

Determination 2010/058

Refusal to issue a code compliance certificate for additions and alterations to a house at 26 Resolution Rise, Cooks Beach



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the owner The Number Eight Trust (“the applicant”) and the other party is the Thames Coromandel District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. I consider the builder, I Free (“the builder”), to be a person with an interest in this determination.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for alterations and additions (“the alterations”) to a house because it was not satisfied that the building work complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The refusal arose because the building work had been undertaken without inspections by the authority.
- 1.3 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this, I must consider whether the alterations comply with the relevant clauses of the Building Code.
- 1.4 Based on the information and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion as to whether the building work complies

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243.

² 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.

³ Under section 177(b)(i) of the Act

with the Building Code. This determination therefore considers whether it is reasonable to 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 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 8.

1.5 In making my decision, I have considered the submission of the applicant, the report of the expert commissioned by the Department to advise on this dispute (“the expert”) and the other evidence in this matter.

1.6 In the applicant’s submission dated 24 June 2010, the applicant’s legal adviser requested that I consider awarding costs. I acknowledge the request and note that any consideration for a direction as to costs under section 190 would only commence after the determination has been made. It is also important to note that a direction as to costs applies to costs and delays incurred only during the process of the determination. In addition, an award for costs under section 190 does not turn on the merits of an authority’s decision that led to the determination.

2. The building work

2.1 The single-storey detached house is situated on an exposed gently sloping site in a high wind zone for the purposes of NZS 3604⁴. The original 1960’s house is of traditional construction and design, and had a concrete foundation wall, a timber-framed floor on concrete piles, timber windows, bevel backed timber weatherboards, and profiled metal roofing. The floor plan of the original house was a simple L-shaped with monopitched roofs at two levels. The north east corner of the roof extended over a recessed porch, which had a concrete floor about 150mm below the interior floor level. All elevations show approximately 600 mm eaves.

2.2 The alterations

2.2.1 The alterations (shown in Figure 1) includes the following:

- the original porch enclosed to extend the dining area (“the dining extension”)
- a deck constructed around the north east corner and along the east elevation
- the roof extended as a canopy above part of the new deck (“the deck canopy”)
- a 600mm deep bay under the deck canopy to extend the kitchen
- interior alterations, including:
 - removing the original master bedroom and extending the living area
 - extending the opening between the altered living and dining areas
 - new kitchen and bathroom fittings and various partition changes.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

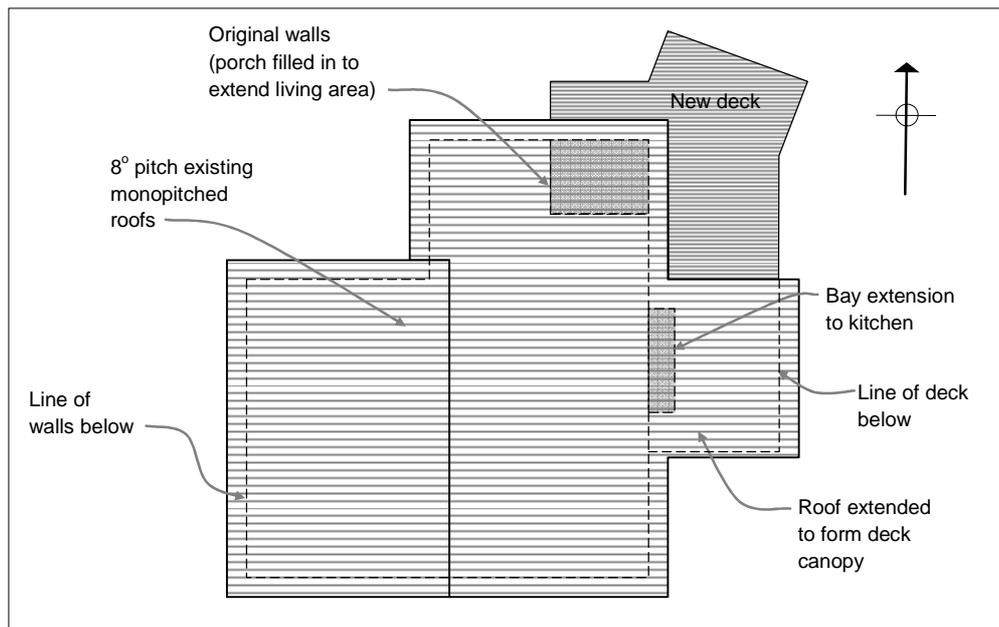


Figure 1: The house and alterations

- 2.2.2 Construction of the alterations is conventional timber frame with some specifically designed elements. A steel 'portal brace frame' braces the new deck canopy and a glue laminated beam spans the extending opening between the altered living and dining areas. The design engineer has provided a producer statement for the design of 'beams and bracing portal'.
- 2.2.3 The new wall cladding matches the original and the new windows and doors are aluminium. The east roof has been reclad, with the roof extended to form the new deck canopy. The framing of the deck canopy is exposed and the original eaves and verges are unchanged at about 600mm overall. The alterations are assessed as having a low weathertightness risk.
- 2.2.4 The new deck floor is spaced timber decking, which is set about 160mm below the interior floor level. The deck area beneath the canopy has solid balustrades clad on both sides with timber weatherboards, with a timber bench built into the remaining edges.
- 2.2.5 The specification calls for the framing to the new walls to be treated, but I have seen no evidence of what timber has been used. Given the age of the original house, I consider that the original wall framing is likely to be boric treated.

3. Background

- 3.1 According to the builder, preparation work for the alterations had commenced prior to the building consent application and it appears that work was well underway by the time the authority issued the building consent (No. ABA/2009/793) on 20 October 2009. The building consent conditions called for certain inspections during the construction.

- 3.2 An inspection was requested, but the authority's inspector ("the inspector") would not inspect the work as it had progressed too far. According to the builder, he met with the authority to discuss the situation and was advised that when a producer statement was provided for the foundations, a site inspection would be carried out.
- 3.3 The engineer viewed the foundations and provided a 'Producer Statement – PS4 – Construction Review' for 'engineer review of foundations for extension' dated 11 December 2009.
- 3.4 According to the builder, site inspections were booked and postponed, with the inspector verbally advising that photographs of exposed construction together with the engineer's producer statement would be sufficient to meet the inspection requirements. The alterations were completed and the builder provided the documents to the authority on 26 January 2010. In the meantime the inspector had left the authority's employ.
- 3.5 In a letter to the authority dated 9 March 2010, the applicant's legal adviser outlined the background to the situation, noting that all work had been undertaken in accordance with the building consent and the problem seemed 'simply to be an issue of whether all of the work can be inspected'. The legal adviser noted that, other than two internal beams, the rest of the work is external and easily inspected and asked the authority to clarify its requirements for a code compliance certificate. I have seen no response from the authority.
- 3.6 The Department received the application for determination on 7 April 2010. In an email dated 21 April 2010 the Department sought clarification from the authority of its reasons for declining to issue the code compliance certificate. The authority made no response. I have therefore considered compliance with all those Building Code clauses that are relevant to this work.

4. The submissions

- 4.1 The applicant forwarded copies of:
- the builder's statement supporting the application
 - the building consent documentation
 - the builder's letter to the authority dated 26 January 2010
 - the engineer's producer statements.
- 4.2 The authority did not acknowledge the application or make any submission.
- 4.3 The draft determination was issued to the parties for comment on 16 June 2010.
- 4.4 The authority responded to the draft determination in an email to the Department dated 22 June 2010. The authority said it did not accept the draft because it had not refused to issue the code compliance certificate. This was because no application for a code compliance certificate had been made by the applicant, and that it was not required to make a decision under section 93 as the two-year anniversary of the issue the building consent had not been reached. The email concluded by saying:

More simply put, it is submitted that the determination cannot reverse a decision that hasn't yet been made.

- 4.5 The applicant accepted the draft determination and responded to the above submission in a letter to the Department dated 24 June 2010. The letter included correspondence between the parties, and between applicant and the applicant's legal adviser.
- 4.6 The applicant submitted that the correspondence showed that on five occasions the authority had advised that it was unable to make a decision about the code compliance of the work, and that the only option open to the applicant was to seek a determination from the Department. In response to the authority's email of 22 June 2010, the applicant's legal adviser submitted that:

Although [email advice from the authority] does not specifically state that [the authority] would not issue a [code compliance certificate] it does make it clear that [the authority] would not progress your [code compliance certificate] application without a determination from the Department

... it was made very clear to us that [the authority] would not take any further steps at all, including issuing any letters, without a determination from the Department ...

The email also said:

In the circumstances ... it would also be appropriate for [the applicant] to seek an order for costs against [the authority] as it has acted unreasonably in delaying the issue of a [code compliance certificate] and as a result you have incurred not insignificant costs that should not have been necessary.

- 4.7 I have considered the submissions of the parties. Given the unequivocal advice that the applicant received from the authority that it was unable to progress the matter, it was reasonable for the applicant to believe that there was no value in making a formal application for a code compliance certificate under section 92. The reasonably expected outcome of any such application was that it would be refused.
- 4.8 Refer to paragraph 1.6 with respect to my response to the 'order of costs' sought by the applicant's legal adviser.

5. The authority's actions

- 5.1 I have not seen any correspondence from the authority in response to the applicant's legal adviser's letter (refer paragraph 3.5), or to the Department's request for the authority's reasons for declining to issue the code compliance certificate (refer paragraph 3.6). The authority has made no submission in response to the application or to the expert's report. The authority appears not to have inspected the work, or made its own assessment as to code compliance. I do not consider the authority's actions to be reasonable.
- 5.2 I consider the authority has refused to issue the code compliance certificate (refer paragraph 4.7). If such a refusal is made, section 94A requires an authority to give the reasons for the refusal in writing. An owner can then either act on those reasons, or apply for a determination if the reasons are disputed.

6. Grounds for the establishment of code compliance

- 6.1 In order for me to form a view as to the code compliance of the building work, I established what evidence was available and what could be obtained considering that the building work is completed and some of the elements were not able to be cost-effectively inspected.
- 6.2 I must therefore look for evidence that confirms that the alterations were constructed in accordance with the building consent and the Building Code. The builder has supplied photographs of wall framing taken during the construction. The building work is simple in design and materials, with access available to the sub-floor framing and the deck canopy structure.
- 6.3 In summary, I find that the following evidence allows me to form a view as to the code compliance of the building work as a whole:
- The drawings, photographs, producer statements and certificates
 - The expert's report on the building work as outlined below.

7. The expert's report

- 7.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me in the evaluation of the Building Code compliance of the alterations. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 10, 12 and 19 May 2010 and provided a report that was completed on 21 May 2010.
- 7.2 The expert noted that the overall standard of finish to the exterior and interior was good, and the joinery installation appeared satisfactory. The expert inspected the interior of the alterations, taking non-invasive moisture readings internally, and noted no evidence of moisture.
- 7.3 The following changes have been made from the building consent drawings:
- the floor joists to the north east corner were installed over the original porch concrete on 15mm packers, in lieu of pile foundations
 - the deck balustrades were changed from open timber to weatherboard-clad balustrades under the deck canopy, with timber benches elsewhere
 - an additional post and beam have been added to the deck canopy.

7.4 The expert assessed the alterations for compliance with the relevant clauses of the Building Code and his comments are summarised in the following table:

Expert's comments	My comments
B1 Structure	
Producer statement for engineer's review of foundations.	<i>PS4 provided by a Chartered Professional Engineer</i>
Glulam beam over living/dining opening is not visible. Span is <u>4.6m</u> . Maximum span for 360 x 90 beam is 4.5m.	<i>The producer statement for the design covers new lintel beam spanning <u>4.3m</u>.</i>
E1 Surface water	
Stormwater disposal connected to existing system.	<i>The site is gently sloping.</i>
E2 External moisture	
No evidence of moisture penetration or problems.	<i>The altered house is a simple, traditional building, with conventional materials. All new work is sheltered by the eaves around all elevations.</i>
Sub-floor ventilation through spaced base boards. Floor joists over original porch floor packed to provide 10 to 15mm gap, with 35mm holes drilled through solid packing to remaining sub-floor.	
E3 Internal moisture	
New vinyl to kitchen, bathroom and laundry. Shower walls finished with seamless wet wall liner. No evidence of failure of impervious finishes.	
F4 Safety from falling	
Part of deck under canopy is more than 1m from ground level and a solid balustrade is provided. Remaining deck areas are less than 1m from ground level.	
G1 Personal hygiene, G2 Laundering, and G3 Food preparation	
All facilities are in good working order and generally comply with the building consent drawings.	<i>The drawings show adequate provision to comply with the requirements.</i>
G4 Ventilation, G7 Natural light and G8 Artificial light	
The alterations generally complies with the building consent drawings.	<i>The drawings show adequate provision to comply with the requirements.</i>
G9 Electricity	
	<i>'Electrical Certificate of Compliance' dated 20 March 2010 provided.</i>
G12 Water Supplies	
Water pipes in black polyethylene, and are visible in sub-floor space. Pipework is adequately supported.	
G13 Foul Water	
Fixtures appear to be in good operating condition with no evidence of problems.	
Waste pipes in sub-floor space are supported by straps, with sufficient falls towards existing gully trap.	
The new toilet is connected to the original soil pipe.	
H1 Energy Efficiency	
Wall and ceiling insulation not visible.	<i>Photographs show insulation installed in walls and ceilings. Appears adequate.</i>

7.5 A copy of the expert's report was provided to the parties on 27 May 2010.

8. Discussion

- 8.1 In assessing the compliance of the alterations with the relevant Building Code clauses, I have taken into account the building consent drawings, the builder's photographic records, the producer statements and the other evidence. In addition, I have considered the expert's general comments regarding the traditional construction and the good workmanship of the visible components in the alterations.
- 8.2 On the basis of the information provided I consider there are reasonable grounds to come to the view that the alterations comply with the relevant clauses of the Building Code. I also note in paragraph 7.3 there have been changes from the building consent drawings.

9. What is to be done now?

- 9.1 The authority should, in cooperation with the owners, amend the building consent documents to show what has been built. Once this matter has been resolved to its satisfaction, the authority shall issue a code compliance certificate.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the house complies with the relevant clauses of the Building Code. Accordingly I reverse the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 June 2010.

John Gardiner
Manager Determinations