



Determination 2017/020

Regarding the decision to issue a certificate of acceptance for building work at 56A Wellpark Avenue, Grey Lynn, Auckland

Summary

This determination considers completed remedial work to a house. The work was consented, but work that was intended to be done as an amendment to the consent was completed by the owner before the amendment was approved by the authority. The code compliance certificate issued by the authority excluded the amended work, which was regularised through the issue of a certificate of acceptance. The owner disputed the exclusion of the amended work from the code compliance certificate.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations 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, CSL Developments Ltd, who is the applicant in the current determination (“the applicant”), represented by a lawyer
 - Auckland Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the authority’s decision to issue a certificate of acceptance in respect of building work on the roof of the applicant’s house. The applicant is of the view that all of the building work should be included within a code compliance certificate.
- 1.4 Accordingly, the matter to be determined² is whether the authority correctly exercised its power of decision in issuing the certificate of acceptance for the building work.
- 1.5 In making my decision, I have considered the application, the submissions of the parties, the report of the independent expert commissioned by the Ministry to advise on the dispute (“the expert”), and the other evidence in this matter. I have not considered any other aspects of the Act or Building Code, beyond those required to decide on the matter to be determined.

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

2. The building work

- 2.1 The applicant's house is located at the rear of a gently sloping, oblong site. The house is mostly single level, except for the master bedroom with ensuite bathroom, which is located at the first floor. There is also a separate two-car garage.
- 2.2 The house was originally constructed in 2000, with a light timber framed structure over concrete foundations and floor slab. The original house had monopitch roofs clad predominantly in steel, except for the north-west wing, which was clad with roofing membrane. The external walls were clad with a mixture of corrugated iron and express-jointed fibre-cement panels. The first floor bedroom was added a year or two later under a separate building consent.
- 2.3 The applicant subsequently discovered that the house had widespread weathertightness issues. As a result, it underwent substantial remedial building work between May 2015 and February 2016, including (among other things) replacing the external wall framing and recladding the house with a mixture of concrete block veneer and vertical shiplap weatherboard.
- 2.4 With respect to the roofs, the building work ultimately involved rebuilding the roofs over the main part of the house and the first floor, and building a new pitched roof over the north-west wing. All three of the roofs are now clad in long-run steel roofing. It is this building work on the roofs that forms the subject of this determination.

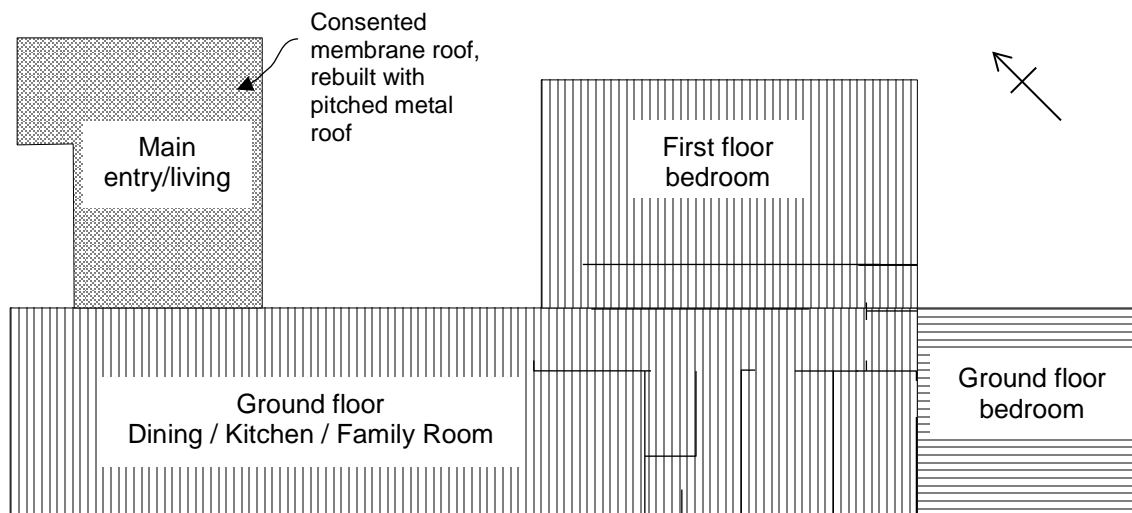


Figure 1: Building Layout Plan (garage not shown)

3. The background

- 3.1 The applicant applied for a building consent for the remedial building work and some internal alterations on 12 January 2015. The authority granted building consent BC/2015/323 on 6 May 2015 for 'RBW³ – Reclad – Renovate works with changes to first floor layout, stairs and amenities'. The building consent included some remedial works to all three of the roofs, including extending the rafters and lower part of the roof on the first floor, and replacing the plywood substrate and membrane roof cladding on the roof over the north-west wing.

³ Restricted building work.

3.2 The remedial building work proceeded between May 2015 and November 2015. An amendment to the building consent was applied for and granted on 10 September 2015 (BC/2015/323/B)for:

Upper roof: cladding new in lower part of this roof only, also framing, lining and building paper new. Existing insulation, steel roof, and framing in upper part of this roof remain.

Membrane roof: New membrane. New framing with change of falls and directions, new substrate.

Main roof: existing remains.

3.3 The authority carried out several inspections during the course of the remedial work. At an inspection on 2 November 2015, an officer of the authority noticed that some building work had been carried out on the roofs that was not in accordance with the amended building consent. The officer made a note on the site inspection form that work was to cease immediately.

... Un-consented work has been carried [out] in relation to roof structure and cladding. Roof cladding is in place without council inspection. A formal amendment is required for work that is not covered by consented plans. #NOTE# ALL WORK ON SITE IS TO CEASE IMMEDIATELY. Formal amendment is to [be] stamped and on site prior to any work continuing in these areas, the roofing cladding may need to be removed to inspect the roof structure.

3.4 On 6 November 2015 the authority issued a notice to fix (No. 6060) for the unconsented work on the roofs.

3.5 On 18 November 2015, the applicant applied for a certificate of acceptance in respect of the roofs as constructed.

3.6 On 19 November 2015, the applicant applied for an amendment to the building consent in respect of the roof for the garage, and some other alterations in relation to the house.

3.7 On 28 November 2015, the applicant submitted updated plans in relation to the application to amend the building consent. Most of the plans are dated 16 November 2015 and show the roofs as constructed.

3.8 Following a site meeting, work continued on the applicant's house and the authority carried out several more inspections.

3.9 On 10 December 2015, the authority granted an amendment to the building consent (BC/2015/323/C). The amendment was stated to apply to:

RBW – Amendment – new metal roofing to garage, resize and replace with new rafters to garage, size new garage lintel, new skylights to roof, delete fireplace

3.10 On 5 January 2016, the authority issued a certificate of acceptance (B/COA/2015/2143) in respect of the roofs. The certificate was stated to apply to the following building work:

RBW – Roof structure to upper and lower roofs. Replacement of membrane roofing to metal profile to roof over living area

Certain aspects of the work were excluded on the grounds that the authority had been unable to inspect them.

[The authority] was not able to inspect the following parts of the building work and this certificate is qualified as follows:

- All concealed structural fixings and fastenings
- All concealed flashings and weatherproofing sealants

- All concealed framing, insulation and building wraps

- 3.11 I understand that all of the building work on the applicant's house is now complete and the house is occupied.
- 3.12 The Ministry received an application for determination on 8 June 2016.

4. The submissions

- 4.1 The applicant is seeking a determination about the authority's decision to issue a certificate of acceptance in respect of the majority of the building work on the roof rather than a code compliance certificate. In a letter to the Ministry dated 15 June 2016, the applicant's lawyer confirmed that 'the roof above the southeast corner bedroom is the only part of the roof [that will be] covered by the Code Compliance Certificate': the balance of the roof is to be covered by the certificate of acceptance. The lawyer confirmed that it was this latter decision that is in dispute.
- 4.2 With the application for a determination, the applicant submitted copies of the consent documentation including plans and specifications, site inspection records, documentation relating to the certificate of acceptance, photos of their house before and during the building work, and a report dated 27 May 2016 by a building consultant about the matters in dispute.
- 4.3 The authority made a submission dated 4 July 2016. In the submission, the authority stated that:

The focus of the determination should be on what building work may properly be subsumed within the building consent, and what building work should be dealt with by means of a Certificate of Acceptance (COA).

The submission confirmed the authority's opinion that a certificate of acceptance was required for the building work to 'the main roof and the roof over the main entry living area' due to their not being constructed in accordance with the building consent. The submission also stated the authority's opinion that the building consent amendment (BC/2015/323/C) granted on 10 December 2015 related to 'other changes affecting the project'. The submission concluded by stating:

It is [the authority's] intention, to issue a [code compliance certificate] for [as much] of the building work as meets the statutory criteria for issue as may reasonably be subsumed within the building consent.

5. The expert's report

- 5.1 As stated in paragraph 1.5, I engaged an expert to assist me in this determination. The expert reviewed the documents and photographs provided by the applicant and the authority's property file. He also attended a site visit at the applicant's property on 7 July 2016 at which representatives of both the applicant and the authority were present. At the site visit, the expert clarified aspects of the documentation and chronology with the parties, and assessed the interior and exterior of the building in terms of compliance.
- 5.2 The expert provided a report dated 21 September 2016. The parties were provided with a copy of the report on 28 September 2016. The report set out the expert's opinion as to the relative chronology of the building work, inspections, building consent and its subsequent amendments, and application for and issue of the certificate of acceptance, and as to the aspects of the building work that were covered by each of the documents.

- 5.3 The expert produced a detailed schedule as part of his report, setting out in chronological order when the various documents were produced and approved, and when the site inspections and other meetings were carried out.

6. The first draft determination

- 6.1 I issued a draft determination dated 16 November 2016, which was sent to the parties for comment on 17 November 2016.
- 6.2 The authority accepted the draft determination without comment on 25 November 2016.
- 6.3 The applicant did not accept the draft determination and made a submission on it dated 30 November 2016. The submission repeated points made in the applicant's earlier submissions, in particular, that the authority had opportunities to inspect the building work on the roofs while the work was being completed, and that an application to amend the building consent was lodged with the authority 'six weeks prior to the issue of the certificate of acceptance'. The applicant submitted that this application for an amendment (which was subsequently granted by the authority as BC/2015/323/C) related to 'the completed roofs as well as the yet to be constructed roofs'. The applicant concluded that, as a result, 'sufficient information existed for [the authority] to be satisfied on reasonable grounds the building work complies with the building consent'.

7. The hearing

- 7.1 The applicant requested a hearing on the matter and this was held on 21 December 2016. The hearing was attended by myself and one officer of the Ministry, a Referee engaged by the Chief Executive under section 187(2) of the Act, a representative of the applicant and the applicant's building consultant, an officer from the authority and the authority's lawyer.
- 7.2 The hearing essentially had two parts. In the first part, the parties clarified the timing of the building work in relation to the second application for amendment to the building consent (BC/2015/323/C). The parties agreed that all of the building work had been completed before this amendment was applied for.
- 7.3 The applicant clarified that the reason this had occurred was that it had been acting on the advice of its professional advisors, which was that the amendments were minor and therefore no formal amendment to the building consent was required. Once the applicant became aware that the authority required consent for the works, it applied for the certificate of acceptance and amendment to the building consent. The applicant submitted that it had been endeavouring to comply with the requirements of the Act and the Building Code, and had suffered significant financial losses as a result of the dispute. It also anticipated further losses if it was unable to obtain a code compliance certificate for the whole of the building work.
- 7.4 In the first part of the hearing, the parties also discussed the scope of the work covered by amendment BC/2015/323/C. Initially, the applicant was of the view that this amendment included the building work on the roofs of the house. However, after examining the consented plans, the parties agreed that this amendment made no mention of this building work, and instead was limited to unrelated building work on the garage and interior of the house.

- 7.5 The authority demonstrated how the consented plans for BC/2015/323/C distinguished between those areas of the building work that had already been built and were to be covered by the certificate of acceptance, and those that were new work to be completed under the amended consent.
- 7.6 The authority submitted that, as far as was able to ascertain, the building work was code compliant and, had it been carried out pursuant to a consent, it would in all likelihood have been able to issue a code compliance certificate for it.
- 7.7 The second part of the hearing involved a discussion about the function and scope of certificates of acceptance in general, and the scope and wording of the certificate issued by the authority in respect of the unconsented building work in this instance (B/COA/2015/2143). The authority submitted that it had made every effort to bring as much of the building work as possible within the scope of the building consent, as amended, but that it had no option other than to issue the certificate of acceptance in relation to the building work on the roofs, as this work had not been covered by any version of the consent.

8. The second draft determination and parties' submissions

- 8.1 I issued a second draft determination to the parties for comment on 27 January 2017.
- 8.2 The authority accepted the second draft determination, subject to some minor modifications to the wording on 13 February 2017.
- 8.3 The applicant also accepted the second draft determination on 20 February 2017, but did not accept that the wording changes being sought by the authority were justified.
- 8.4 I have accepted the authority's suggested wording changes and amended the final version of this determination accordingly. The wording changes predominantly related to the impressions that I gained at the hearing of the authority's opinion of the quality of the finished building work. The authority was entitled to correct those impressions. The changes do not materially affect the outcome of the determination.

9. Discussion

9.1 General

- 9.1.1 It appears that there is no dispute between the parties that the building work complies with the Building Code – the exception is the elements of the building work on the roofs that the authority was unable to inspect before they were completed, as listed in the Certificate of Acceptance.
- 9.1.2 There is also now no dispute that that the work on the roofs was completed before the second amendment to the building consent (BC/2015/323/C) was either applied for on 19 November 2015, or granted on 10 December 2015. This was clarified at the hearing, and is backed up by the expert's report.

9.2 The code compliance certificate

- 9.2.1 The applicant was originally of the opinion that because the authority had ample opportunity to inspect the building work on the roofs as it progressed, and did inspect aspects of it, it could be satisfied that the work complied with the Building Code and could exercise its discretion to bring the building work within the code compliance certificate.

- 9.2.2 However, no such discretion exists in the Act. The relevant legislation is sections 40, 44, 45, 45A and 94 of the Act⁴. (See Appendix A for the applicable clauses from these sections.)
- 9.2.3 Section 40 specifies that all building work must be carried out in accordance with a building consent, while section 44 specifies that the building consent must be applied for before work begins. In the current case, the building consent that was in force at the time that the building work was carried out was the original building consent, including the first amendment. Neither the original nor the amended consent makes provision for the roofs on the main or the first floor to be rebuilt. The first amendment to the consent provides for new framing and a new membrane to replace the existing membrane roof, but the design as consented differs materially from that which was built (monopitch vs pitched, and membrane cladding vs steel). As a result, the building work on the roofs was carried out without a building consent being issued in respect of it.
- 9.2.4 As I understand the situation, the applicant now accepts this interpretation and agrees that the amended consent (BC/2015/323/C), and the plans it is based on do not cover the building work on the roofs.
- 9.2.5 Section 94 provides that a building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds that the building work complies with the building consent. It follows that if building work has been carried out without a building consent it cannot have a code compliance certificate issued in respect of it. There is no provision in the Act to issue a code compliance certificate in respect of work that is not covered by a consent, or to retrospectively bring already completed work within the ambit of a new or existing consent. In this situation, where the as-built work is considered compliant, the only option is for an applicant to apply for a certificate of acceptance in respect of the work under section 96.

9.3 Was the amended work a minor variation?

- 9.3.1 There is an exception within the Act where the restrictions imposed by sections 40 and 94 may not apply, because a variation to a building consent is considered minor. The sections of the Act that apply to variations to building consents are sections 45 and 45A of the Act.
- Section 45 allows for applications to amend a building consent. For minor amendments, the application must be in accordance with section 45A. In all other cases, the application for an amendment must be made as if it were an application for a building consent.
 - Section 45A specifies that an application for a minor variation does not need to be on a prescribed form, and does not require the authority to issue an amended consent.
- 9.3.2 Applying these sections in the current case, if the building work could be considered to be a minor variation, then the authority would only need to record the minor variation in writing and there would be no need for it to issue an amended consent (section 45A(3)(a) and (b)). This would mean that, despite the variations between the building work and the approved consent documentation at the time of construction,

⁴ In this determination, unless otherwise stated, references to sections are to sections in the Act and references to clauses are to clauses of the Building Code.

the authority could still issue a code compliance certificate in respect of the building consent, as the consent would essentially be unaltered.

9.3.3 This was the situation that the applicant, acting on the advice of its professional advisors, believed applied in the current case, and the reason that it proceeded with the building work as carried out on the roofs without applying for a formal amendment to the consent in respect of it.

9.3.4 The Building (Minor Variations) Regulations 2009 define what is meant by a minor variation in clause 3.

3 Minor variation defined

(1) A **minor variation** is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.

9.3.5 Applying this definition in the current case, I do not consider that the variations between the building work and the plans and specifications are minor. The subsequent completion of this building work is not an insignificant deviation from the consented plans; the original consent does not allow for any structural changes to be made to the majority of the roof, nor for it to be re-clad. The exception is the membrane roof, where provision is made for new framing and cladding by the first amendment. However, again I do not think what was built can be considered an insignificant deviation: a completely different design of roof was constructed, with different structural and compliance considerations, than that allowed for under the amended consent.

9.3.6 Because I have decided that the variation in the current case is not minor, then under section 45, the applicant was required to make a formal application to amend the building consent in respect of it before the work was carried out. Because this did not occur, a code compliance certificate cannot now be issued in respect of it. It becomes irrelevant whether or not the subsequent (second) amendment to the consent was intended to cover this work, as it is the only consent in force at the time the work was completed that is material for the purposes of section 94. However, I agree with the parties that this building work also does not come within the second amendment's scope.

9.4 Conclusion

9.4.1 Accordingly, I conclude that the authority correctly issued a certificate of acceptance in respect of the building work. The authority could not have issued a code compliance certificate for this work because the building work was not carried out in accordance with a building consent.

9.5 The certificate of acceptance

9.5.1 As discussed above, I consider it clear that the certificate of acceptance was the only means of obtaining regulatory sign off for the building work available to the authority. From their submissions at the hearing, I understand the parties now accept this too.

9.5.2 At the hearing, it also emerged that the authority was of the opinion that the building work was in all probability code compliant. The need for the certificate of acceptance arose because of timing issues and inconsistencies between the building work and the required regulatory documentation. It did not in any way relate to issues with the compliance of the building work or building.

- 9.5.3 Having established this at the hearing, I considered the wording and scope of the certificate of acceptance proposed in this case in order to establish whether it was as close to optimum as possible. By this I mean that the certificate is legally and technically accurate, and allows people to judge what building work is not covered and why, but does not raise any unwarranted negative perceptions or create needless doubt around the compliance of the building work.
- 9.5.4 I consider it useful to repeat some of the matters touched on at the hearing here, as they may go some way towards alleviating the concerns of the applicant, and other owners who find themselves in similar positions, about having a certificate of acceptance issued in respect of building work, rather than a code compliance certificate.
- 9.5.5 The legislative provisions relating to certificates of acceptance are in sections 96 to 99 of the Act, and the certificate must be applied for and issued on prescribed forms (forms 8 and 9, respectively, of the Building (Forms) Regulations 2004).
- 9.5.6 Under section 96 of the act, a territorial authority may issue a certificate of acceptance for building work that is completed without a building consent, when one was required, or in other situations where the authority cannot issue a code compliance certificate, provided the authority is satisfied ‘to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code’.
- 9.5.7 The Ministry’s online guidance on certificates of acceptance explains their function as follows.
- The value of a certificate of acceptance to the building owner and a potential buyer will ultimately depend on how much of the work the council was able to inspect. In many circumstances, it’s not possible to see everything so the certificate will only specify the elements of the building that can be approved.
- A certificate of acceptance has some similarities to a code compliance certificate in that it will provide some verification for a building owner or future owners that part or all of certain building work complies with the Building Code.
- 9.5.8 An authority can only issue the certificate in relation to building work that it has reasonable grounds to believe will comply with the Building Code. Work where compliance with the Building Code cannot be confirmed, such as work that it has been unable to inspect, will be specified in the ‘Acceptance of Compliance’ section of the certificate. For the balance of the work, however, the issue of the certificate serves the same function as a code compliance certificate in that it verifies that the work complies with the Building Code.
- 9.5.9 It is important to note, however, that the legislation does not specify that the authority must inspect the work before it can be reasonably satisfied. In situations where a certificate of acceptance is applied for, it is open to authorities to rely on other sources of information and evidence to satisfy themselves on reasonable grounds that compliance has been achieved. So, for example, where building professionals such as architects and engineers have been involved in the building work, including potentially supervising or inspecting it themselves as the work has progressed, they can provide evidence, such as a PS4, as to the works’ compliance, which the authority can then take into account.
- 9.5.10 This has occurred in the current case where, in the Acceptance of Compliance section of the certificate of acceptance, the authority has listed the documents it has relied upon to establish compliance with the Building Code, including third party reports, certificates and producer statements from the applicant’s advisors.

- 9.5.11 The authority has stated that it went to some lengths to ensure that as much of the building work as possible was captured by the building consent (and hence could have a code compliance certificate issued in respect of it); and, for the balance of the work, to accept as much work as possible as code compliant within the certificate of acceptance, without being unduly affected by exceptions.
- 9.5.12 I consider the authority has succeeded in this aim. While in no way absolving the applicant of responsibility for applying for a building consent for the building work (which they should have done), the authority's dual approach has ensured that the optimum amount of unconsented work has nonetheless been verified as compliant. The only exclusions are the concealed fixings, fastenings, flashings, weatherproofing sealants, framing, insulation and building wraps used on the roofs. In my opinion, this does not amount to a significant exclusion, given the extent of the building work.
- 9.5.13 The applicant is concerned that there is stigma attached to certificates of acceptance, and that this will affect their ability to sell the property. He may be correct in this regard, as buyers and their professional advisors may be unfamiliar with certificates of acceptance and their function. However, it is open to the applicant to use this determination and other Ministry guidance to inform potential buyers about certificates of acceptance and their function in verifying Building Code compliance.
- 9.5.14 At the hearing, I discussed with the parties other ways of making certificates of acceptance more useful, and potentially reassuring, for future buyers. Ensuring that certificates are sufficiently clearly worded so that they indicate exactly what work they relate to, what portion is considered compliant and what is excluded⁵, so as not to raise needless doubt in buyers' minds is an important first step. Authorities may also consider attaching to the certificate copies of all documents and other evidence they have relied on in reaching their assessment of compliance, thereby ensuring that all information relating to compliance and the certificate is available in one place.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I confirm that the authority correctly exercised its power of decision in issuing a certificate of acceptance for the building work as described herein.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 March 2017.

John Gardiner
Manager Determinations and Assurance

⁵ Building work that could not be inspected and for which code compliance could not be determined, can be excluded from the certificate of acceptance. The fact that compliance may not be able to be determined in respect of the Building Code Clauses does not necessarily mean that the work concerned is non-compliant. The exclusion is not a means to address building work that does not comply with the Building Code.

Appendix A: The legislation

A.1 The Building Act 2004

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.

45 How to apply for building consent

- (1) An application for a building consent must—
 - (a) be in the prescribed form; and ...
- (4) An application for an amendment to a building consent must,—
 - (a) in the case of a minor variation, be made in accordance with section 45A; and
 - (b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.

45A Minor variations to building consents

- (1) An application for a minor variation to a building consent—
 - (a) is not required to be made in the prescribed form; but
 - (b) must comply with all other applicable requirements of section 45.
- (2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.
- (3) A building consent authority that grants a minor variation—
 - (a) must record the minor variation in writing; but
 - (b) is not required to issue an amended building consent.

94 Matters for consideration by building consent authority in deciding issue of code compliance certificate

- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
 - (a) that the building work complies with the building consent; and
 - (b)...

96 Territorial authority may issue certificate of acceptance in certain circumstances

(1) A territorial authority may, on application, issue a certificate of acceptance for building work already done—

(a) if—

(i) the work was done by the owner or any predecessor in title of the owner; and

(ii) a building consent was required for the work but not obtained; or

(b) if section 42 (which relates to building work that had to be carried out urgently) applies; or

(c) if subsections (3) and (4) of section 91 (which apply if a building consent authority that is not a territorial authority or a regional authority is unable or refuses to issue a code compliance certificate in relation to building work for which it granted a building consent) apply; or

(d) if—

(i) the work affects premises to which section 362A applies; and

(ii) a building consent for the work was obtained before 31 March 2005; and

(iii) the territorial authority is unable or refuses to issue a code compliance certificate for the work; and

(iv) the application for the certificate of acceptance was made before 31 March 2010.

(2) A territorial authority may issue a certificate of acceptance only if it is satisfied, to the best of its knowledge and belief and on reasonable grounds, that, insofar as it could ascertain, the building work complies with the building code.

(3) This section—

(a) does not limit section 40 (which provides that a person must not carry out any building work except in accordance with a building consent); and

(b) accordingly, does not relieve a person from the requirement to obtain a building consent for building work.