



## Determination 2012/068

### Regarding the refusal to issue a code compliance certificate due to a lack of inspections of the foundations to a house at 30 Miranda Street, Avondale, Auckland

#### 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 current Act”) made under due authorisation by me, John Gardiner, Manager Determinations, 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, Birdwood Custodians Limited (“the applicant”)
  - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers in refusing to issue a code compliance certificate on the basis it could not be satisfied on reasonable grounds that the building work complied with the consent. The authority’s concerns relate to building work carried out that was not inspected by the authority.
- 1.4 In making this decision I must consider whether there is sufficient evidence to establish on reasonable grounds that the building work, including the foundations, complies with the Building Code (Schedule 1 of the Building Regulations 1992) that was current at the time the consent was granted.
- 1.5 I note here that the application raised matters concerning the processing of land use and subdivision, and the fees charged by the authority. This determination does not consider these matters other than as they relate to the authority’s exercise of powers in respect of the grant and issuance of the relevant building consents.
- 1.6 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.7 I have referred to the relevant legislation in Appendix A.

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

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

## 2. The building work

- 2.1 The building work consists of the construction of a new single storey house located on a site at the rear of an existing house. The house is simple in plan and form, with concrete foundation and floor slab and a light timber frame. The foundations, which were designed by a firm of specialist geotechnical engineers (“the engineer”), include specifically designed piles and ground beams to bridge a 150mm foul water drain that runs under the house.
- 2.2 Cladding specified in the documentation for the first building consent (refer paragraph 3.1) consists of brick veneer and weatherboard over a cavity, with small areas of fibre-cement sheet above windows on the north elevation. It appears fibre-cement weatherboards were installed in place of the brick cladding.
- 2.3 The 20° pitched roof is clad in profiled metal roofing with eaves of 600mm on most elevations, and aluminium joinery is used throughout.

## 3. Background

- 3.1 On 4 May 2005 the authority issued building consent B/2005/136 (“the first consent”) under the Act for the construction of a ‘New single storey dwelling’.
- 3.2 The application for consent work was supported by a building certificate issued by a building certifier but the certificate excluded ‘Engineers design for foundations and bridging design’ and ‘Geotechnical investigation’.
- 3.3 The geotechnical assessment of the ‘building platform and for bridging the under lying (sic) public sanitary sewer line’ was completed by the engineer in a report dated 3 June 2004. The engineer provided a Producer statement – Design PS1 for ‘beams, posts, foundations, wall bracing’ dated 11 February 2005. The authority completed its assessment of the resulting design by the engineer on 18 April 2005.
- 3.4 The consent included the following note:

You are advised that this Building Consent will lapse in 12 months from the date of issue if no work or an inspection has been undertaken. Also the building work proposed in this Building Consent must be completed with two years from the date the Building Consent was granted.

The consent also included the following ‘Structural Engineering Conditions’:

The applicant is responsible for arranging the required observations by a CPEng Registered Engineer ...

The Engineer shall, upon completion of the work, submit a written report to [the authority] certifying that the construction of the work has been carried out in accordance with the design, drawings, specifications, geotechnical report ...

The above conditions are in addition to inspections by Auckland City Environments inspectors, required by the building consent issue.

- 3.5 Construction commenced with some site works carried out for the diversion of a foul water drain from the existing house around the proposed house. The inspection records show that inspections were completed on 24 May 2005, 20 June 2005, and 5 August 2005. The last inspection passed the work. All inspections record the inspection against ‘Consent No: 20050013601’ in respect of ‘30 Miranda Street,

- 3.6 Avondale'. The 5 August 2005 inspection refers to the as built drainage plan which also contains the same consent details.
- 3.7 It appears that no further work was carried out, and the authority's records indicate that this was in part due to 'delays experienced with a concurrent subdivision application'.
- 3.8 In May 2007 the applicant sought an extension of time to complete the building work. The authority declined the extension as 'works for the proposed new dwelling had not commenced', and recommended the applicant seek a new consent.
- 3.9 On 15 June 2007 the authority wrote to the previous owner<sup>3</sup> "cancelling" the consent. The authority's letter stated:
- After viewing the above consent inspection records, it is found that insignificant progress has been carried out to this consent. Under the Building Act 2004, the development, must be started within one year of the date the Building Consent was issued and a Code Compliance Certificate must be applied for within two years of the date the Building Consent was issued.
- 3.10 The applicant made a new building consent application and fell into dispute with the authority as to the payment of fees (being costs associated with development contribution) that the applicant considered had already been paid under the first consent.
- 3.11 The applicant resubmitted the application for building consent, using the same plans and supporting information, and on 1 August 2007 the authority issued a 'Notice of Consent Approval' for building consent B/2007/13181 ("the second consent"). The notice stated that the building consent 'has been approved' but before the consent could be uplifted payment of the development contribution was required. The parties disputed the matter of payment of the development contribution and the consent was not uplifted; construction continued regardless.
- 3.12 On 18 September 2007 the applicant sought to book an inspection with the authority. The authority advised the applicant 'not to do any works until outstanding issues are resolved'. The applicant advised the authority that as it was refusing to carry out inspections the engineer would be engaged to undertake the necessary inspections.
- 3.13 The engineer carried out the following inspections during construction:
- |                   |   |
|-------------------|---|
| 2 September 2007  | Footings, drain bridging beams, drain bridging piles  |
| 24 September 2007 | Under slab hardfill compaction  |
| 27 September 2007 | Concrete floor slab   |
| 31 October 2007   | Pre-cladding  |
| 6 November 2007   | Pre-lining  |
| 20 May 2008       | Removed a window scribe and re-confirmed that foam pressure seal was installed around door & window openings. |
- 3.14 On 21 November 2007 the matter of the development contribution was settled, with the authority waiving the requirement and noting that the applicant had earlier paid the consent fees required for the new consent. The authority advised the applicant by email on the same day that the consent would be 'bundled up ready to issue in the

<sup>3</sup> The previous owner had entered into an agreement with a company to develop the property; however the Certificate of Title shows the applicant was the owner of the property at the time the authority 'cancelled' the consent.

morning'. The authority noted that there were some differences in the second consent application; the cladding had changed from brick veneer with a concrete tile roof, to fibre-cement weatherboard with a profiled metal roof.

3.15 The following inspections were subsequently carried out by the authority:

03 December 2007 post line (passed) notes:

Only passes if we can have confirmation that prior inspections have been undertaken. As this is the first council inspection registered...

11 December 2007 preline plumbing (failed)

18 December 2007 membrane - notes:

Waterproofing to bathroom and toilet in order. PS3 from installer is required at final.

Previous inspections have not been done by [the authority] except IPP and IPL. An inspection indicates no pressure seal around windows, head flashing gap too large, head flashing overhang insufficient.

No work is allowed to continue until engineer has resolved the above issue with [the authority].

3.16 The authority issued a 'Site instruction to property owner' (No. 22510) on 18 December 2007 which noted that previous inspections had not been done by the authority and no engineer's inspection records were on site. The site instruction repeated the concerns stated in the earlier inspection reports, and required the engineer to contact the authority 'to discuss the inspection issue'.

3.17 The engineer provided a Producer Statement PS4 Construction Review dated 30 November 2007 for 'footings, under slab hardfill compaction, floor slab, pre-cladding inspection'.

3.18 A pre-certificate checklist dated both 2 and 4 April 2008 completed by the authority noted that engineer's PS4 had been received but was not accepted by the authority as it shows a date (30 November 2007) being before the second building consent was issued on 3 December 2007, and that the majority of the construction referred to took place before the second building consent was issued.

3.19 Further inspections were carried out by the authority on 4 and 8 April, and 28 May 2008, with a final inspection (which passed) on 20 June 2008.

3.20 On 1 September 2008 an application for a code compliance certificate was made; documents provided with the application included producer statements for plumbing and waterproofing, an electrical certificate of compliance, and a statement from the engineer as to inspections carried out (refer paragraph 3.13) along with the engineer's PS4 and supporting documents.

3.21 It appears the authority put the application on hold and requested further information from the engineer, however is not apparent to me exactly what information the authority was seeking.

3.22 In a letter dated 18 August 2009 to the applicant's legal adviser, the authority confirmed that it would not issue a code compliance certificate 'as the required building inspections from foundation to pre-line did not take place'. The authority also stated that it would not issue a code compliance certificate 'even if [the engineer] provided suitable producer statements, as [the authority] would still run the risk of contingent liability for the building works should they prove to be deficient in later years.'

- 3.23 In a letter to the applicant dated 8 March 2012, the authority formally refused to issue the code compliance certificate on the grounds that there was insufficient information in respect of the work completed prior to the authority's inspections, and that the authority could not be satisfied that the building work complies with the consent and the Building Code.
- 3.24 On 24 July 2012 the Ministry received an application for determination; payment of the required fee was not received until 7 August 2012.

#### **4. Submissions**

- 4.1 The applicant set out the background to the dispute in a letter dated 7 June 2012, and provided copies of the various documents supplied with the code compliance certificate application (refer paragraph 3.20) including:
- the application for a code compliance certificate
  - a producer statement construction – plumbing, dated 10 July 2008
  - an undated producer statement construction, for waterproofing to wet areas
  - some inspection records
  - an electrical certificate for the underground mains
  - from the engineer:
    - a letter dated 26 May 2008 outlining inspections carried out
    - the producer statement – construction review dated 30 November 2007
    - precladding and preline inspection records dated 31 October and 8 November 2007 respectively
  - a producer statement construction PS3 from the builder, dated 3 April 2008
  - the 'Notice of Consent Approval' (refer paragraph 3.11)
  - various correspondence between the parties
- 4.2 The authority made a submission by letter dated 27 August 2012, reiterating its view that there was 'lack of reasonable grounds to ascertain compliance with the building consent, and subsequently the Building Code.' The authority provided copies of:
- a summary of events
  - inspection records
  - the engineer's producer statement
  - various correspondence between the parties
- 4.3 The Ministry sought further information as to the consents, and received a copy of the plans for the first consent from the applicant, and a copy of the property file from the authority on CD ROM.
- 4.4 A draft determination was issued to the parties for comment on 24 September 2012.
- 4.5 The applicant accepted the draft without further comment in a response dated 11 October 2012.

- 4.6 By email on 23 October 2012 the authority responded that did not accept the draft determination and submitted that:

[the first building consent] lapsed automatically on 4 May 2006 as per Section 52 Lapse of a building consent

The building works undertaken on the 5 August 2005 were part of the subdivision consent

The building consent record has now been altered from cancelled to lapsed ...

A code compliance certificate will not be issued for [the first building consent] as the council did not undertake the key inspections of the building works during construction.

The authority noted a typographical error that has been corrected.

- 4.7 I do not accept the authority's contention that the inspections referred to in paragraph 3.5 were completed against the subdivision consent, and that the first building consent had therefore lapsed. The first building consent detailed the drainage work that was inspected, and the inspection records all record the inspections being completed against that consent. The authority provided no documented evidence to support its view that the drainage work was completed under the 'subdivision consent' as opposed to the building consent.
- 4.8 The authority's records show that the 'Certificate of Compliance' (which I take to be the 'subdivision consent') for the proposal to build the house under provisions of the Resource Management Act was issued on 24 January 2005. Approval given under the Resource Management Act does not allow the laying of a private foul water drain without a building consent having been obtained.
- 4.9 In response to the authority's submission that a code compliance certificate will not be issued for the first building consent, I note that under section 188(2) of the Act the determination is binding on the parties concerned.

## **5. Discussion**

### **5.1 General**

- 5.1.1 The dispute centres on the building work carried out after the "cancellation" of the first consent and before the granting of the second consent, with inspections for the building work initially undertaken by the engineer rather than the authority. The following paragraphs consider the building consent matters and the code-compliance of the building work.

### **5.2 Building consent matters**

- 5.2.1 On 15 June 2007 the authority wrote to the previous owner "cancelling" the first consent because insufficient progress had been made, and because the period in which the code compliance certificate 'must be applied for' had passed.
- 5.2.2 I have considered the provisions of the Act that relate to building consents. There are no provisions that relate to the cancellation of consents, however, I note that section 52 of the Act provides for the lapse of a building consent when building work to which it relates does not commence within 12 months after the date of issue of the building consent (or any further period that the authority may allow).

- 5.2.3 From the description of the background to the events provided by the applicant, and the inspection record of 5 August 2005 for drainage work, I am of the view that work was undertaken within this period that was within the scope of the work approved in the building consent, and as such the building consent could not lapse and therefore section 52 does not apply.
- 5.2.4 The two year period in which an authority is required to make a decision about compliance is described in section 93 of the Building Act 2004.
- 5.2.5 If an application for a code compliance certificate is not received within two years of the granting of the building consent, an authority must then assess whether the building work complies with the building consent and issue or refuse to issue, the code compliance certificate. The Building Act 2004 contains no provisions that provide for an authority to cancel a building consent once the two year period has passed. The application of section 93 of the Act is discussed in detail in Determination 2008/040<sup>4</sup>.
- 5.2.6 I therefore consider the authority incorrectly exercise its powers in cancelling the first consent because it had no power under the Act to do so.
- 5.2.7 As a result of the authority's decision to "cancel" the first building consent the applicant was required to apply for a new building consent to complete the building work.
- 5.2.8 The parties were in dispute as to the payment of the development contribution and the authority considered that the second building consent had not been "issued" and could not be uplifted until payment was received.
- 5.2.9 Under section 51(1)(b)(ii) of the Act current at the time the second consent was granted, 'a building consent must have attached to it a copy of a development contribution notice under section 36...'. Section 36 of the Act provides for an authority to withhold a code compliance certificate where the relevant development contribution has gone unpaid.
- 5.2.10 Accordingly I consider the authority erred in refusing to issue the second consent, granted under section 49, on the basis that the development contribution had not been paid, and in refusing to carry out inspections when those inspections were called for by the applicant.

### **5.3 Code-compliance matters**

- 5.3.1 The authority notified the applicant that the second consent had been 'approved' (refer paragraph 3.11); I take this to mean that the authority had granted consent under section 49 of the Act, therefore it was satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications that accompanied the application.
- 5.3.2 It is noted that the authority had specifically considered and approved the house foundations and bridging structure as part of the first consent. The first consent required the applicant to arrange 'the required observations by a CPEng Registered Engineer': I have not seen any similar conditions in respect of the second consent.

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<sup>4</sup> Determination 2008/140: Refusal to issue a code compliance certificate for a farm shed because the building consent was more than two years old

- 5.3.3 The applicant sought to book the required inspections but the authority declined to undertake these. The work was inspected by the engineer and a PS4 supplied in respect of that work. The authority has given, as one of its reasons for refusing the PS4, that it is dated before the second consent was issued (refer paragraph 3.18). However, I am of the view that as the first consent had been incorrectly “cancelled” by the authority it was still in effect.
- 5.3.4 The authority accepts that the work it has inspected is code-compliant. It has not provided any evidence to support its view that the remaining work does not comply with the Building Code and I do not accept the authority’s view that because it did not inspect the work itself that the work cannot be considered code compliant.
- 5.3.5 I also consider that the compliance of the building as a whole cannot be treated in isolation from the compliance of the foundation and the remaining work that the authority did not inspect.
- 5.3.6 The authority has advised the applicant it would not issue a code compliance certificate due to ‘contingent liability’ for any defects that might arise in ‘later years’.
- 5.3.7 The authority is required to apply the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function.
- 5.3.8 The house is a simple low-risk structure located on ground that underwent a full geotechnical assessment, and the specifically-designed foundations were inspected by the engineer as required by the conditions of the first consent. The house has been substantially complete since early 2008 with no apparent defects.
- 5.3.9 In my view the authority has not provided any specific reasons why it does not consider the work is code-compliant. I consider that the applicant has provided sufficient evidence to show that the work was properly inspected, and there are reasonable grounds on which to base the view that compliance has been achieved. I note the lack of inspections by the authority, of itself, does not make work non-compliant.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in relation to the “cancellation” of building consent B/2005/136 as there is no power in the Act to cancel a building consent.
- 6.2 I also determine that the authority incorrectly exercised its powers in refusing to issue a code compliance certificate and I therefore reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 October 2012.

John Gardiner  
**Manager Determinations**

## Appendix A:

A1. The relevant provisions of the Act include<sup>5</sup>

**36 Territorial authority may attach development contribution notice to project information memorandum**

If a territorial authority considers that a development contribution under the Local Government Act 2002 is payable by the owner, the territorial authority may attach to the project information memorandum a notice, in the prescribed form, to the effect that a code compliance certificate for the building work will not be issued unless the development contribution is paid (development contribution notice).

**52 Lapse of building consent**

A building consent lapses and is of no effect if the building work to which it relates does not commence within—

- (a) 12 months after the date of issue of the building consent; or
- (b) any further period that the building consent authority may allow.

**93 Time in which building consent authority must decide whether to issue code compliance certificate**

- (1) A building consent authority must decide whether to issue a code compliance certificate for building work to which a building consent relates within—
  - (a) 20 working days after the date specified in subsection (2); or
  - (b) any further period after the date specified in subsection (2) that may be agreed between the owner and the building consent authority concerned.
- (2) The date referred to in subsection (1)(a) and (b) is—
  - (a) the date on which an application for a code compliance certificate is made under section 92; or
  - (b) if no application is made, the expiry of—
    - (i) 2 years after the date on which the building consent for the building work was granted; or
    - (ii) any further period that may be agreed between the owner and the building consent authority concerned.
- (3) Subsection (1) applies whether or not an application for a code compliance certificate is made under section 92.
- (4) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application for a code compliance certificate, and, if it does so, the period is suspended until it receives the information.

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<sup>5</sup> Current at the time of the relevant exercise of powers by the authority