



## Determination 2017/050

### Regarding the refusal to issue a code compliance certificate for a 12-year-old house completed under the supervision of a building certifier at 80 Koutunui Road, Athenree



#### Summary

This determination considers the compliance of a 12-year-old house that had been built under the supervision of a building certifier, but where a code compliance certificate had not been issued. The authority had issued a certificate of acceptance for the work, but the current owners were seeking a code compliance certificate in its place. The determination considers which certificate was appropriate to issue in the circumstances.

#### 1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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 current owners of the building, A and A McLennan (“the applicants”)
- Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

#### 1.3 The reasons for this determination

1.3.1 The application for this determination arises from the following:

- The house was constructed under the supervision of Bay Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the Building Act 1991 (“the former Act”). The house was completed in April 2005, but the building certifier ceased operating as a certifier in June 2005 before it had issued a code compliance certificate.

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

- In June 2006, the authority required further inspections of uncompleted building consents and in December 2006, the original owners requested the authority undertake an assessment of the building work.
- In March 2007, the authority inspected the house and identified two items that it considered did not comply with the Building Code. Without providing reasons, the authority stated that it would not issue a code compliance certificate and required the owners to apply for a certificate of acceptance, which was subsequently issued.
- The applicants purchased the property from the second owner in June 2016, and sought a code compliance certificate for the house. The applicants were advised by the authority that a code compliance certificate could not be issued because a certificate of acceptance had already been issued.

1.4 The matter to be determined<sup>2</sup> is therefore the exercise of the authority's decisions to issue the certificate of acceptance and to refuse to issue the code compliance certificate. In deciding that matter, I must consider:

**1.4.1 Matter 1: The certificate of acceptance**

Whether the authority correctly exercised its powers of decision in issuing the certificate of acceptance when the original owners had applied for a certificate of compliance. (I consider this matter in paragraph 5.)

**1.4.2 Matter 2: The relevant Building Code clauses**

Whether the building work complies with the relevant clauses<sup>3</sup> of the Building Code that was current at the time the building consent was issued. (I consider this matter in paragraph 8.)

1.5 Based on the information and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion as to whether this building complies with the Building Code that was in force at the time the building consent was issued. This determination therefore also considers whether it is reasonable to now issue a code compliance certificate. In order to determine that, I have addressed the following questions:

- (a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? I address this question in paragraph 6.
- (b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? I address this question in paragraph 9.

1.6 In making my decision, I have considered the report of the independent expert commissioned by the Ministry to advise on this dispute ("the expert") and the other evidence in this matter.

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

<sup>3</sup> Unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

## 2. The building work

2.1 The building work consists of detached house, which is two storeys high in part and is situated on a gently sloping large site in a high wind zone<sup>4</sup> as defined in NZS 3604<sup>5</sup>. The house is fairly complex in plan and form and is assessed as having a low to medium weathertightness risk.

2.2 The split-level house includes:

- three levels on the ground floor to suit the southwest slope of the site, with:
  - a double garage to the southwest at the lower level
  - a rumpus room on the middle level, with stairs up to the first floor
  - stairs up to the upper level ground floor; which includes entry, dining, living and kitchen, and three bedrooms, a study, two bathrooms and laundry
- a kitchenette and sitting room on the first floor above the rumpus room.

2.3 Construction is generally conventional light timber frame; with concrete masonry foundations, concrete floor slabs, brick veneer and weatherboard claddings, aluminium windows and pressed metal tile roofing. The 27° pitch hipped roofs are set at various levels, with eaves of 600mm, except for increased overhangs above two recessed wall areas and decreased overhangs above two bay windows.

### 2.4 The wall claddings

2.4.1 The primary wall cladding is conventional brick veneer, which extends up to soffit height and incorporates a 40mm drained and ventilated cavity between the brickwork and the building wrap. A direct-fixed weatherboard is installed above aluminium joinery units, which extends from the soffit to overlap the head flanges.

2.4.2 The upper level wall cladding is fibre-cement weatherboards fixed horizontally directly through the building wrap to the framing. Small areas of direct-fixed weatherboards are also installed beside joinery at recessed walls at the southwest entry and adjacent the ground floor kitchen.

### 2.5 Timber treatment

2.5.1 The consent specification called for timber framing to conform to NZS 3602 and NZS 3640, which were amended in December 2003 to include new levels of timber treatment. However, the amended requirements for timber treatment in B2/AS1 did not take effect until April 2005, although the expert noted that many authorities were requiring treated timber at the time the building consent was issued in May 2004.

2.5.2 The consent drawings noted the wall framing to the upper level walls as 'KD H1.2 studs', but no treatment was noted for ground floor wall framing. Taking account of the date of construction, I consider that the exterior wall framing is likely to be a mix of treated and untreated timber.

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<sup>4</sup> According to the bracing calculations

<sup>5</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

### 3. Background

3.1 The authority issued building consent No. 70886 to the original owners on 14 May 2004 under the former Act, based on a building certificate dated 22 April 2004 issued by the building certifier.

### 3.2 Construction

3.2.1 The building certifier carried out the following inspections:

- Footings on 24 June 2004 (which passed).
- Masonry foundation walls on 15 July 2004 (which passed).
- Pre-pour slab inspections on 2 August 2004 (which passed).
- Drainage on 13 September 2004 (which passed, with a note that an as-built drainage plan was received and forwarded to authority on 23 September 2004).
- Pre-line building and plumbing inspection on 28 October 2004 (which passed and noted ‘bracing OK, timber moisture OK’).
- Insulation on 9 November 2004 (which passed).
- Pre-stopping plasterboard bracing on 23 November 2004 (which passed, noting ‘timber moisture OK, bracing OK’).

3.2.2 In total, the job report noted that 13 inspections were required and 13 were carried out, with two of those recorded as failed. The building certifier carried out final plumbing and building inspections on 7 April 2005. The final plumbing inspection was recorded as a ‘fail’, noting ‘no terminal vent through roof.’ The building inspection was also recorded as a ‘fail’, with the following minor items identified:

Install smoke detectors.  
 Producer statements required for shower tanking.  
 Block off ends of downpipe spreaders.  
 Safety barrier to top of retaining wall adjacent to garage door where more than 1 metre of fall to lower drive.  
 14/4/2005 received confirmation from [the electrician] 3 smoke detectors installed.  
 In file at [the authority].

3.3 The building certifier ceased to operate as a building certifier on 30 June 2005 without the code compliance certificate being issued. A year later in June 2006, the authority sent out pro-forma letters to all owners of buildings with open building consents that had been constructed under the supervision of building certifiers, setting out the options available to them to obtain regulatory sign-off.

### 3.4 The authority’s 2006 pro-forma letters to owners<sup>6</sup>

3.4.1 In the pro-forma letter dated 20 June 2006, the authority explained that when the building certifier ceased operating, an agreement had been made with a contractor to complete outstanding inspections on the building certifier’s projects and make recommendations regarding the issuing of code compliance certificates. The authority went on to explain it would not accept liability for work undertaken by building certifiers because certifier “inspections, supporting documentation and evidence are not satisfactory to support [the authority] issuing code compliance certificates”.

<sup>6</sup> Wording sourced from four other determinations for houses consented by the same authority and inspected by the same building certifier; (2010/114, 2011/001, 2011/116 and 2012/116)

3.4.2 The authority explained that further inspections were therefore required in order to determine:

- If a Code Compliance Certificate could be issued or whether more building work and inspections are necessary, or
- If a Certificate of Acceptance could be issued or whether more building work and inspections are required, or
- If a Certificate of Acceptance is not appropriate or a Code Compliance Certificate cannot be issued to advise owners of their right to seek a Determination from [the Ministry].

3.4.3 The pro-forma letter attached a 'Transfer Form' to be filled in as required to initiate an assessment of the property. The owners completed the form authorising the authority to undertake an assessment of the project as explained in the authority's letter dated 20 June 2006.

### 3.5 The certificate of acceptance

3.5.1 The original owners completed the 'Transfer Form' on 7 December 2006 and the authority inspected the house on 8 March 2007. Following the inspection, the authority wrote a letter, dated 12 March 2007, listing the following "non-complying items" including:

1. No ventilation slots under the window sills in the brick veneer cladding
2. The lower end of the roof flashing over the bay window on the north side appears to be only sealed with a sealant instead of having a kick out to divert water if the sealant fails.

3.5.2 The authority gave no reasons for its refusal to issue a code compliance certificate, but instead advised that a certificate of acceptance should be applied for.

3.5.3 I have not seen any record of an application, but a certificate of acceptance was issued shortly after the above letter. The copy I have seen is undated, but is likely to have been issued during March 2007<sup>7</sup>. The certificate stated that it covered:

Finished ground levels, ventilation and drainage of brick veneer cladding, height of gully traps, ceiling insulation, safety glazing, sealing of floors, walls and ceilings in wet areas, but does not include tanking of shower areas, installation of hot water heater, natural light, natural ventilation, spouting and downpipes, smoke alarms.

The certificate said did not include:

...the structure or the exterior cladding weathertightness of the building, or water pipes, waste pipes or other enclosed services or materials.

3.6 The house was sold to the second owner in April 2007 and then to the applicants in June 2016, who approached the authority about gaining a code compliance certificate in lieu of the certificate of acceptance. The applicants were apparently advised that this was not possible because the authority believed that "if a certificate of acceptance has already been issued, then a [code compliance certificate] cannot be issued thereafter." Authority suggested a determination be sought on the matter.

3.7 The Ministry received an application for a determination on 28 November 2016. Additional information was sought by the Ministry on 9 December 2016, with further requests on 21 February and 20 March 2017. The requested information was received from the authority on 27 March 2017.

<sup>7</sup> The unsigned copy of the certificate was issued to the original owners and the house sale to the second owner is recorded by Quotable Value NZ as 2 April 2007

## **4. The submissions**

### **4.1 The applicants' submission**

4.1.1 The applicants set out their understanding of the background to the situation and noted that the second owner had commissioned a report when offering the house for sale in February 2016, which had identified only two minor defects in the house. The applicants were prepared to “do whatever is needed” to replace the certificate of acceptance with a code compliance certificate.

4.1.2 The applicants provided copies of:

- the building certifier’s inspection summary dated 29 June 2006
- the undated and unsigned certificate of acceptance.

### **4.2 The authority’s submission**

4.2.1 In response to the Ministry’s request for information (refer paragraph 3.7), the authority set out its reasons for issuing a certificate of acceptance rather than a code compliance certificate as follows (in summary):

- the authority carried out only one inspection of the house (the final)
- the lack of inspections by the authority meant that there were no reasonable grounds to be satisfied that the building work complied with the Building Code
- it was agreed with the original owner that a certificate of acceptance could be issued for the work that was able to be “reasonably inspected and ascertained for code compliance” and this was standard practice by the authority for dealing with consents that were granted and inspected by private Building Certifiers.

4.2.2 In addition to the applicants’ information, the authority provided copies of:

- the building consent, the consent drawings, and specifications
- the ‘Transfer Form’ dated 7 December 2006
- the letter to the original owners dated 12 March 2007
- the authority’s refusal to issue a code compliance certificate dated 24 March 2016
- various producer statements, certificates, statements, and other information.

4.3 A draft determination was issued to the parties for comment on 19 June 2017. The applicants and the authority both accepted the draft without comment on 21 June 2017.

## **5. The certificate of acceptance**

5.1 In its pro-forma letters to building owners in June 2006 (see paragraph 3.4), the authority stated that further inspections of building certifiers’ uncompleted building consents would be necessary to determine whether a code compliance certificate “could be issued or whether more building work and inspections are necessary”.

5.2 The authority’s letter to the then owners on 12 March 2007 implied that the owners had no option but to apply for a certificate of acceptance by the authority refusing to consider issuing a code compliance certificate. This is not correct as the authority

could have issued a code compliance certificate if it believed the work was compliant.

5.3 Any assessment to determine compliance requires an authority take into account all the available evidence as outlined paragraphs 6.1 to 6.3. I note that where the authority did not carry out particular inspections itself it is entitled to rely on inspections by others. It may also seek evidence to corroborate such inspections, or verification by other means, such as requesting certain elements to be exposed for inspection.

5.4 Now that the house is 12 years old, further evidence is able to be gathered from the performance of the exterior envelope since completion which, in combination with the certifier's inspection records and a visual assessment, may or may not reveal that further evidence needs to be gathered to determine compliance.

## **6. Grounds for the establishment of code compliance**

6.1 In order for me to form a view on the code-compliance of this house, I established what evidence was available and what could be obtained considering that the building work is completed and some of the elements are not able to be cost-effectively inspected.

6.2 In the absence of evidence to the contrary, I take the view that I am entitled to rely on the building certifier's inspection records, but I consider it important to look for evidence that corroborates these records to verify that the certifier's inspections were properly carried out. I also consider that the level of reliance is influenced by the information available to me and by the conventional nature of this house.

6.3 In summary, I find that the following evidence will allow me to form a view as to the compliance of the building work as a whole:

- The record of inspections carried out by the building certifier, which indicates satisfactory inspections of the building work (refer paragraph 3.2.1).
- The drawings, producer statements and other technical information.
- The expert's report as outlined below, on the performance of the exterior building envelope and hidden elements over the past 12 years.

## **7. The expert's report**

### **7.1 General**

7.1.1 As mentioned in paragraph 1.6, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors to assist me. The expert carried out an assessment of the house on 2 and 11 May 2017, providing a report that was completed on 24 May 2017 and was forwarded to the parties on 25 May 2017.

7.1.2 The expert noted that the house generally appeared to accord with 'the overall intent' of the consent drawings, but noting that the single garage had been converted into a rumpus room.

7.1.3 The expert observed that the cladding had been 'well installed and aligned', and 'flashings and wall junctions have been well executed/sealed', with no 'visual evidence of failure'. The expert considered that:

The dwelling has been constructed and finished with good quality materials. General workmanship is good. The dwelling is well presented and has been very well maintained.

## 7.2 Moisture investigations

7.2.1 The expert inspected the interior, taking non-invasive moisture readings at external bottom plates, below windows, adjacent to cladding penetrations and in areas associated with other high risk locations. Readings were all ‘within the normal range’, with no evidence of excessive moisture levels.

7.2.2 The expert also carried out invasive moisture testing as follows:

- 20 readings into ground floor bottom plates using long probes from the inside
- 6 readings below first floor windows to the living room/kitchenette using long probes from the inside
- 2 readings into interior bottom plates to the master ensuite shower walls
- 3 readings into interior bottom plates to the bathroom shower walls.

7.2.3 Readings ranged from 11% to 16%, which were ‘within the low range’, with ‘no evidence to suggest that moisture inside the structural cavities may be excessive’.

## 7.3 Clause B1 Structure

7.3.1 Taking account of the building certifiers inspection records, the expert noted that:

- the inspection summary indicates that the footings, masonry foundation walls and the slab reinforcing, damp proof membrane and under slab drainage were inspected and passed from June to August 2004
- pre-line framing and bracing was inspected in October 2004
- post-line sheet bracing was inspected in November 2004.

7.3.2 The expert observed no signs of ‘structural stress or excessive movement’ in regard to foundations and floor slab, or to wall claddings and interior linings; concluding that ‘it appears the structural components of the dwelling are performing well and under normal circumstances will likely continue to do so.’

## 7.4 Clause E2 External moisture

7.4.1 Taking account of the moisture investigations and the current age of the house, the expert assessed the weathertightness and durability of the external building envelope.

7.4.2 In regard to the brick veneer, the expert noted that:

- windows are recessed by about 60mm, heads are overlapped by a weatherboard in lieu of head flashings and sloping bricks form a traditional projecting sill; with moisture readings indicating that junctions are performing satisfactorily
- ground clearances generally accord with those shown in E2/AS1, except at the southeast elevation where clearances above the ground vary from 75mm to 100mm
- service penetrations have been ‘appropriately sealed’
- the brick veneer is in ‘excellent condition’, with ventilation and weep holes provided, no signs of stress cracks or excessive movement and no evidence of moisture problems after 12 years.



7.4.3 In regard to the fibre-cement weatherboards, the expert noted that:

- the weatherboards appear to have been installed in accordance with the manufacturer's instructions at the time
- face-fixed windows include jamb scribes, head flashings that project beyond the scribes and no sill flashings (common practice at the time), with low moisture readings indicating that junctions are performing satisfactorily
- weatherboards are well maintained and in very good condition, with no signs of stress cracks, excessive movement or moisture problems after 12 years.

7.4.4 In regard to the roof cladding, the expert noted that:

- the pressed metal roof tiles are in 'sound condition', in keeping with their age; with all penetrations 'well flashed/sealed' and no evidence of moisture problems after 12 years
- the 50mm roofing overlaps into gutters are satisfactory and roof/wall junctions accord with the tile manufacturer's instructions, with proprietary kick outs installed at the bottom of apron flashings to the main roof
- the living area bay window has a separate lean-to hip roof, with apron flashings that lack kick-outs and rely on sealant for weathertightness
- spreaders from down pipes from the upper roof lack holes to disperse water over the lower roofs.

## **7.5 Clause E3 Internal moisture**

7.5.1 In regard to the tiled shower enclosures, the expert noted that:

- the two shower areas are in good condition, with tiling showing 'excellent workmanship' and adequate slopes toward floor drains
- moisture levels are low in bottom plates of walls around the showers, which indicate that the underlying water proofing membrane is performing satisfactorily after 12 years.

## **7.6 Clauses D1 Access routes, and F4 Safety from falling**

7.6.1 The expert noted that:

- the main access steps have six risers but lack a graspable handrail
- the retaining wall along the driveway is above 1m high in some areas, but lacks a safety barrier.

## **7.7 Clause G12 Water supplies**

7.7.1 The expert noted that:

- water is provided from mains supply, with no risk of cross-connection contamination and no signs of any problems after 12 years
- the hot water cylinder installation appears satisfactory, with appropriate valves and seismic restraints.

## **7.8 Clause G13 Foul water**

7.8.1 The expert noted that:

- appropriate wastes drain into the authority's sewers via three gully traps, which have rims below the level of the lowest sanitary fixture
- however, gully trap tops have insufficient clearance above ground (at the southeast elevation cladding clearances are also insufficient – see paragraph 7.4.2)
- the branch line drain is about 18m long with only one terminal vent (I note that the as-built drainage plan also shows only one terminal vent).

## **7.9 Clause H1 Energy efficiency**

7.9.1 The expert noted that:

- the certifier inspected and passed insulation in November 2004
- the removal of two randomly selected light switches revealed fibreglass insulation installed in those external walls.

## **7.10 Summary**

7.10.1 The expert considered that following areas required attention (with relevant code clauses provided in brackets):

- ground clearances to part of the southeast elevation (Clause B2 related to E2).
- lack of kick-outs to bay window apron flashings (Clause B2 related to E2)
- spreaders to down pipes from the upper roof (Clause B2 related to E2)
- the lack of a hand rail to the main steps (Clause D1)
- the lack of a safety barrier to the top of the retaining wall (Clause F4)
- clearances of the gully trap tops above ground level (Clause G13)
- the lack of a second terminal vent to the 18m branch line (Clause G13).

# **8. Compliance of the house**

## **8.1 General**

8.1.1 The building consent considered in this determination was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate only if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.

8.1.2 In order to determine whether the authority correctly exercised its power in refusing to issue a code compliance certificate, I must therefore consider whether the house complies with the provisions of the Building Code that applied when the consent was issued in 2004.

8.1.3 An application can be made to the authority for a modification of durability requirements to allow durability periods for the house to commence from the date of

the first final inspection in April 2005 (see paragraph 3.2.2). Although that matter is not part of this determination, I have taken the anticipated modification into account when considering the performance of some building elements.

- 8.1.4 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the building certifier's inspection records. I note that these records are very limited in detail and it is therefore important to look for corroborating evidence to verify that the certifier's inspections were properly carried out. In this particular case, corroboration comes from the expert's assessment of accessible components.
- 8.1.5 Taking account of the expert's report and the other available evidence, the following paragraphs assess the compliance of this house with relevant clauses of the Building Code.

## **8.2 Clause B1 Structure**

- 8.2.1 The house is a fairly simple conventional structure and the inspection summary records satisfactory inspections of footings, foundations and floor slab. The summary also notes that bracing was passed during the pre-line and post-line inspections.
- 8.2.2 The lack of visible signs of structural settlement, movement or other problems after 12 years indicates that the house is meeting the performance requirements of Clause B1.

## **8.3 Clause E2 External moisture**

- 8.3.1 The claddings generally appear to have been installed in accordance with good trade practice and to manufacturers' instructions at the time of construction. I consider the expert's report establishes that the current performance of the exterior building envelope is adequate because there is no evidence of moisture penetration into the timber framing. Consequently, I am satisfied that the house currently complies with Clause E2 of the Building Code.
- 8.3.2 However, remedial work is necessary in respect of the minor items identified by the expert. The building envelope is required to comply with the durability requirements of Clause B2 and because the faults may allow the ingress of moisture over time, the building work does not comply with the durability requirements of Clause B2.
- 8.3.3 Because the identified faults occur in discrete areas, I am able to conclude that satisfactory rectification of items outlined in paragraph 7.10.1 will result in the house being brought into compliance with Clause B2 insofar as it applies to Clause E2 of the Building Code.

## **8.4 Clause E3 Internal moisture**

- 8.4.1 The tiled shower enclosures are in good condition and low moisture levels in adjacent walls indicate satisfactory performance of the underlying water proofing membrane over the past 12 years.

## **8.5 Clauses D1 Access Routes and F4 Safety from falling**

- 8.5.1 The expert confirmed the lack of a safety barrier to the driveway retaining wall as identified in the building certifier's final inspection. Except for the lack of a handrail to the main steps, the expert observed no other evidence of non-compliance.

## **8.6 Clause G12 Water supplies and G13 Foul water**

- 8.6.1 The inspection summary records satisfactory inspections of pre-pour drainage and pre-line plumbing, together with a final plumbing inspection which passed, except for the lack of a terminal vent.
- 8.6.2 The expert confirmed the lack of a second terminal vent pipe as identified in the building certifier's final inspection. Except for clearances above ground levels of the gully trap tops, the expert observed no other evidence of non-compliance.

## **8.7 Clause H1 Energy efficiency**

- 8.7.1 The building certifier's inspection summary indicates that the insulation installation was inspected, which is supported by the expert's observation of insulation in external walls when two light switches were removed.

## **8.8 Conclusion**

- 8.8.1 Taking account of the above observations, I concur with the expert's conclusion that the minor items outlined in paragraph 7.10.1 require attention. I also consider that the expert's report, the building certifier's inspection records, the authority's assessment and the other documentation, allow me to conclude that the remaining building work complies with the Building Code that was in force at the time the building consent was issued.
- 8.8.2 Effective maintenance is important to ensure ongoing compliance with the Building Code and is the responsibility of the building owner. The Ministry has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

## **9. The appropriate certificate to be issued**

- 9.1 Having found that the building work can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.
- 9.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In this situation, where I have reasonable grounds to conclude that the building work can be brought into compliance with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course. Accordingly I reverse the authority's decision to issue the certificate of acceptance in order that the code compliance certificate may be issued once the building work is brought into compliance with the Building Code that was in force at the time the building consent was issued.

## **10. The durability considerations**

- 10.1 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).

10.2 In this case the 12-year delay since substantial completion of the house in 2005 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.

10.3 I have considered this in many previous determinations and I maintain the view that:

- a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by an owner
- b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the house had been issued in 2005.

I therefore leave the matter of amending the building consent for the house to modify Clause B2.3.1 to the parties to resolve in due course.

## 11. What happens next?

11.1 The authority may deal with this matter via a notice issued under section 95A of the Act. The notice should include the defects identified in paragraph 7.10.1; and refer to any further defects that might be discovered in the course of rectification, but not specify how those defects are to be fixed – that is a matter for the applicants to propose and for the authority to accept or reject.

11.2 A code compliance certificate will be able to be issued once these matters have been rectified and the matter of amending the building consent to modify Clause B2.3.1 has been resolved.

## 12. The decision

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

- the house does not comply with Building Code that was in force at the time the building consent was issued in the following respects:
    - the external envelope does not comply Clause B2 insofar as it applies to Clause E2
    - the main steps do not comply with Clause D1
    - the driveway retaining wall does not comply with Clause F4
    - the gully trap tops do not comply with Clause G13
    - the branch line drain does not comply with Clause G13
- and accordingly I confirm the authority's decision to refuse to issue the code compliance certificate.
- the certificate of acceptance issued in 2007 is hereby reversed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 6 July 2017.

John Gardiner  
**Manager Determinations and Assurance**