



Determination 2015/062

The issuing of a building consent and a code compliance certificate for a 14-year-old house at 220 Ocean Road, Whangamata

Summary

This determination discusses the construction and code compliance of a 14-year-old house. The determination also considers the authority's powers of decision in issuing the building consent and code compliance certificate.

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1. The matters 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 and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”²), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties

1.2.1 The parties to the determination are:

- the owners, Mr and Mrs Smith (“the applicants”). The applicants acted through an agent (“the applicants’ agent”) during the initial stages of this determination.
- the Thames-Coromandel District Council (“the authority”), acting through their lawyer (“the authority’s lawyer”).

1.2.2 The persons with an interest in this determination are:

- the builder
- the master franchise holder.

1.3 The dispute

1.3.1 This determination arises from a dispute between the parties and persons with an interest about the construction of a fourteen-year-old house and the decision of the authority to issue a code compliance certificate for the house.

1.4 The matters to be determined

1.4.1 The application for determination raised five specific issues, however, under section 177 of the Act³, I can only determine the following matters⁴:

- whether the authority’s decision to issue a building consent was correct
- whether the building as constructed complied with the requirements of the Building Code (First Schedule, Building Regulations 1992 that was current at the time the consent was issued)
- whether the authority’s decision to issue a code compliance certificate was correct.

1.5 The matters that cannot be determined and the jurisdiction of the Chief Executive

1.5.1 As stated in paragraph 1.3.1, I am of the opinion that I can only determine the matters set out in paragraph 1.4.1. I have considered the arguments put forward by the applicants and authority in respect of the determinable matters and have concluded that the following matters are not determinable in terms of section 177:

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.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 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.

⁴ Under sections 177(1)(a), 177(1)(b), 177(2)(a) and (d)

- the validity of the authority's inspections
- the authority's alleged failure to identify defects.

1.5.2 I also note that during the course of the determination, the applicants have provided a significant amount of documentation about perceived discrepancies between various versions of the plans, and perceived discrepancies between the versions, copies, and the content of what was considered by and signed off by the authority, and what I consider constitutes allegations of fraud.

1.5.3 While these issues are very important to the applicants, I am of the view that the decisions that I must make in this determination (in terms of the matters set out in paragraph 1.4.1) do not turn on my consideration of these issues. I therefore do not need to form a view on these particular issues.

1.5.4 In relation to fraud, the authority is entitled to an assumption that the documents provided are genuine on a prima facie basis. If this assumption were to be reversed it would be impractical to function as a building consent authority. If there is evidence provided to an authority at the time that the documents were not genuine, this should be taken into account and investigated, with the involvement of the NZ Police if necessary. However in this case the allegations of fraud have been made after the authority carried out its consenting functions under the former Act.

1.5.5 While determinations can consider matters of Building Code compliance and decisions of an authority, the authority was required to consider the Building Code compliance of the house⁵, and therefore this determination cannot consider these other issues raised by the applicants. They do however assist me in providing the context leading to the determination.

1.5.6 I also note that determinations cannot consider contractual matters. I consider that if the Chief Executive made decisions about the enforceability of any contract made between the parties, the Chief Executive would be exceeding the specific provisions in the Act that describe matters that can be determined.

1.6 The application of section 179

1.6.1 Following the application for a determination, the authority and the builder submitted that the application for a determination was vexatious and frivolous under section 179(2)(a). As I indicated by letter to the parties and the persons with an interest on 20 March 2009, I consider that the application does not meet the test for a vexatious or frivolous application. As noted in that correspondence, the application was accompanied by an extensive submission that covered matters of both contractual nature and code compliance, as well as the actions of the authority and its decision to issue a building consent and a code compliance certificate.

1.6.2 I note that the applicants and the master franchise holder have been involved in mediation and arbitration processes regarding alleged breaches of the building contract. An arbitration award was made. The applicants also commenced High Court proceedings; however, an out of court settlement, which was accepted by the parties, was reached on 26 April 2006. The agreement was for the applicants to pay the builder and the authority each a sum of money as a full and final settlement and

⁵ Section 438(1)(a) of the current Act states that a code compliance certificate issued under section 43 of the former Act has effect as if it had been issued under section 95 of the current Act. Section 43(3)(a) of the former Act states that a authority shall 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.

discharge of all and any claims current and hereafter by the applicants against the builder and the authority.

- 1.6.3 The authority submitted that the applicants were seeking to revisit items that had been dealt with in the arbitration award. It was submitted that this was grounds to refuse the application for determination under section 179(2)(a). Regarding these issues, I do not consider that the arbitrator made a direct decision in the arbitral award on whether the authority had reasonable grounds to issue a building consent or a code compliance certificate. I am of the opinion that as the Chief Executive is the person who has been given express statutory authority to make a binding decision on matters of code-compliance, the applicants are entitled to a determination from the Chief Executive.

1.7 The process of the determination

- 1.7.1 I note that a significant number of submissions by the parties and persons with an interest have been made during the course of this determination. Given that the way the issues have been presented by the parties has changed over time, I have summarised the initial submissions in paragraph 4 and the subsequent submissions and information presented at hearings in paragraph 6.
- 1.7.2 In making my decision, I have considered these submissions of the parties, the reports of the independent experts (“the experts”) commissioned by the Ministry to advise on this dispute, and the other evidence in this matter.
- 1.7.3 I note that at the time of issue, the applicants maintained they had further submissions to provide. The determination process has been put on hold for long periods of time and stretched over several years, with several draft determinations and hearings held. I consider the significant amount of information I have been provided with is sufficient to make a decision on the matters. I consider the applicants have continued to provide submissions that relate to contractual matters despite it being clear this is outside the jurisdiction of the determinations process. I consider natural justice has been upheld in all parts of this process and am satisfied a final determination can be issued to bring conclusion to all the parties involved.

2. The building work

- 2.1 The building work comprises a two-storey detached house, built on a low-lying level site that is part excavated subsoil and part fill. The house is located in a coastal sea spray zone, and in a high wind zone for the purposes of NZS 3604⁶. The house is of timber-framed construction on a concrete slab foundation.
- 2.2 The house is relatively simple in shape and form but has some complex features. The pitched roofs have hip, valley, and wall-to-roof junctions, with 600mm projections to the majority of the eaves. A timber-framed deck is constructed at the upper level over a living space and this has an enclosed balustrade and double-layer butyl-rubber membrane flooring.
- 2.3 I have not received any evidence as to the treatment, if any, of the external timber wall framing.
- 2.4 The lower level of the house is clad with a brick veneer, and the upper level has a PVC weatherboard cladding direct fixed over building paper to the wall framing.

⁶ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.5 While an existing house was removed as part of the building consent, the first expert noted that the consent application did not identify an existing garage on the site.

3. The background

- 3.1 On 19 January 2001, the authority issued a building consent (No.ABA/20010010) under the Building Act 1991 (“the former Act”). The consented plans were dated 16 January 2001.
- 3.2 On 31 July 2001 a firm of building consultants inspected the house, on behalf of the applicants and during the construction period, and produced a report dated August 2001. The report detailed numerous defects that the consultants considered needed rectifying, and listed some recommendations.
- 3.3 The authority carried out various inspections during the course of the construction. A final inspection was undertaken on 12 October 2001 when the house was substantially completed. The applicants are of the view that a number of inspections were not completed or not properly carried out. The authority disputes this and has recorded that the inspections were undertaken.
- 3.4 The builder issued a guarantee for the house dated 8 November 2001. The guarantee stated that the house was built in accordance with the former Act and the Building Code.
- 3.5 On 8 November 2001 the authority issued an interim code compliance certificate. A final code compliance certificate was issued on 16 April 2002.
- 3.6 On 20 June 2002 a firm of consulting engineers produced a report for the applicants regarding an inspection of the house they had undertaken in the company of a master builder. The report noted certain structural and durability matters that were considered to be defective, and voiced concern regarding the issuing of the code compliance certificate. The master builder produced a report dated 2 July 2002: this report noted some building defects.
- 3.7 Correspondence took place between the applicants and the builder during the construction of the house and up to the time of the application for a determination. Much of this correspondence related to the applicants’ concerns with the construction and some finishing work of the house.
- 3.8 The firm of building consultants who had produced a report in August 2001 (see paragraph 3.2) inspected the house again on 9 June 2004 on behalf of the authority, and produced a report dated June 2004. The report:
- considered the reports described in paragraphs 3.6
 - identified issues relevant to the code compliance certificate and for which the authority was considered negligent
 - described the remedial work required and estimated cost.
- 3.9 The processes with respect to arbitration and settlements subsequently took place as described in paragraphs 1.6.2 and 1.6.3.
- 3.10 The application for a determination dated 19 December 2008, was received by the Ministry on 5 January 2009.

4. The initial submissions

4.1 The application and responding submissions from the authority and the builder were as follows:

4.2 The applicants

4.2.1 The application for determination included submissions made on behalf of the applicants, which set out the issues that the applicants considered should be determined; these are summarised as follows:

- The building consent plans and specifications lacked the detail required to establish compliance with Clauses B1 “Structure” and B2 “Durability”
- The authority had failed to fully inspect the building work.
- The property exhibited the defects listed by the applicants.
- The authority had incorrectly issued the code compliance certificates.

4.2.2 The applicants forwarded copies of:

- the plans and specifications relating to the building
- the consent documentation
- the two code compliance certificates
- the authority’s inspection details
- the correspondence between the parties and with other organisations
- the building consultants’ reports of August 2001 and June 2004
- the reports from the consulting engineer and the master builder
- the structural engineers’ design check
- the arbitration award
- some photographs showing aspects of the construction.

4.2.3 The applicants responded in detail on 25 March 2009 to the authority’s submission set out in paragraph 4.3.1.

4.3 The authority

4.3.1 The authority’s lawyer forwarded a submission made by the authority to the Ministry on 5 March 2009. The authority was of the opinion that only the matters relating to the defects in the building and its code-compliance were determinable. The authority noted that many of the issues raised by the applicants related to poor workmanship and were not code compliance issues. The authority accepted that there were some non-compliant items and also noted that some amendments to various building elements had taken place after inspections by the authority or the issue of the code compliance certificates. The authority forwarded copies of:

- the plans and specifications relating to the building
- the consent documentation
- the two code compliance certificates

- the authority's inspection details
- the correspondence between the parties and with other organisations
- the building consultants' reports of August 2001 and June 2004
- the reports from the consulting engineer and the master builder
- the structural engineers' design check.

4.3.2 The authority also referred to the arbitration that had taken place (refer to paragraph 1.6.2 and 1.6.3) and that the applicants were seeking to revisit items that had been dealt with in the arbitration award. It was submitted that this was grounds to refuse the application for determination under section 179(2)(a).

4.3.3 The authority's lawyer wrote to the Ministry on 6 May 2009, stating that the list of defects put forward by the applicants in June 2004 (as reasons why the code compliance certificate should be reversed) had risen from 13 'to no less than 60'.

4.3.4 The letter also noted that the applicants had declined a request from the authority to allow an independent engineer to inspect the property on behalf of the authority.

4.4 The builder

4.4.1 Following a letter from the builder to the Ministry dated 19 January 2009, an affidavit and a submission were provided on behalf of the builder. The builder set out the background to the dispute, and the proceedings undertaken to settle the matters in question. The builder was of the opinion that the applicants had no further claims against any party regarding the matters that were determined by arbitration. The builder considered the applicants' determination application to be frivolous or vexatious.

4.4.2 The builder forwarded copies of:

- the arbitration award
- the letter setting out the post-court hearing settlement
- a summary of responses to the arbitration award.

5. The experts' reports

5.1 General

5.1.1 Various reports have been prepared on behalf of the parties that I have examined, although I have only mentioned these briefly in the determination. Copies of these reports were also forwarded to the first and second experts.

5.2 The first and second experts' reports

5.2.1 As mentioned in paragraph 1.7.2, I engaged two independent experts to provide an assessment of those building elements that are subject to this determination. One expert was experienced in the field of building controls and the local government regulatory environment, the other was a Chartered Professional Engineer. Each expert visited the site and provided me with a detailed report within their areas of expertise.

5.2.2 In summary, the first two experts' reports raised certain concerns and I have summarised those that I consider to be relevant as follows:

B1 – Structure

- the internal linings not adequately fixed nor properly nailed at some locations
- the high level of air movement in the roof space
- the seating, fixing, and connections of the upper floor timber framing
- the drainage pipe penetration through the upper floor joist
- the oversize penetration through the upper floor joist to accommodate the floor waste
- the missing and unsatisfactory connections of the various roof members
- the slab thickening between the toilet and the laundry and between bedroom 1 and the lounge not being situated below the bearing wall above it

B2 – Durability

- the lower courses of the brick veneer having galvanised wall ties installed instead of the required stainless steel ones
- the clarification and substantiation of the upper floor boundary structural elements, including their supports and foundations

E1 – Surface Water

- the reduced number of soak holes

E2 – External Moisture

- the evidence of rising damp at lower floor locations
- the lack of a damp proof course installed at the base of the brick veneer
- the built-up ground levels at some locations
- the channel fixed at the base of the upper weatherboard cladding
- the 12mm thick plywood substrate to the upper-level deck membrane and the faults in the laying of the 2-layer butyl rubber membrane
- the unsealed kitchen extract fan
- the one soaker that has come away at the upper deck soffit

E3 – Internal Moisture

- the lack of impervious and easily cleaned surfaces to the two bathrooms
- the joints between the tiles and the top of the bath and those between the bath and the floors

G 9 – Electricity

- the lack of an energy works certificate to establish the code-compliance of the energy works

G12 - Water Supplies

- the lack of the required top restraint to the hot water cylinder

5.2.3 The first expert also noted that the following aspects were not built in accordance with the approved building consent:

- layout of the laundry
- the upper deck and barrier
- the wall and roof insulation
- the drainage system and noting in particular the number of soak holes.

5.3 Submissions on the first and second experts' reports

- 5.3.1 The authority's lawyer commented on the first and second experts' reports in a letter to the Ministry dated 22 June 2009. In summary, the submission considered that, as the authority's engineer was not allowed to inspect the site, and the two experts were accompanied by the applicants' agent during their inspections, the "independence" of the two reports had been compromised.
- 5.3.2 The applicants' agent wrote to the Ministry on 25 June 2009, regarding the agent's attendance at the site inspections. The agent noted that he attended as the agent of the applicants, that the first expert had previously liaised with an officer of the authority, and that the authority could have directed its enquiry at its own direction.
- 5.3.3 While I acknowledge the parties concerns, I am confident the matters have been adequately reported and any opinions obtained were independently expressed.
- 5.3.4 In a letter to the Ministry dated 1 July 2009, the applicants' agent commented on the experts' reports. The applicants' agent, in general terms, accepted the first expert's report as being appropriate, apart from a detailed list of comments on various paragraphs of the report. With regard to the second expert's report, the applicants' agent noted that the applicants had experienced considerable vibration and movement of the upper floor during moderate wind movements. In addition, the agent considered it to be desirable to check if there were blockings installed at the floor joists.

5.4 The third expert's report

- 5.4.1 A third expert who is a member of the New Zealand Institute of Building Surveyors was asked to investigate the matters raised by the independent reviewer (refer paragraph 6.4.2). The third expert's report was received on 13 July 2010 and forwarded to the parties and persons with an interest in the determination for comment on 14 July 2010.
- 5.4.2 The third expert removed an area of brickwork and was able to observe the cavity and brick ties and found that:
- Clause B2 of the Building Code requires building materials in situ to have a certain minimum durability. For claddings (moderately difficult to replace) the requirement is a minimum of 15 years, however for brick ties (difficult to replace), the requirement is 50 years. The brick veneer on the most exposed side of the dwelling, shows no evidence of the presence of marine salts and the galvanised brick ties that were exposed showed a very light corrosion where the ties have been in contact with mortar and did not appear to have suffered any loss of strength.
 - The cavity behind the bottom course of bricks was filled with damp sand and behind the second course of bricks with mortar droppings. These mortar droppings are bridging the bottom of the cavity and can accommodate moisture

transport between the brick veneer and the building wrap over the face of the timber framing. Damp proof course was not installed in the bottom of the cavity, allowing moisture ingress around the perimeter of the concrete floor slab. The height of the paving and grounds that are close to or covering parts of the bottom course of bricks appear to be contributing factors to moisture ingress around the perimeter of the floor slab.

- The presence of moisture in the concrete floor slab under the floor tiles in the kitchen was evident. The darker areas in the grey grouting indicated that moisture is able to access the floor slab and indicated that the polythene water proofing under the floor is failing. Moisture ingress around the perimeter of the concrete floor at the bottom of the brick veneer is evident but minor and has so far not resulted in severe damage to structural timbers in the areas that were exposed. The moisture ingress is in violation of the requirement of Building Code Clause E2.3.2.
- Ground water levels can be very high in stormy easterly wind conditions which may exacerbate problems with the damp proof membrane and moisture penetration through the slab.

5.4.3 The third expert noted the following would be required to remedy these defects:

- lower the grounds and paving around the dwelling
- improve surface drainage around the dwelling
- further investigation to assess the extend of moisture ingress into the concrete floor slab

5.4.4 The third expert also observed water dripping from an overflow, installed in the soffit near the corner of the dining room. Moisture was seen accumulating between two layers of a grey coloured membrane, the top membrane appeared installed retrospectively and has not been installed behind the weatherboard cladding and was lifting. Moisture on the deck was 'well below' the level of the overflow so it was not apparent why the outlet was dripping. Further investigation of this matter was recommended.

6. The draft determinations, the site visit, the independent review the hearing, and the site survey and the drawings

6.1 The first draft determination

- 6.1.1 The first draft determination was issued to the parties for comment on 2 July 2009.
- 6.1.2 The authority responded through its lawyer on 27 August 2009. The response stated that the authority 'can neither accept nor reject the findings of the Chief Executive because it was not permitted to fairly participate in the Determination process'. This was on the grounds that the authority was not given the opportunity to send an independent engineer to the property to investigate the matters raised in the determination application. In the view of the authority, this constituted a breach of natural justice.
- 6.1.3 The authority was also of the opinion that certain defects that have been recorded would either have become defects after the authority's final inspections or were of little consequence at the time that they were inspected. The authority at this time

also wished it to be recorded in the determination that “[t]he Council took no further part in the determination process”.

- 6.1.4 The builder provided a lengthy undated submission regarding the draft determination that was received by the Ministry on 24 July 2009. The builder commented on some 18 specific items that were described in the determination. As the builder is a person with an interest in the determination rather than a party, these comments can only be considered as being advisory. However, after carefully considering the builder’s comments, I have taken into account those of his comments that I consider clarifies some of the matters raised in the draft determination.

6.2 The site visit

- 6.2.1 As concerns were raised on behalf of the authority, as described in paragraph 6.1.2, I visited the site on 30 October 2009 to carry out an independent inspection of the house. I was accompanied by a Referee engaged under section 187(2) of the Act. Also present were:

- the applicants’ agent
- an engineer acting on behalf of the authority (“the authority’s engineer”)
- a representative for the Ministry.

- 6.2.2 Following the visit, the authority’s engineer provided the Ministry and the parties with earlier ‘consultant advice notes’, dated 2 October 2009 and 29 October 2009, setting out his observations of the matters in dispute.

6.3 The second draft determination

- 6.3.1 The second first draft determination issued to the parties for comment on 20 November 2009.
- 6.3.2 The builder responded to the second draft in an email to the Ministry dated 4 December 2009. The submission reiterated earlier comments, and disagreed with the determination’s technical findings about code compliance.
- 6.3.3 The authority accepted the second draft determination without comment on 14 December 2009.
- 6.3.4 The applicants’ agent responded to the second draft in a letter to the Ministry dated 22 February 2010. The applicants’ agent submitted that the process leading to the interim conclusions in the second draft determination was flawed.

6.4 The independent review

- 6.4.1 As a result of submission made by the applicants’ agent (refer paragraph 6.3.4) the Ministry commissioned an independent review. The review concluded that no procedural errors had been made, and that the conclusions reached in the second determination were in accordance with the facts. However, the review recommended that further investigations be made into the durability of the ties to the brick veneer, the moisture rising through the foundations and the lower brickwork, and the integrity of the damp proof membrane to the ground floor concrete slab.
- 6.4.2 In order to undertake these investigations, I engaged another expert (“the third expert”). The third expert visited the site accompanied by an officer of the Ministry.

The authority was also advised of the visit and given the opportunity to attend. The results of these investigations are recorded in paragraph 5.4.

6.5 The first hearing

6.5.1 I held a hearing on 22 June 2011 in Whangamata. Present at the hearing were a representative of the authority, the authority's lawyer and structural engineer, the applicants, and the applicants' agent, consulting engineer, and two building advisors. I was accompanied by a Referee engaged under section 187(2) of the Act, together with two officers of the Ministry and the second and third experts. The applicants and the authority both presented evidence.

6.5.2 The major issue discussed at the hearing was the categorisation of various items as:

- not code-compliant (in terms of the Building Code current at the time of installation) and that I consider *should have* been apparent to the authority at the time that it carried out its inspections
- not code-compliant (in terms of the Building Code current at the time of installation), and that I consider *would not* have been apparent to the authority at the time that it carried out its inspections
- compliant (in terms of the Building Code current at the time of installation).

6.5.3 The applicants were of the view that items categorised as compliant were in fact not compliant at the time the authority carried out its inspections.

6.5.4 The configuration and detailing of the brick veneer, the damp proof course at the base of the brick veneer, the slab thicknessings to the concrete floor slab and the connections and fixings of the timber framing were discussed in detail.

6.5.5 As a result of the hearing, the following actions were agreed on, to be undertaken by the Ministry:

- (i) a survey would be made of the property and building and determine relative ground and building levels
- (ii) a summary and timeline of the drawings would be prepared, in conjunction with the parties, and then supplied to the parties for comment.

Both matters are considered in paragraph 6.6

6.5.6 I have taken into account the discussions at the hearing that I consider clarify some of the matters raised in the draft determinations.

6.6 The site survey and drawings

6.6.1 The survey of the property (refer paragraph 6.6.5) found that the relative ground and building levels were such that they would not lead to non compliance of the building work, apart from the garage and front door area.

6.6.2 I assessed the drawings and the various versions of the drawings to identify the changes that were made, and the drawings that were approved as amended plans by the authority. The authority first approved drawings on 16 January 2001 and approved amended drawings on 14 February 2001.

- 6.6.3 In an email to the Ministry dated 7 February 2012, the applicants contended that the plans that were held by the authority and stated to be ‘the amended plans’ were not actually the correct amended plans.
- 6.6.4 In a letter to the Ministry dated 9 February 2012, the authority’s lawyer noted that it was accepted that a revised plan showing a change to bedroom 1 was not submitted and no corresponding amendment was made to the building consent. The authority’s lawyer also noted that the revised plans do show a change to the internal floor thickening that supports the internal wall to bedroom 1.
- 6.6.5 In a further email to the Ministry dated 13 February 2012, the applicants reiterated that the amended plans held by the authority and stated to be the amended plans are not actually the amended plans (refer to paragraph 6.6.3). The applicants requested the Ministry take steps to obtain the correct amended plans.
- 6.6.6 In response to this, I note that I previously requested, on 8 August 2011, that the authority provide copies to me of all drawings related to the house. I received a response from the authority on 12 August 2011. The authority provided ‘these three sets of plans that [it] had on file’ as follows:
- a set of 10 which were originally submitted for consent
 - a set of 7 which were submitted to amend the consent (refer to paragraph 6.6.2); only the front drawing of the set provided was stamped by the authority
 - a set structural drawing s use by the supplier of prefabricated elements (these included the kitchen joinery to amended layout).
- 6.6.7 Following this information that was provided to me, I requested further information about an old sewer drain and septic tank running beneath the eastern corner of the house. The applicants and authority provided me with information and I am satisfied there is no issue with this.

6.7 The third draft determination

- 6.7.1 The third draft determination issued to the parties for comment on 29 February 2012.

6.8 The second hearing

- 6.8.1 I held a second hearing on 11 July 2012 in Whangamata. Present at the hearing were a representative of the authority, the authority’s lawyer and structural engineer, one of the applicants, and the applicants’ agent. I was accompanied by two officers of the Ministry.
- 6.8.2 The hearing was held to allow the applicants to present information to me. The authority participated, put forward its view about particular matters, and asked questions. I acknowledge that the applicants were not able to cover all the material prepared in the depth in which the applicants intended, however, all this information was provided to me and I spent a great deal of time reviewing and considering this material, and the points that the applicants wished to bring to my attention, following the hearing and took them into account in preparing the subsequent draft determination.
- 6.8.3 The applicants presented and provided an extensive amount of information with respect to:
- discrepancies in the plans, including structural discrepancies

- issues about the building consent process and building consent amendment process
 - issues relating to the pre-cut calculations for the framing and trusses
 - issues about the inspections
 - issues relating to Building Code compliance that have not been considered in the determination or that have been wrongly categorised.
- 6.8.4 The applicants presented and described seven versions of various plans and provided extensive detail about the differences between these plans, including the differences between the detail on the plans, and the differences between markings and notes on the plans.
- 6.8.5 The applicants are of the view that amended plans that were approved by the authority on 14 February 2001 and issued as an amendment to the building consent are not the plans now provided by the authority as ‘the amended plans’. The applicants believe that the amended plans now held by the authority were changed after the amendment to the consent was issued. The applicants believe this is a significant issue in terms of the construction of their house.
- 6.8.6 The applicants are of the view that there were inspections that were not carried out and presented information about this. The authority disputed this.
- 6.8.7 The issues about what is to happen next were discussed at the hearing, as to what the first action should be. The options of whether the authority should issue a notice to fix to the applicants or whether the applicants should, with the assistance of their agent, prepare a scope of works to address the non compliant building work were discussed. The authority and the agent were of the view that the process would be more straightforward for the applicants if a notice to fix was not issued.
- 6.8.8 The applicants also requested that I re-engage the expert (refer to paragraph 5) to return to the property and provide me with the correct information regarding what is constructed, compared to the amended plans now held by the authority and the plans that were originally consented. I have carefully considered this request; however, I do not believe this would provide me with any additional information that is relevant to the decision that I have to make.
- 6.8.9 The information presented by the authority was provided to the parties and persons with an interest for comment on 24 July 2012.
- 6.9 The fourth draft determination**
- 6.9.1 The fourth draft determination was issued to the parties for comment on 7 August 2012.
- 6.9.2 The authority accepted the fourth draft determination without comment (asides a minor typographical error) on 10 August 2012.
- 6.9.3 The applicants provided various submissions in response during August 2012. These further submissions primarily pointed out variations in the plans (contractual and consented plans).
- 6.9.4 On 20 November following discussion with the applicants, I put the determination on hold at the applicant’s request.

6.10 The third hearing

- 6.10.1 On 6 and 7 July 2015 I held a third hearing in Whangamata at the applicant's request, as new information was to be presented in relation to the current determination. The applicants requested two days to be set aside for this. Present at the hearing was the authority's lawyer, the builder, one of the applicants and a builder acting on behalf of the applicants. I was accompanied by two officers of the Ministry. I note the authority's lawyer and the person with an interest were not present for the second day of the hearing, however, they were provided with a summary of what was discussed and the audio file.
- 6.10.2 The authority and the builder put forward their views about particular matters. The applicants had again provided a substantial amount of material which took some time to work through. I acknowledge that the applicants may not have had time to verbally discuss every matter presented in the written material; however, the written information has been thoroughly reviewed.
- 6.10.3 The applicants presented and provided information with respect to:
- water ingress to the building including ground levels, possible causes,
 - the consent documents including discrepancies in the plans
- 6.10.4 In relation to water ingress, it was agreed by the parties it has not been ascertained the exact cause of any water intrusion. Water has appeared in certain areas of the building (for example the tiled areas) following certain heavy rain events, however not in other parts of the house (for example the garage or carpeted areas). Several theories were discussed at the hearing, concluding I need to decide which theory is the most plausible in this situation for the purposes of this determination.
- 6.10.5 In relation to the consent documents, it was accepted by the authority that changes to the second bedroom were not brought to the attention of the authority as no amendment was submitted to the building consent in this matter.
- 6.10.6 The applicants pointed out further discrepancies between the various plans. The applicants stated this was to prove that the officers of the authority had acted fraudulently. This argument was rejected by the authority. I again noted that allegations of fraud were outside of my jurisdiction in this determination. The applicants produced drawings that related to contractual matters with the master franchise holder as a person with an interest in this determination; these were completed prior to the building consent being lodged.
- 6.10.7 The authority considered the following points need to be revisited from the fourth draft determination, which stated the following items were not compliant in terms of the Building Code current at the time they were installed and should have been apparent to the authority at the time of its inspections:
- the inadequate seating, fixing, and connections of the upper floor timber framing
 - the missing and unsatisfactory connections of the various roof members
 - the oversized penetration through the upper floor joist to accommodate the floor waste
 - the relative ground and building levels at the garage and front door area

- 6.10.8 I have reviewed all the information provided by the applicants for the third hearing, and subsequent to the hearing. I consider a significant amount of this information to be a duplication of arguments and materials presented to me previously.
- 6.10.9 I acknowledge the submission from the builder following the hearing (some of which are the same arguments under paragraph 1.6). In summary, the builder contended most of the matters raised in the determination have already been dealt with in the arbitration award. The matters have been finalised and the Ministry should not review any of the items covered in the arbitration award. The principles of natural justice are referenced under the Bill of Rights Act 1990, section 26. The builder suggests no determination should be made.
- 6.10.10 On the second day of the hearing it was discussed with the applicants the implications of reversing a building consent; I noted this is a very high threshold as an owner would be left with an unconsented building, and a certificate of acceptance is unlikely to be obtained. I noted in this case the building consent was not too far from what was considered standard practice at the time. In addition, the determination as drafted directs the authority to issue a notice to fix. I discussed the consequence of this with the applicants; that the responsibility to comply with the notice to fix would rest with the applicants as a specified person under section 164 of the Act.

7. Discussion

7.1 Overview

- 7.1.1 As this determination has taken some time to complete due to being placed on hold at various stages, some of the matters at issue when the application was first received are no longer at issue now that time has passed.

7.2 The documentation and process used by the authority to determine compliance

- 7.2.1 As I noted in paragraphs 1.5.2 to 1.5.5 and paragraph 6.8, the applicants have provided a significant amount of documentation about perceived discrepancies between various versions of the plans, and perceived discrepancies between the versions, copies, and the content of what was considered by and signed off by the authority.
- 7.2.2 I reiterate that I acknowledge that these issues are very important to the applicants, however, I am of the view that the decisions that I must make in this determination (in terms of the matters set out in paragraph 1.4.1) do not turn on my consideration of these issues. I therefore do not need to form a view on these issues.
- 7.2.3 I note however, that the various experts' reports and submissions from the parties, along with my investigations into the various versions and amendments made to the drawings during the construction process have led me to believe that:
- the drawings were generally appropriate and contain the key information required including a floor plan for each floor level, an elevation of each external wall, the type and location of each foundation element, adequate information on the subfloor, floor, wall and roof framing and bracing, and the type and location of cladding, sheathing, and lining

- the administrative practice of the authority was unsatisfactory in terms of how it managed the building consent amendment process and the documentation and various amendments to the drawings. However, some of these issues relate to contractual matters between the applicants and the builder; and for a range of reasons explained by the applicants, the applicants signed the various changes that were made to the plans and the contractual variations
- there were some issues in the building consent documentation that should have been clarified before the consent was granted and issued, including detailed information to address flashing details, cladding installation details, etc
- the lack of detail and clarity makes it unclear how the authority was satisfied that the requirements of the Building Code were to be met in some respects.

7.3 The compliance of the house with the Building Code

- 7.3.1 I have considered the evidence available to form a view as to the Building Code compliance of the house. The evidence I have considered includes the various reports supplied by the parties, the experts' reports, the evidence presented to me at the hearings, and the observations I made during the site visit.
- 7.3.2 I note that in various submissions from the applicants, matters have been raised relating to aspects of the contractual documentation. This relates to items that have not been constructed in accordance with the plans and specifications.
- 7.3.3 Determinations cannot consider contractual matters. While determinations can consider matters of Building Code compliance and decisions of an authority, the authority was required to consider the Building Code compliance of the house⁷, and therefore this determination does not consider differences in the construction that may not be what the owner desired. I also note that the applicants have presented a significant amount of information and documentation relating to versions of plans and perceived discrepancies between the versions, copies, and the content of what was considered by the authority. While these issues are very important to the applicants, I am of the view that the decisions that I must make in this determination do not turn on these issues.
- 7.3.4 In considering the Building Code compliance of the house I have categorised the items as follows:
- items that are not compliant in terms of the Building Code current at the time that they were installed, and which should have been apparent to the authority at the time it carried out its inspections
 - other items that are not compliant with the Building Code, but which I consider would not have been apparent to the authority at the time that it carried out its inspections
 - items that have been raised as being in dispute, but which I consider comply with the Building Code.

Items in each of the three categories are considered below.

⁷ Section 438(1)(a) of the current Act states that a code compliance certificate issued under section 43 of the former Act has effect as if it had been issued under section 95 of the current Act. Section 43(3)(a) of the former Act states that a authority shall 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.

7.4 Category (i) items

7.4.1 Taking account of the evidence described in paragraph 7.3.1, I have concluded that the following items were not compliant in terms of the Building Code current at the time that they were installed and should have been apparent to the authority at the time of its inspections:

- the inadequate seating, fixing, and connections of the upper floor timber framing
- the missing and unsatisfactory connections of the various roof members
- the lack of sealing of taps and other penetrations in the bathroom
- the oversized penetration through the upper floor joist to accommodate the floor waste
- the relative ground and building levels at the garage and front door area

7.4.2 I acknowledge the authority retracted agreement with the above as stated in the fourth draft determination at the third hearing (refer paragraph 6.10.7). Based on all the evidence before me I consider the above non-compliant matters that should have been apparent to the authority above should remain, however as noted in paragraph 7.1.1 significant time has passed during the course of this determination and I do not consider all the above matters are still at issue at the date of issuing this determination.

7.5 Category (ii) items

7.5.1 Taking account of the evidence described in paragraph 7.3.1, I have concluded the following items were not code-compliant, however, would not have been apparent to the authority at the time that it carried out its inspections:

- the transmission of water by means of exterior wall and foundation elements in contact with the ground that is causing undue dampness under the floor tiles in the kitchen, which may be caused by the lack of a damp proof course at the base of the brick veneer, the sand behind the bottom course of brickwork and the mortar droppings behind the second course of brickwork
- the 12mm thick plywood substrate being unlikely to provide a sufficiently rigid base for the upper-level deck membrane
- the defects in the 2-layer butyl rubber membrane to the upper-level deck
- the soaker that has come away at the upper deck soffit
- the sealed joints between the tiles and the top of the bath and between the bath surround and the floors
- the glue failures of the plaster board wall linings that form part of the bracing system for the house
- the inadequate impervious and easily cleaned surfaces in the two bathrooms
- the installation of the floor waste.

7.6 Category (iii) items

7.6.1 Taking account of the evidence described in paragraph 7.3.1, I have concluded that the remaining items listed by the experts, as follows, are compliant in terms of the Building Code current at the time that they were installed:

- the overall ground and paving levels in relation to the cladding (comply with Clause E2) (however I note that a possible solution to the issue with the damp proof course and brickwork is to lower the ground and paving levels)
- the channel to the base of the level weatherboards
- the fixing of the hot water cylinder (as it was at the time of inspection)
- the soak pits (however, I note these differ from the consented details and I note that high levels of ground water in some circumstances may render soak pits ineffective in the management of surface water, and that other engineered solutions may be appropriate)
- the kitchen extract fan penetration
- the penetrations for floor wastes in the upper floor joists (I accept the opinion of the authority's engineer that the effect on the penetration on the members is not significant)
- the air movement in the roof
- the galvanised brickwork ties (I accept the view of the third expert that the ties show very light corrosion only and no loss of strength, therefore I accept that the ties meet the performance requirements of the Building Code).

7.6.2 I note that it is likely that the slab thicknessings are not correctly placed as a result under the bedroom wall due to changes from the planned layout, and I consider this should have been apparent to the authority, and should have initiated the authority to seek further information from the builder. However, I also note and accept the statement made by the structural engineers that the concrete slab is adequate. I note that the adequacy of the slab is agreed by the applicants' and authority's structural engineers.

7.6.3 I also note that it was reasonable for the authority to accept the energy works certificate.

7.7 The decision of the authority to issue the code compliance certificate

7.7.1 Section 438(1)(a) of the current Act states that a code compliance certificate issued under section 43 of the former Act has effect as if it had been issued under section 95 of the current Act. Section 43(3)(a) of the former Act states that a authority shall 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.

7.7.2 Having carefully examined all the arguments and evidence put before me, I have reached the conclusion that the defects as listed in paragraph 7.4.1 were non-compliant at the time that the code compliance certificate was issued and should have been apparent to the authority at the time of its inspections.

7.7.3 Accordingly, I am of the opinion that the authority did not have reasonable grounds on which to issue the code compliance certificate for this house.

7.8 The decision of the authority to issue the building consent

- 7.8.1 With regard to the building consent issued by the authority, I must consider whether the consented drawings and specification provided reasonable grounds to form the view that the house, when constructed, would comply with the Building Code if the building work were properly built in accordance with the plans and specifications submitted.
- 7.8.2 Determination 2011/014 considered the factors that should be considered with respect to whether flaws in a building consent meant the building consent should be reversed. That determination considered that if the building was not Building Code compliant and if there were considerable flaws that were significantly connected with the issues of non compliance found in the building, then it would be appropriate to consider reversing the building consent. That determination found that there were significant omissions in the building consent documentation.
- 7.8.3 The matter of documentation in support of a building consent application was also considered in a Court Case⁸ in relation to a consent issued under the former Act. Here, it was found that the authority was not required to receive detailed drawings before issuing a building consent under the former Act and the Court stated that the authority:
- ...was entitled to issue the consent if the plans and specifications (with the documents they incorporated) showed a building that a competent tradesman would complete in such a way that it would be in compliance with the code.
- 7.8.4 However, the judgement noted that there was an expectancy that the standard of inspections undertaken by an authority would be required to be of a high standard where detail may be lacking in the consented documentation.
- 7.8.5 In addressing this question I have considered the adequacy of the documentation in this case. In this respect, I have taken account of the extent of shortcomings and faults in the consent documentation, and whether the non compliances in the construction are significantly connected to any shortcomings of the consent documentation.
- 7.8.6 As I discussed in paragraph 7.2.1 and 7.2.2, the applicants have provided a significant amount of documentation about perceived discrepancies between various versions of the plans, and the content of what was considered by and signed off by the authority. In considering the information, I found that the drawings were generally appropriate, although there were some details that should have been clarified before the consent was granted.
- 7.8.7 Despite this, the details that should have been clarified are not significantly connected to the issues of non compliance, I therefore conclude that there was sufficient documentation, taking into account the inspections that would be carried out during construction, for the authority to be satisfied on reasonable grounds and to issue the building consent.
- 7.8.8 As I have described in paragraph 7.1, I note the management of the building consent amendment process was not satisfactory, however, many of these issues with the documentation relate to contractual matters between the applicants and the builder.

⁸ *Body Corporate No 189855 and Anor v North Shore City Council and Ors 25/7/08*, Venning J, HC Auckland, CIV2005-404-005561

8. What is to be done now?

- 8.1 Now that I have reversed the decision of the authority to issue the code compliance certificate, there are two options available to the parties for the first action to be taken, depending on how the parties wish to proceed:
- The applicants may prepare a scope of works and apply to the authority for an amendment to the building consent to undertake this work to rectify the defects.
 - The authority may issue a notice to fix requiring the applicants to bring the building up to compliance with the Building Code current at the time the building consent was issued. Any notice issued should identify the defects listed in this determination, and also refer to any further defects that might be discovered in the course of rectification. It is not for the notice to fix to specify how the defects are to be fixed. That is a matter for the applicants to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.
- 8.2 Following the third hearing, I consider the significant remaining issue for the applicants is the moisture under the tiled areas of the building. I consider that further investigation is likely to be needed along with a notice to fix on this matter.
- 8.3 As described in previous determinations (for example, Determination 2008/30), the authority would have the ability to amend the building consent, on application and in line with any departures from the original consented documentation. Such an amendment could be based on a set of as-built drawings.

9. The decision

- 9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the house as constructed does not comply with the Building Code⁹.
- 9.2 For the reasons set out in paragraph 7.7, I also determine that the authority's decision to issue the code compliance certificate is reversed.
- 9.3 For the reasons set out in paragraph 7.8, I also determine that the authority's decision to issue a building consent is confirmed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 7 October 2015.

John Gardiner
Manager Determinations and Assurance

⁹ At the time the building consent was issued.