



## Determination 2013/079

# The exercise of an authority's powers of decision in refusing to issue a code compliance certificate in 2003 for a 7-year-old house with monolithic cladding at 60 Godley Lane, Albany, Auckland

## 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 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 owner of the house, Waddingham Family Trust ("the applicant"), acting through a legal adviser ("the legal adviser")
  - Auckland Council ("the authority")<sup>2</sup>, carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision the authority made in 2003 to refuse to issue a code compliance certificate for the then 7-year-old house because of the period of time that had elapsed from the issue of the building consent until when the code compliance certificate was sought.
- 1.4 The matter to be determined<sup>3</sup> therefore is the exercise of the authority's powers of decision in refusing to issue the code compliance certificate.
- 1.5 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 two-storey conventional light timber frame detached house that appears complex in plan and form. The monolithic cladding to the external walls consists of a solid plaster over rigid baking that is direct fixed to the timber framing. The roofing is asphalt shingles and joinery is aluminium. The building appears to have little or no eaves to most elevations.

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

<sup>2</sup> The location in which the building work is located was formerly under the jurisdiction of the North Shore City Council which was later transitioned into the Auckland Council. The reference to "the authority" refers to both.

<sup>3</sup> Under sections 177(1)(b), and 177(2)(d) of the Act

- 2.2 The authority issued building consent No. A11685 on 16 December 1996 under the Building Act 1991 (“the former Act”). The authority carried out a final inspection at some time in 2003.
- 2.3 On 21 October 2003 the authority wrote to the applicant to confirm that a final building inspection and plumbing and drainage inspection had been carried out and that
- The inspections confirm that all work has been completed as per the approved plans.
- Building consent number is (*sic*) A11685 has now been cleared.
- A post script to the letter stated:
- As discussed, no Code Compliance Certificate will be issued due to the age of the building consent, 16/12/1996.
- 2.4 It seems that the matter rested at that until the applicant wrote to the authority on 31 January 2013 seeking to have the decision made by the authority in 2003 overturned and a code compliance certificate issued. The applicant noted that the building was considered to be compliant with the Building Code at the time of the final inspection in 2003.
- 2.5 On 7 February 2013 the authority responded to the applicant, stating that due to the age of consent a further final building inspection would be required.
- 2.6 On 26 March 2013 the legal adviser wrote to the authority, noting that the authority had inspected the building work in 2003 and that it was found to be completed in accordance with the approved plans. The legal adviser considered there was no impediment to the issue of the code compliance certificate at that time, and requested that a code compliance certificate now be issued by the authority.
- 2.7 On 1 May 2013 the legal adviser sought a response from the authority to the previous letter. I am not aware of any further correspondence between the parties.
- 2.8 The Ministry received an application for a determination on 3 July 2013.

### **3. The submissions**

- 3.1 The legal adviser provided a detailed submission dated 28 June 2013, which set out the background to the dispute and pointed out the reason provided by the authority for refusing to issue the code compliance certificate was solely due to the age of the building consent. The legal adviser considered the basis for the refusal to be ‘invalid’ and submitted that as the authority had considered the building work to be compliant with the Building Code at the time of its final inspection there was no reason why a code compliance certificate could not be issued immediately.
- 3.2 The legal adviser forwarded copies of
- the certificate of title
  - a photograph of the house
  - correspondence between the parties
  - Determination 2012/031<sup>4</sup>.

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<sup>4</sup> Determination 2012/031: Refusal to issue a code compliance certificate for a 14-year-old house at 117 Haukore Street, Hairini, Tauranga

- 3.3 The authority acknowledged the application but made no formal submission in response. The authority provided a copy of the property file on CD ROM which included some documents relevant to the determination.
- 3.4 On 24 July 2013 I wrote to the legal adviser and stated that, given the circumstances, it would seem appropriate for the authority to carry out a final inspection (refer paragraph 2.5) and that the determination could then consider the outcome if the authority continued to refuse to issue a code compliance certificate.
- 3.5 The legal adviser responded by letter dated 1 August 2013 reiterating that the authority had carried out a final inspection in 2003 and that the applicant accepted the refusal on the grounds provided by the authority at that time as the applicant was not aware that the authority could not refuse on those grounds.
- 3.6 On 9 August 2013 I again wrote to the legal adviser noting that, given the design and features of the building work and the increased awareness of performance of cladding systems, it would not be reasonable for the authority to stand by a proposal to make a decision that was not formally made in 2003. In addition the requirements of Clause B2.3.1<sup>5</sup> would mean that the durability periods would have begun from the date of the issue of the code compliance certificate (in 2003 if it had been issued then) and that this would now routinely handed by authorities by way of an amendment to the consent to modify Clause B2.3.1. In addition I noted that in order for the authority to issue a code compliance certificate now, it would still need to be satisfied that the building work was compliant with the Building Code that was in force at the time the consent was issued.
- 3.7 The legal adviser responded by letter dated 5 November 2013, noting that the applicant 'accepted the process to remedy the situation' and that this would involve an inspection. The legal adviser stated that the applicant wished to continue with the determination on the authority's original decision in 2003 to refuse to issue the code compliance certificate on the basis of the reason provided in letter of the 21 October 2003 (refer paragraph 2.3).
- 3.8 A draft determination was issued to the parties for comment on 25 November 2013.
- 3.9 The applicant accepted the draft without further comment in a response received on 3 December 2013.
- 3.10 The authority responded on 10 December 2013, submitting that (in summary):
- it was the applicant's responsibility to request a code compliance certificate in the form of an application and this was not done until January 2013
  - the authority considers it fair and reasonable to have the benefit of knowing the building has been and is performing before issuing a code compliance certificate; this building has many risk features and details
- 3.11 In regards to the wording of the determination decision the authority sought clarification as to whether the determination was reversing the authority's 'position' and requiring it issue a code compliance certificate; if not, the authority considered the determination should instruct the applicant to allow a 'durability inspection' to take place so that the authority can review it's decision.

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<sup>5</sup> In this determination, references to sections are to sections of the Building Acts (1991 or 2004), and references to clauses are to clauses of the Building Code.

- 3.12 In response to the authority's query on the wording of the decision, I consider this is adequately addressed in paragraph 4.3. As regards the applicant completing a form requesting a code compliance certificate; I consider that the applicant had accepted the post script on the authority's letter of 21 October 2003 would mean there was no purpose to be served in making a formal application.

## **4. Discussion**

### **4.1 The authority's 2003 refusal**

- 4.1.1 The authority's decision to refuse to issue the code compliance certificate was made under section 43 of the former Act. Section 43(3) of the former Act states that the authority shall issue the code compliance certificate 'if it is satisfied on reasonable grounds that (a) the building work to which the certificate relates complies with the building code...'
- 4.1.2 I accept the letter from the authority dated 21 October 2003 sets out the reason for the authority's refusal to issue the code compliance certificate (as required under section 43(5) of the former Act), albeit as a post script. The reason provided to the applicant was on the basis of the age of consent and not on the compliance of the building work.
- 4.1.3 I note also that section 43(6) of the former Act provided for the authority to issue a notice to rectify (the equivalent to a notice to fix under the current Act) where the building work concerned did not comply with the Building Code. In this case no notice to rectify was issued.
- 4.1.4 Given the above I consider that the authority was of the view in 2003 that the building work complied with the Building Code. I do not accept that the age of the building work alone was sufficient reason to refuse to issue the code compliance certificate. I acknowledge however that a modification of the durability clause B2.3.1 (refer paragraph 4.2) was not common at that time; meaning a code compliance certificate issued in 2003 would have required the building work remain durable for the periods set out in B2.3.1 regardless of the fact that the building work had been completed some seven years prior.

### **4.2 Durability considerations**

- 4.2.1 The age of the building work raises concerns regarding durability, and hence the compliance with the Building Code, of certain elements of the house, taking into consideration the age of the building work. In this case the delay since the completion of the building raises concerns that many elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.
- 4.2.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") "from the time of issue of the applicable code compliance certificate" (Clause B2.3.1).

- 4.2.3 I continue to hold the views expressed in previous relevant determinations; that an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009<sup>6</sup>). As such I leave this matter to the parties to resolve in due course.
- 4.2.4 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

### **4.3 The establishment of compliance**

- 4.3.1 The legal adviser has confirmed the applicants' desire to have a code compliance certificate issued, and I make the following comments in order to assist the parties.
- 4.3.2 As the building consent was issued under the former Act the authority is required to consider the application for a code compliance certificate under the transitional provisions of the current Act.
- 4.3.3 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'.
- 4.3.4 As the determination reverses the decision made in 2003 and requires the authority make a new decision, the authority will be making a contemporaneous decision about the compliance of the building work. This is likely to include an inspection and a detailed assessment of the building work concerned.
- 4.3.5 In regard to this house, the evidence as to compliance is able to be gathered from the authority's inspection records, the performance of the building work over the past sixteen 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. This methodology has been used and articulated in a number of determinations such as 2011/116<sup>7</sup>.
- 4.3.6 The authority's assessment should be able to identify defects requiring attention, or identify any matter that it requires the applicant to provide further evidence in order to establish compliance.
- 4.3.7 If the authority then refuses to issue a code compliance certificate, it is important that the applicant be given clear reasons why the authority considers compliance has not been achieved so the applicant can either then act on those reasons or apply for a determination if the reasons are disputed.

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<sup>6</sup> Codewords articles are published by the Ministry and are available on the Ministry's website at [www.dbh.govt.nz/codewords-index](http://www.dbh.govt.nz/codewords-index)

<sup>7</sup> Determination 2011/116: Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier at 24 Tuapiro Road, Katikati

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers of decision in refusing to issue a code compliance certificate in 2003 on the grounds provided; accordingly I reverse the authority's decision to refuse to issue a code compliance certificate (thus requiring the authority to make a new decision under section 436 of the Building Act 2004).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 December 2013.

John Gardiner  
**Manager Determinations and Assurance**

## Appendix A

### A.1 Relevant sections of the Building Act 1991

#### **43 Code compliance certificate**

- (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
- (2) ...
- (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that---
  - (a) The building work to which the certificate relates complies with the building code; or
  - (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.
- (4) ...
- (5) Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.
- (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.
- (7) ...

### A.2 Relevant sections of the Building Act 2004

#### **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.