufficient doubt as to the building's compliance in respect of Clause E2 and Clause B2 and accordingly those items are appropriate to be included as reasons for refusing to issue a code compliance certificate as the authority cannot be said to be satisfied on reasonable grounds that the building work is code compliance.
- 4.4.8 Paragraph 2.3 of the notice to fix listed 'Drainage and Ventilation', noting that the 'construction methods used in this building do not allow the water to drain away' and 'there is only limited ability for air circulation in the wall framing to ensure that damp timber can dry out.' This statement is not related to a breach of the Act or its regulations.
- 4.4.9 Paragraph 4.0 of the notice to fix identifies two 'other building related issues', being internal moisture related to plumbing fixtures, and decaying carpets adjacent external walls). The first item may well be a maintenance matter related to the fixtures concerned, and the owner and agent have stated that the damage to the carpet has been the result of beetles rather than moisture damage; I accept that statement.
- 4.4.10 Paragraph 5.0 of the notice outlines the durability requirements of various building elements, and paragraph 7.0 states the applicants may apply to the authority 'for a Waiver and modification ... to waiver (sic) the requirements of Clause B2 (Durability) of the building code.' I note the reference to 'waiving' the requirements of Clause B2 is incorrect. The reference to Clause B2 does not constitute a breach of the Act or its regulations and I do not believe its inclusion in the notice to fix is appropriate.
- 4.4.11 Paragraph 9.0 of the notice to fix says the owner 'must confirm in writing by 14 November 2011' their 'intention to apply for a determination' from the Ministry. This requirement does not represent a breach of the Act or its regulations.
- 4.4.12 Under the heading 'further particulars' the authority required that 'all building work must cease immediately...' The building work was substantially complete in 1998 and there is no reference in correspondence or the authority's records as to any building work being carried out at this time: a stop work notice is appropriate for work that is currently in progress. I therefore consider that the authority incorrectly included the stop work instruction in the notice to fix.

⁵ The commentary provided with the pictures in the photo file say 'Deck barrier cappings have insufficient means of waterproofing ...', and '... gutter flashings between the concrete tiles and wall cladding will need to be addressed ...'

4.5 Conclusion: The refusal to issue a code compliance certificate, the provision of reasons, and the issue of a notice to fix

- 4.5.1 I note that section 43 of the former Act required an owner to advise the authority that the building work has been completed “as soon as practicable”, and section 92(2)(a) of the current Act requires an owner to apply to a building consent authority for a code compliance certificate “as soon as practicable” after all the building work to be carried out under a building consent has been completed. In this case there was a significant delay between the completion of the building work and the applicants seeking a code compliance certificate.
- 4.5.2 The transitional provision in section 436 of the Act applies to the application for a code compliance certificate where the building consent was issued under the former Act. Section 436(3)(b) of the Act requires an authority to issue a code compliance certificate ‘if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code that applied at the time the building consent was granted’.
- 4.5.3 I am satisfied that at the time of the authority’s inspection there was insufficient evidence for the authority to be satisfied that the house complied with the Building Code that was in force at the time of the issue of the building consent, and the authority made the correct decision to refuse to issue the code compliance certificate.
- 4.5.4 In respect of the provision of reasons for the refusal to issue the code compliance certificate I am of the view that the letter to the applicants, along with the details provided in the notice to fix, satisfied the obligations of the authority under section 95A to provide reasons for the authority’s refusal to issue a code compliance certificate. However, I consider these reasons were not correctly set out in the notice to fix and the authority should modify these reasons in accordance with the findings herein and issue a statement under section 95A.
- 4.5.5 It appears the notice to fix was automatically issued by the authority at the same time as advising the applicants of the reasons for refusing to issue the code compliance certificate. The authority does not appear to have specifically considered the particular reasons for issuing the notice to fix under section 164. Further, the matters of non-compliance identified in the notice to fix are not generally supported by evidence that establishes reasonable grounds for the authority’s belief in those matters of non-compliance, as required by section 164. I also note that the authority’s covering letter to the notice to fix assured the owners that the authority would not be seeking to prosecute them for a failure to comply with the notice and that this is not consistent with the purpose of a notice to fix.
- 4.5.6 The authority did not properly exercise its powers in issuing the notice to fix for the reasons set out above. The notice to fix does not correctly identify the matters of non-compliance and I am not satisfied that in automatically issuing the notice to fix at the same time as refusing to issue the code compliance certificate the authority has complied with the requirements of section 164.
- 4.5.7 While I have come to the conclusion that authority’s decision to issue notice to fix was incorrect, that does not prevent the authority from issuing a new notice to fix if it believes that the requirements of the Act or the regulations have been breached, and that the notice will be used for the purpose for which it is intended, i.e. issued with

the intension that it is to be enforced. The issue of a notice to fix should also take account of the circumstances and the seriousness of any breach, as discussed in paragraph 4.2.8.

5. The decision

5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that

- there is insufficient evidence to establish on reasonable grounds that the building work complies with the Building Code that was in force at the time of issue of the consent, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.
- the authority correctly exercised its powers under section 95A in the provision of its reasons for refusing to issue the code compliance certificate
- the authority incorrectly exercised its powers in issuing the notice to fix and I therefore reverse the authority's decision to issue the notice to fix

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 8 April 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 Relevant sections of the Building Act 2004 include:

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

40 Buildings not to be constructed, altered, demolished, or removed without consent

(1) A person must not carry out any building work except in accordance with a building consent.

...

44 When to apply for building consent

(1) An owner intending to carry out building work must, before the building work begins, apply for a building consent to a building consent authority that is authorised, within the scope of its accreditation, to grant a building consent for the proposed building work.

(2) An owner may make a series of applications for building consents for stages of the proposed building work.

95A Refusal to issue code compliance certificate

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.

166 Special provisions for notices to fix from building consent authority

(1) If section 164 applies because a building consent authority that granted a building consent for building work considers that the building work has not been, or is not being, carried out in accordance with this Act or the building consent, a notice to fix applies only—

- (a) to building work required during the period in which a building consent is operative; or
- (b) in respect of building work for which a building consent should have been obtained; or
- (c) in respect of building work for which a building consent was not required but where there was a requirement that the work meet the building code.

(2) A building consent authority that is not a territorial authority or a regional authority that issues a notice to fix must, within 5 working days after issuing it, give a copy of it to—

- (a) the territorial authority; or
- (b) if the territorial authority has transferred, under section 233, any of its functions, duties, or powers under this Act to another territorial authority, the territorial authority to whom the functions, duties, or powers have been transferred.

433 Transitional provision for building consents granted under former Act

(1) A building consent that was granted under section 34 of the former Act before the commencement of this section must, on that commencement, be treated as if it were a building consent granted under section 49.

(2) However,—

(a) section 93 does not apply; and

(b) accordingly, a building consent authority is not required to issue a code compliance certificate for the building work concerned within the period specified in that section.

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.