

Determination 2024/062

The refusal to issue a code compliance certificate and the reasons given

255 Mangatawhiri Road, Omaha, Warkworth

Summary

This determination considers the authority's refusal to issue a code compliance certificate due to concerns that some of the building work does not comply with the building consent and the Building Code. The determination considers whether the authority had grounds for refusing to issue the code compliance certificate, and the reasons given for the refusal as set out in its section 95A notice.



In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Peta Hird, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).¹
- 1.2. The parties to the determination are:
 - 1.2.1. the owners of the property and dwelling, D and L Beckett, who applied for this determination (“the owners”)
 - 1.2.2. Auckland Council carrying its duties as a territorial authority or building consent authority (“the authority”).²
- 1.3. This determination arises from the authority’s refusal to issue a code compliance certificate for construction of a dwelling. The owners are of the view that the building work complies with the building consent and the Building Code, and that adequate evidence has been provided to establish this.
- 1.4. The matter to be determined, under section 177(1)(b) and 177(2)(d) of the Act, is the authority’s refusal to issue a code compliance certificate for building work carried out under building consent ABA 63066.³
- 1.5. In deciding this matter, I must consider whether the authority had grounds for refusing to issue the code compliance certificate and the reasons given for that refusal as set out in its letter dated 7 December 2018 (“the section 95A notice”).
- 1.6. After the determination application was lodged further clarity was sought by the Ministry about what aspects of the building work were in dispute between the parties. A list of outstanding issues was collated, a further inspection was carried out, and several of the matters were resolved and an application made for minor variations to the consented plans. However there remained some items still in dispute. Therefore, in deciding whether to confirm, reverse or modify the

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² The building consent was issued by Rodney District Council before it transitioned into Auckland Council. For the purposes of this determination, both authorities are referred to collectively, and as if they were one entity.

³ Authority records indicate the building consent has subsequently been assigned number BCO10038492.

authority's 2018 decision to refuse to issue the code compliance certificate, I have also considered the issues subsequently confirmed by the parties as remaining in dispute.

- 1.7. I have not considered any other building work detailed in the building consent or any other aspects of the Act or Building Code.

2. The building work and background

- 2.1. The building is a 221m² five-bedroom, partially two-storey dwelling on a flat section in a residential area near the coast in Omaha.
- 2.2. The building consent was granted and issued on 26 March 2007 to the previous owners. The building work is detailed on eleven plans numbered 1 to 11 and dated 3 November 2006.⁴ The relevant design information associated with the items in dispute is detailed in the discussion section of this determination.
- 2.3. The building work commenced in about June 2007, and the authority conducted its first inspection (foundation) on 25 June 2007. The inspection record noted a 'pass' and that solid sand was observed as part of the excavations and steel reinforcement was installed, and that a Producer Statement – Construction Review (PS4) was required from the engineer for the "footings" and another for a "surveys certificate".
- 2.4. At a site inspection on 2 November 2007, the authority noted that aspects of the work on the foundation for the outdoor fire were not satisfactory, for example that there was insufficient cover for the steel reinforcement which was "touching [the] side walls of the foundation. The record noted the blockwork under construction was different from the consented plans and an amendment was required.⁵ The inspection noted PS4s were required for both elements.
- 2.5. Further inspections and site meetings occurred,⁶ until a final inspection was conducted on 1 April 2011. Multiple outstanding issues were identified at this inspection, and the authority issued site instructions to the previous owners on the same day, identifying 46 items that required resolving.⁷
- 2.6. On 5 April 2011, the authority sent the previous owners a letter refusing to issue a code compliance certificate for the building work. The letter referred to four of the authority's site instructions as containing the details of the items to be completed,

⁴ I have not been provided with any other documentation in support of the application for the building consent, such as copies of the application forms or any separate specifications (if any).

⁵ For the purposes of this determination, I have assumed the authority was referring to the foundation wall blockwork as detailed on building consent plans 5 and 6.

⁶ The inspections range in date from 25 June 2007 to 16 January 2012, notwithstanding further final inspections in 2018, 2021 and 2022. The inspections included those for "floor slab", "preline", "wrap", and "drainage".⁷ Site instruction numbers 47394, 47395, 47396 and 47397.

⁷ Site instruction numbers 47394, 47395, 47396 and 47397.

but stated, 'Please note this is not a full and complete list of works to be completed.' The letter also identified several items where the authority considered further paperwork was required, including "...for changes in block work ...".

- 2.7. The authority conducted a further site inspection on 16 January 2012, following which it emailed the previous owners a list of 35 issues that still needed to be resolved and identified 15 items of paperwork it required. The authority stated it had "endeavoured to cover all items but due to the amount of items there may be others that occur".
- 2.8. On 20 November 2018, the authority conducted a further final inspection of the building work. This inspection again failed for multiple reasons.
- 2.9. On 7 December 2018, the authority sent the previous owners a letter ("the 95A notice") refusing to issue a code compliance certificate on the grounds that it "could not be satisfied on reasonable grounds that building works comply with the NZ Building Code, or that it is performing as intended".
- 2.10. The section 95A notice referred to the inspection carried out on 20 November 2018, and listed 20 items of concern (while noting that was not a definitive list):
 - Various concerns regarding B1 Structure, B2 Durability, E2 External Moisture, E3 Internal Moisture, F4 Safety from Falling and F7 Warning Systems are expanded below: -
 - 1. Glazing in buildings to comply with NZS 4223^[8]
 - 2. Cladding penetrations
 - 3. Ground clearances not achieved
 - 4. Building paper hanging below cladding
 - 5. Bottom edge of weatherboards and facings not painted
 - 6. Weatherboard sprung – Front deck barrier
 - 7. Lower ends of some scribes broken
 - 8. No weather groves to corner box facings
 - 9. New scribes installed – Why?
 - 10. Shiest stone (sic) to weatherboard junction – Back Flashings
 - 11. Down pipe clamps broken or not fixed
 - 12. Down pipe diffusers not installed
 - 13. Gully trap haunching
 - 14. Polybutylene piping used externally
 - 15. Incorrect vent cowlings installed
 - 16. Gas bottles not restrained
 - 17. Proximity of exterior gas Cali font to roof of shed – Fire hazard?
 - 18. Dining room ranch slider support post not as built 57mm [outside diameter] installed should be 76mm with 4.5mm wall - Pipe bending – Engineer to assess and provide a report
 - 19. Ground floor toilet not fully sealed to wall
 - 20. Water proofing assessment required to first floor ensuite shower tile base.

⁸ New Zealand Standard NZS 4223:2008 *Glazing in buildings*.

2.11. The section 95 notice also noted:

Note:

- a) Layout changes – Bedroom and family/TV room added to garage.
- b) Dining room ranch slider support post not as built 57mm [outside diameter] installed should be 76mm with 4.5mm wall - Pipe bending – Engineer to assess and provide a report.

2.12. In addition, the section 95A notice listed documentation that the authority required:

Documentation Required:

1. Application for CCC and B2 [modification] for ABA 1994 4916^[9]
2. As built plans required for layout changes as listed in “a” above – Provide evidence of [damp proof course] under garage slab and insulation to garage walls and ceiling
3. As built plans required for drainage
4. Electrical compliance certificate
5. Gas certificate
6. Dining room ranch slider support post not as built 57mm [outside diameter] installed should be 76mm with 4.5mm wall - Pipe bending – Engineer to assess and provide a report
7. Outstanding issue as per past site instructions to be satisfied
8. Site specific maintenance plan which covers, waste-water system, roof, exterior cladding and gutters – To be signed by existing owners, and passed on to new owners if property is sold.

2.13. The owners purchased the property in 2019.

2.14. On 26 October 2021, the authority conducted a further ‘residential final inspection’. The inspection failed noting multiple issues that required resolving.¹⁰ Following the inspection, the authority sent the owners a ‘Building Inspection Outcome’ report. The report noted five instances where the building work had changed from the consented plans. It also listed 12 items the authority considered ‘Non-compliances and issues’, while noting this may not be a complete list, and seven items for which there was ‘Outstanding documentation’.

2.15. The owners wrote to the authority on 22 February 2022, advising items listed in the authority’s ‘Building Inspection Outcome’ report had been addressed or no action was required, and that some documentation had been provided to the authority. In regard to Producer Statement – Construction (PS3) for the stone veneer, the owners advised they were unable to locate the original stone mason. The owners

⁹ This is not the original building consent reference number ABA63066 or the more recent number BCO10038492. It is not clear what the number ABA 1994 4916 relates to.

¹⁰ The inspection report referred to “unresolved issues” from 7 December 2018, and introduced several additional items, for example (but not limited to), no seals or stopends at the ends of the joinery head flashings.

also provided a summary of the actions taken and documentation provided in response to the section 95A notice.¹¹

- 2.16. On 22 February 2022 the authority responded that it was not satisfied that the building work “is compliant with the building consent and has performed since construction”.
- 2.17. The owners applied for this determination, and as part of the determination process, a list of outstanding issues was collated. The authority then conducted a further ‘durability inspection’ of the building work. Several of the matters on the list were subsequently resolved, including some minor variations to the consented plans. A revised list was then created, with the final version containing both parties’ comments on the outstanding issues in dispute.¹²
- 2.18. The parties reviewed and updated this list, resulting in the following aspects of the building being identified by the parties as unresolved (details of which are included in the discussion section of this determination):
- Foundations and sub-structures.
 - Wall bracing and wet area linings.
 - As-built blockwork.
 - Drainage.
 - Sill flashings.
 - The Roof.
 - Energy works certificates.
 - Floor slab and chimney foundation.
 - As-built plans for “foundations and masonry steel”.
 - Stone veneer.
 - The pergola.
- 2.19. The owners submit that the dwelling “is performing to expectation for its age” and is compliant with the plans and the Building Code. They state the dwelling has never leaked and shows no sign of failing, and destructive investigations of the windows show there are no weathertightness issues. The owners believe the main reason that issues have arisen is due to “loss of council records”.
- 2.20. The owners and the authority made submissions on the various aspects of building work that remain in dispute, and those views have been summarised in the relevant paragraphs below.

3. Discussion

- 3.1. The matter to be determined is the authority’s refusal to issue a code compliance certificate for the building work. The authority’s reasons for refusal are set out in the section 95A notice dated 7 December 2018 (see paragraphs 2.9 to 2.12).
- 3.2. However, as noted in paragraph 1.6, in considering whether to confirm, reverse or modify the authority’s earlier decision I have also considered issues subsequently confirmed by the parties as remaining in dispute (refer paragraph 2.18).

¹¹ It is not clear if the summary in response to the section 95A notice provided by the owners was attached to their email of 22 February 2022 or only provided with the application for determination.

¹² Titled ‘List of Issues updated 18th May 2022’.

Legislation

- 3.3. Section 94 provides that an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds that the building work complies with the 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 ...

- 3.4. Section 95A applies where an authority refuses to issue a code compliance certificate and provides that the authority must give the applicant written notice of the refusal and the reasons for the refusal.

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

(a) the refusal; and

(b) the reasons for the refusal.

- 3.5. In the following paragraphs I first discuss the content of the section 95A notice, then whether the authority had grounds for its refusal in terms of section 94(1)(a), and finally I consider the remaining items in dispute.

The 95A notice

- 3.6. Numerous previous determinations have considered the requirements for notices issued under section 95A.¹³ In summary:

3.6.1. An authority must provide reasons in writing for refusing to issue a code compliance certificate.

3.6.2. A generalised refusal, or a refusal which does not adequately indicate the specific failures is not sufficient for an authority to meet its obligations under section 95A.

3.6.3. The reasons provided by the authority must identify the areas of building work that the authority does not believe comply with the building consent.

¹³ See, for example, Determination 2022/007 *Regarding the proposed or purported refusal by an authority to issue two code compliance certificates and grant two certificates of acceptance for building work in respect of alterations to an existing building, timber deck, and several retaining walls* (30 May 2022), [6.11 to 6.14].

- 3.6.4. It is important that an applicant is given sufficiently explicit, specific, and clear reasons why compliance has not been achieved, so they can consider what is required for a certificate to be obtained.
- 3.7. Rather than identifying work that does not comply with the building consent, the 95A notice states that the authority has 'various concerns' about compliance with several clauses of the Building Code. The notice does not specify what the concerns are, and although a list of features of the building work was included minimal or in some cases no information was provided about why the authority considered those features did not comply.
- 3.8. The 95A notice provides inadequate detail about what the non-compliance is of the items listed in it or where on the dwelling they are located. For example:
- 3.8.1. Item 1 states the 'glazing in buildings to comply with NZS 4223'. The notice does not clarify which part of the standard the comment is referring to,¹⁴ whether the comment relates to some or all of the glazing, or in what way the glazing does not comply with the standard. I note the record of the 20 November 2018 inspection, which is referred to in the notice, notes "Permanent marking to safety glass" as "pass" for the building interior, bathroom and ensuite and does not mention other issues related to glazing.
- 3.8.2. Item 10 merely mentions the 'shiest (sic) stone to weatherboard junction - back flashings' but makes no indication of what aspect of the flashing is considered non-compliant, and the inspection record does not provide any further information about this issue.
- 3.8.3. Item 13 identifies the 'gully trap haunching' as an item of concern but does not state why. Further, this appears to contrast with the 20 November 2018 inspection referred to in the notice, which notes under the title 'drainage' "Gullies haunched" and recorded this as a "pass".
- 3.8.4. The notice is not specific about which of the penetrations are an issue or what about them does not comply (item 2), or where on the building the ground clearances are not in accordance with the building consent (item 3) or where the building paper is hanging below the cladding (item 4).
- 3.9. I note also that other items on the list provide sufficient detail of the location of the building work and what is at issue, but do not identify in what way the building work is not in accordance with the building consent.
- 3.10. Item 18 is the only one on the list that I consider is sufficiently detailed and is a useful example of what is needed to be clear in notifying owners of the reasons for refusing to issue the code compliance certificate.

¹⁴ Part 1 Glass selection and glazing, Part 2 Insulating glass units, Part 3 Human impact safety requirements, Part 4 Wind, dead, snow and live actions.

- 3.11. In my opinion and for the reasons outlined above, the section 95A notice dated 7 December 2018 does not achieve the requirements of section 95A(b). The reasons stated in the letter from the authority are not sufficiently explicit, specific, or clear as to why compliance with the building consent (or Building Code) has not been achieved.
- 3.12. Accordingly, I conclude that the authority did not fulfil the requirements in section 95A(b) in its notification to the owners of its refusal to issue a code compliance certificate.

The grounds for refusal

- 3.13. Despite the inadequacies of the section 95A notice, it is apparent there was some building work carried out that was not in accordance with the building consent (Item 18 on the section 95A notice) and therefore the authority had grounds to refuse to issue the code compliance certificate.
- 3.14. However, the section 95A notice also lists various documentation the authority required. Generally speaking, documentation is not sufficient reason in itself for an authority to refuse to issue a code compliance certificate. The requested paperwork is not the only means by which compliance with the building consent can be established.
- 3.15. In particular, item 8 in the documentation list requires a 'site specific maintenance plan'. An authority cannot refuse a code compliance certificate merely on the grounds of requiring a maintenance plan with no indication of how this informs the authority's assessment under section 94(1) of compliance of the areas of building work the plan should cover.

Remaining items

- 3.16. Notwithstanding the authority's decision in 2018 to refuse to issue the code compliance certificate, the parties have since confirmed items that remain in dispute. Therefore, in deciding whether to confirm, reverse or modify the authority's earlier decision I have also considered each of these remaining items.

Foundations and sub-structures

- 3.17. The authority raised the matter of a PS4 for the foundations and substructure, noting the PS4 they received does not cover the foundations, excavations or blockwork and it was not from the original design engineer.¹⁵ The owners are of the view that the PS4 supersedes earlier documentation requirements, and there is no

¹⁵ PS4 dated 26 May 2010 from a Chartered Professional Engineer in respect of "Slab prepour [and] hardfill test" that states compliance with Clause B1 *Structure* by way of Acceptable Solution B1/AS1 and Verification Method B1/VM1. The PS4 does not reference the foundations for the dwelling or the associated blockwork.

requirement for the inspecting engineer to be the same as the original design engineer.

- 3.18. The owners also submit there was never any “failure” of the footings, only the pre-slab, and the issue was rectified and inspected by an engineer who issued a PS4 for the work “before the slab was poured”.¹⁶ The owners also submit “footings were inspected by [the authority] and passed”.
- 3.19. As stated in previous determinations, there is no basis in the Act for an authority to demand a producer statement as a condition for establishing compliance and for issuing a code compliance certificate.¹⁷ In terms of the decision under section 94(1)(a) a PS4 may provide evidence of compliance but the mere absence of a PS4 is not evidence of non-compliance.
- 3.20. The authority’s concerns regarding foundations and sub-structures stem from a firm of consulting engineers who were undertaking construction monitoring at the site stating it “will NOT be issuing a PS4 for a number of reasons including concern over engineering aspects of foundations and sub-structures which were subject of observation at the time of construction and which to date have not been satisfactorily resolved”.¹⁸ It is not clear what engineering aspects of the foundations and sub-structures were an issue or why, and the consulting engineers’ statement did not clarify the nature or extent of the other reasons for not issuing the PS4. The statement also did not clarify how the unresolved matters affected compliance of the building work with the building consent or the Building Code, and it is also not clear what sub-structures the firm of consulting engineers were referring to.
- 3.21. In the absence of that information, the relevant evidence available to me in assessing whether the building work on the foundations and subfloor complies with the building consent includes the PS4 subsequently issued for the floor slab, the authority’s own inspection records, and the ongoing performance of the as-built work.
- 3.22. The authority’s foundation inspection on 25 June 2007 included the dimensions of the footings and the installed steel reinforcement, and determined they were supported on “solid sand”, and the inspection outcome was “passed”. The associated inspection record refers to a requirement for a Producer Statement – Construction Review (PS4) from an engineer for the footings, but it is not clear if the reason for requiring a PS4 was a condition for the granting of the building consent and/or associated with the original design for the foundations.
- 3.23. Regardless, the parties have provided no information to suggest there are any continuing issues related to the compliance of the foundations or that they do not comply with the building consent. Therefore, in reliance on the authority’s

¹⁶ The date of the PS4 is after the slab was poured but does not confirm when the engineer was on site.

¹⁷ See for example: Determination 2023/021 *The refusal to issue a code compliance certificate for a 21-year-old dwelling* (18 September 2023).

¹⁸ The issue was raised by the firm of consulting engineers on 27 October 2009.

inspection record from June 2007 and the in-service history of the as-built construction, and in the absence of evidence to the contrary, I am satisfied the foundations comply with the building consent.

Wall bracing and wet area linings

- 3.24. The wall bracing is detailed on plan 3 for the ground floor and plan 4 for the first floor.¹⁹ The authority contends the post-line inspection was not carried out and so the authority did not have the opportunity to check all the as-built wall bracing and associated fixings (eg to confirm the type and setting out of the fixings used).²⁰ The owners dispute the inspection was missed; they contend the authority's records are incomplete and the documentation for the post-line inspection is missing.
- 3.25. With all the internal surface finishes completed the as-built wall bracing or fixings are now visible, and I have received no other information from the parties that establishes the construction of the wall bracing complies with the building consent or if it has otherwise been fixed in accordance with the manufacturer's instructions. Therefore, I am unable to determine if the building work to construct the wall bracing complies with the building consent.
- 3.26. The wet area linings to the first floor "bathroom" are specified on plans 4 and 5.²¹ Floor and wall tiles were to be fixed over a proprietary liquid applied waterproof membrane and "Silicone" was specified for the "tile joints". The floor substrate was a proprietary compressed fibre-cement sheet product, and the wall substrate was a proprietary fibre-cement board.
- 3.27. There are no inspection records available, and now the floor and wall finishes are now in place the as-built wet area waterproof membrane is no longer visible. As I am lacking information about how the wet area linings have been installed, I am unable to reach a conclusion on whether the building work was carried out in accordance with the building consent.
- 3.28. However, a Producer Statement – Construction (PS3) has been provided for the work.²² The owners submit the PS3 confirms the application of a proprietary waterproofing liquid membrane product, and the work complies with the building consent and clause B2 *Durability* and E3 *Internal moisture*, and that the wet areas have been flood tested.
- 3.29. I note the author of the PS3 appears on the authority's register for PS3s for waterproofing. Further, the manufacturer's technical statement for the waterproof

¹⁹ I have received no bracing calculations in support of the specified wall bracing.

²⁰ The authority referred to its letter to the previous owners dated 5 April 2011 confirming a post-line inspection is required, and its site instructions dated 1 April 2011 that stated "Please call for a post-line inspection to check all [plasterboard] brace fixing and wet area membrane inspection for all wet areas under tiles as per building consent conditions when work has been completed".

²¹ There are no similar details or specifications for the ground floor "Bathroom 2".

²² Dated 27 July 2021.

membrane product requires installation only be approved applicators. I am of the view that in the absence of inspection records satisfaction of this requirement in conjunction with the authority's knowledge of the author of the PS3 and their competence, skills and area of expertise is sufficient for the authority to make a decision under section 94(1).²³

As-built blockwork

- 3.30. Plans 5 and 6 show the external timber walls were supported on reinforced masonry blockwork tied into reinforced concrete foundations and a concrete floor slab. The "footing detail F1" on plan 6 shows two courses of blockwork (ie approximately 400mm high²⁴).
- 3.31. The authority asserts that changes have been made from the consented plans for the blockwork. The authority referred to its inspection notes from 2 November 2007 that states "Block work is vastly different from what is shown on [the] consented plans". The inspection notes also state, "The block work is also over 600mm high and...a compaction (PS4) test will be required on the fill" material and "ensure starter steel is clear of blockwork".²⁵
- 3.32. The authority is of the view the changes required an amendment, and as no amendment has been sought the authority cannot confirm the compliance of the completed building work with the building consent.
- 3.33. The owners state the blockwork has been built in accordance with the consented plans, although it is not clear on what basis or what information they are relying on other than a Producer Statement – Construction Review (PS4) dated 26 May 2010 (see paragraph 3.17). However, that PS4 only concerns compliance with clause B1 for the "Slab prepour [and] hardfill test"; it does not refer to the blockwork construction observed by the authority in November 2007.
- 3.34. I note also that plan 6 refers to D10 vertical starters at 600mm centres, and the authority recorded observing D12 starter bars at 600mm centres during the foundation inspection on 25 June 2007.
- 3.35. The inspection records indicate a departure from the building consent plans, including the height of the blockwork walls²⁶ and the placement of the steel reinforcement. These departures would be grounds to refuse to issue the code

²³ For a detailed discussion on the status of producer statements and the types of factors that authorities may consider, see Determination 2021/023 *Regarding the purported refusal by an authority to grant a building consent for proposed new timber retaining walls* (issued 6 October 2021) [4.9 to 4.16]

²⁴ Approximate height based on an assumption that 20 series blocks were used (each 190mm high), and x2 standard 10mm mortar joints.

²⁵ I have assumed this relates to the D10 vertical starter bars at 600mm centres extending 300mm horizontally from the blockwork into the floor slab, complete with a single D12 horizontal bar in the "top bond beam"; all as detailed in "Footing detail F1" on plan 6. The vertical starter bars are shown positioned centrally within the blockwork.

²⁶ The inspection record did not record the height of the blockwork, only that it was "over 600mm high".

compliance certificate. What is not clear is if there are other reasons why the authority considered the blockwork was “vastly different” from the plans. Also, there is no information about whether any further work had been undertaken by the previous owners after that inspection to bring the blockwork into compliance with the building consent, and for that reason I consider there is insufficient information on this matter for me to reach a conclusion about whether the blockwork has been constructed in accordance with the plans.

- 3.36. I note for the benefit of the parties that the owner may be able to provide sufficient information to establish reasonable grounds for the authority to be satisfied that the blockwork does comply. I suggest the parties consider how this information may be obtained, such as exposing a representative sample of the blockwork to confirm the height and scanning the exposed area of blockwork to confirm the cover to the reinforcing.

Drainage

- 3.37. The section 95A notice listed an as-built plan for the drainage as a requirement. The owners subsequently provided an as-built drainage plan dated 25 November 2021 from a different drainlayer that shows the approximate setting out of the foul and surface water drainage and references the relevant building consent number. The owners advised the original drainlayer was unable to be contacted.
- 3.38. I am satisfied the as-built drainage plan broadly aligns with the setting out of the below ground foul and surface water drainage detailed on building consent plan 1, albeit the as-built plan does not indicate the location of the foul water drain proposed under the floor slab serving the fixtures in the kitchen and garage (located adjacent to the internal wall).
- 3.39. The authority raised concerns about a lack of cover to the below ground foul and surface water drains, referring to a failed drainage inspection. I assume the authority’s inspection reference to be that dated 29 July 2010, which stated “110[mm] PVC pipe to sewer [and] stormwater - Insufficient cover to pipes – To have 75mm concrete capping over 50mm bedding as per G13...PS3 + Asbuilt [required]”. I note the record is unclear as it cites G13 *Foul water* but also refers to “storm water” pipes.
- 3.40. Neither the inspection record nor the authority’s submission identifies the location where there is inadequate coverage (eg if it relates to a complete length of a drain(s) or a specific section).
- 3.41. Plan 1 indicates the majority of the surface water and foul water drains were to be located in unpaved areas (except for one length of the surface water serving a sump set into the driveway), and specifies they were to be laid in accordance with AS/NZS 3500.²⁷ Table 3.4 of AS/NZS 3500.2:2003 requires a minimum depth of cover of

²⁷ The drainage schematic does not specify the minimum cover required for the surface water and foul water drainage.

300mm in all locations not subject to vehicular traffic. Table 7.1 of AS/NZS 3500.3:2003 requires a minimum pipe cover of 100mm for single dwellings not subject to vehicular loading without a pavement.

- 3.42. The provision of suitable cover to below ground drainage is a relevant consideration in whether the building work complies with the building consent. However, I have received insufficient information that establishes what the current depth of cover is to the as-built foul and surface water drains and therefore if it complies with the stated means of compliance in the building consent.
- 3.43. The authority also required a Producer Statement – Construction (PS3) from the drainlayer and indicated additional testing of the drains was required.²⁸ The owner is of the view that there is no need for testing and the drains are functioning well.
- 3.44. Regarding the testing of the drains, according to the authority’s inspection record dated 29 July 2010, a test was conducted on the foul water drainage²⁹ and the outcome was recorded as “complies”. No similar test was recorded for the surface water drainage. Regardless, the parties have provided no information to indicate the surface water drainage is not functioning as intended.
- 3.45. Although the authority has suggested the owners undertake additional testing, and obtain a Producer Statement – Construction (PS3) from the drainlayer, these would not address the issue of the cover required to the drain pipes.
- 3.46. In conclusion, I am satisfied the as-built below ground foul and surface water drains are set out broadly in line with building consent plan 1, and the previous testing of the foul water drainage demonstrates compliance. I have also relied on the in-service history of the surface water drainage as demonstrating compliance with the building consent in this case. However, there is insufficient information for me to form a view on whether the cover to the drainage meets the requirements of the stated means of compliance as specified on building consent plan 1.

Sill flashings

- 3.47. The authority’s inspection record of 26 October 2021 identified “missing sill flashings” as one of the issues with the building work. The authority subsequently stated the sill flashings differ from the consented plans as they should be visible if they were installed in accordance with the plans, but they have been “covered by battens preventing drainage”. The authority also said that no sill flashings have been fitted on the full height windows and door joinery, but the authority did not clarify the basis for concluding this was contrary to the building consent.
- 3.48. The owners have provided photographic evidence that shows sill flashings have been installed to some of the windows at first floor level (not full height joinery) and some concealed behind external timber battens. The owners are of the view

²⁸ A CCTV survey and “flow testing”.

²⁹ It is not clear from the inspection record what type of test was conducted (ie either an air or water test).

that the “wrap inspection” would not have passed if the flashings were not in place.³⁰ The owners are also of the view sill flashings on full height windows and doors are not required, with reference Acceptable Solution E2/AS1, which only requires “weather seal tap[e] at concrete to trimming stud junction”, and that these are no longer visible.

- 3.49. The edition of E2/AS1 that was current at the time the building consent was granted of provided for “sill flashings as necessary to suit cladding situation” in figure 17B, titled *Level thresholds for ground level*.³¹ I note the owners reference to “weather seal tape” may be to Figure 17B of the current edition of E2/AS1,³² which provides for the use of flashing tape for level thresholds for ground level for both concrete slab and floor details.
- 3.50. Regardless, the building consent plans 8 and 11 detail sill flashings to some joinery. Plan 8 shows sill flashing for the full height first-floor door leading to a balcony, and plan 11 specifies a sill flashing to windows (not full height joinery). It is not clear what was intended for full height doors and windows at ground floor level. Neither detail specifies a batten is to be fixed across the vertical (external) face of the sill flashing.
- 3.51. Where timber battens have been fixed across the vertical face of the flashings, this is not in accordance with building consent plan 11, and therefore is grounds to refuse to issue the code compliance certificate.
- 3.52. Regarding sill flashings to full height first-floor doors leading to the balcony, I have received insufficient information to confirm the presence of the specified sill flashing here, and so I cannot reach a conclusion on whether the building work complies with the building consent in this respect.
- 3.53. For the remaining full height joinery, because the building consent documents lack detail I consider it is for the authority to assess whether (in the absence of confirmation that sill flashings have been installed or the sill is otherwise detailed in accordance with an Acceptable Solution) the joinery otherwise complies with clause E2.3.2.

The Roof

- 3.54. Plan 2 specifies the roof cladding as a proprietary “corrugated” profiled metal. The setting out of the roof construction and cladding is detailed on plan 7. The plans

³⁰ It is not clear which “wrap” inspection the owners were relying on. Regardless, a “wrap” inspection on 9 September 2009 states “sill [and] head flashings yet to be installed...”. I note a subsequent inspection on 10 June 2010 confirmed the installation of the “head flashings” was “ok”, but there is no reference to sill flashings.

³¹ E2/AS1 *External Moisture*, third edition, amendment 2, erratum 1, (effective on 1 December 2005 until 21 June 2007) was the current version when the plans were drafted in November 2006 and the building consent granted in March 2007.

³² Acceptable Solution E2/AS1, third edition, amendment 10 (effective from 5 November 2020).

also detail the location of valley gutters and ridge flashings,³³ apron flashing where the ground floor roof abuts the external wall of the first floor, and barge flashings required (plan 9). Plan 10 details the flashings where the chimney construction abuts the roof cladding.

- 3.55. The authority stated it was unable to safely access the roof to check its condition, installation, and its associated flashings, and required the owners “provide photos of [the] upper roof or provide safe access for inspection”.
- 3.56. The owners are of the view the roof and its associated flashings would have been inspected at the time of the “wrap inspection”.³⁴
- 3.57. The authority has provided photographs taken on 20 November 2018 that show the roof cladding installed and associated fixings, ridge, barge and apron flashings in place, and roof valleys formed. Several photographs also show flashings between the stone schist chimney located at the west end of the Living Room and the adjacent roof cladding.
- 3.58. On 19 May 2024, the owners also provided photographs showing the completed roof. These indicated the presence of several ridge and barge flashings, and an apron flashing below a window (number W22) to Bedroom 1, and another apron flashing to the north side of the stone schist chimney located in the Living Room.
- 3.59. I am of the view the authority’s photographs adequately demonstrate the roof has generally been formed in accordance with the building consent plans (eg plan 7 of 11). I am unable to determine the adequacy or compliance of the flashings where they are concealed behind other building elements, such as the vertical part of the apron flashing behind the weatherboards to the west side of the dwelling.

Energy works

- 3.60. As per section 43 of the Act, energy work does not require a building consent other than in specific situations.³⁵ Section 43(3) states that an owner may apply for a building consent for energy work that otherwise does not require a building consent, in which case the Act applies as if the energy work required a building consent and under section 94(3) the failure to provide a certificate for energy work

³³ The details for the valley and ridge valleys are copied from figures 51 and 46(a) of Acceptable Solution E2/AS1 *External Moisture* (third edition, amendment 2, erratum 1).

³⁴ It is not clear which “wrap” inspection the owners were relying on. Authority records show there were two “wrap” inspections on 2 and 9 September 2009. I note the inspection of 9 September 2009 “excludes flashing to chimney [and weatherboard]”. However, both inspection records confirm “cladding system as approved on Consent Plans...complies”, and on 2 September 2009 “Junctions of dissimilar claddings as approved details...complies”; it is not clear if these records were referring to the roof or wall cladding, or both.

³⁵ Under section 43(2), energy work requires a building consent where it relates to a specified system or where a consent could not be granted unless it was subject to a waiver or modification of the Building Code.

for which building consent was granted is a sufficient reason for an authority to refuse to issue a code compliance certificate in respect of that energy work.

- 3.61. The building consent plans include references to a gas hot water system and electrical work. Building consent plans 1 and 3 specify the location and type of proprietary gas hot water system to be installed, and plan 3 specifies the type of proprietary gas fire to be installed in the Living Room. Building consent plans 1 and 3 detail the location of the electrical meter box, and plan 3 shows the location of the fuse box. This work therefore forms part of the building consent
- 3.62. The section 95A notice required an energy works certificate for both the electrical and gas work.
- 3.63. The owners provided a copy of a gas safety certificate and advised they had provided a copy of the electrical certification to the authority during “a final inspection” but did not retain a copy. The authority notes the gas certificate received covers some of the gas work but does not include the hot water system and the authority maintains that no electrical certificate was received.
- 3.64. The gas safety certificate dated 12 May 2021 concerns work carried out on 12 May 2021 to install a proprietary gas fire in the living room, a replacement range hose in the kitchen, and an automatic changeover gas regulator. However, the certificate does not include the installation of the as-built gas hot water system, which according to the authority’s inspection records appears was installed sometime prior to April 2011.
- 3.65. It is apparent there was energy work within the scope of the building consent and for which an energy work certificate has not been provided (ie the electrical work and the gas hot water system). While section 94(3) says that failure to provide an energy works certificate is “sufficient reason” to refuse to issue a code compliance certificate, the absence of one does not *prevent* a code compliance certificate being issued. I note that the carrying out of energy work is regulated under other legislation, and in this case, I am of the view that certification some 17 years after the energy works were carried out is of limited value.

Floor slab and chimney foundation

- 3.66. The authority’s inspection record dated 27 April 2009, which “failed”, notes: “Steel not placed as per plan grass [and] weeds in floor slab” and “weeds need to be removed from chimney foundation”.³⁶ The inspection notes also refer to a “compaction test” required for the floor slab, issues with the ‘perimeter reinforcing’ and “starters to be under mesh”.

³⁶ I have assumed the authority was referring to the chimney located in the external wall to the living room, and not the chimney associated with the standalone outdoor fire (as noted separately in the authority inspection record dated 2 November 2007).

- 3.67. The owners have obtained a Producer Statement – Construction Review (PS4) from a Chartered Professional Engineer dated 26 May 2010 for “slab prepour [and] hardfill test”. The PS4 refers to the relevant building consent and compliance with Acceptable Solution B1/AS1 and Verification Method B1/VM1.
- 3.68. Despite the provision of the PS4 what remains unclear is whether the topsoil had been cleared prior to the hardfill and concreting, or whether topsoil remained and to what extent. However, there is no suggestion from either party that there is evidence of settlement having occurred since, such as dipping or cracking in the slab, as a result of any topsoil remaining under the hardfill.
- 3.69. Based on the information included in the PS4 and the in-service performance, I am satisfied the as-built floor slab and chimney foundation complies with the building consent.

As-built plans

- 3.70. The section 95A notice required the owners provide as-built plans for layout changes, specifically “Bedroom and family/TV room added to garage”. As this work was not carried out in accordance with the plans, there were grounds for refusing to issue the code compliance certificate.
- 3.71. However, section 45(4) provides for those situations where an application for an amendment to a building consent may be necessary, including minor variations under section 45A.
- 3.72. The owners have applied for minor variations for changes to the joinery, the boxed corners for the weatherboards, alterations to some internal walls, and the installation of a timber post in the corner of the Kitchen. The owners advise the application related to the removal of “timber cap and sill from around windows as per E2/AS1”,³⁷ weather grooves to corner boxings, two non-structural partitions built in the garage, removal of non-structural walls in the TV room, and an additional timber post and fixings installed in the corner of the kitchen.
- 3.73. The authority confirmed it received the application for minor variations³⁸ but noted that it did not include the changes to the foundations and masonry steel reinforcement.
- 3.74. Regarding the reinforcement, plan 6 specifies the use of “mesh” reinforcement in the 100mm thick concrete floor slab. Pairs of 1200mm long D12 supplementary reinforcing bars were to be located diagonally at the internal corner locations of the floor slab. Additional D12 and D10 steel reinforcement was specified at several other locations (ie under several internal walls, at a step change in finished floor

³⁷ The timber facings / cappings to the windows were as detailed on plan 11 of 11. These have not been constructed as part of the building work.

³⁸ It is not clear what decision(s) the authority has made in respect of the application.

level between the garage / laundry and the rest of the dwelling, and at the location of a steel post in the Kitchen / Dining Room).

- 3.75. Based on the authority's inspection record from 25 June 2007, it is not clear what changes have been made to the foundations. It appears the only change made to the "masonry steel" was that the building consent plan 6 specified the use of D10 starter bars but the authority noted D12 starter bars had been installed. If the authority is concerned with any other changes to the "masonry steel" it is not clear what those may be. I note the matter of the height of the blockwork is addressed in paragraphs 3.30 to 3.36.

Stone veneer

- 3.76. The section 95A notice stated simply "Shiest stone (sic) to weatherboard junction – Back Flashings". The authority later expanded on this, saying it requires a Producer Statement – Construction (PS3) for the stone veneer installed to the chimney³⁹ and confirmation the back flashings at the junctions between the stone veneer and the weatherboard cladding have been installed in accordance with the plans.⁴⁰
- 3.77. The authority said that a PS3 could be provided by someone other than a Licensed Building Practitioner, and the "[p]erformance of this area of cladding (chimney) can be demonstrated by removing the gas fireplace and observing the wall framing".
- 3.78. Plans 2, 3, 5, 7, 10 and 11 specify the use of 150mm wide stone schist veneer to be installed on two chimneys. The stone was to be secured by stainless steel ties and screws at 400mm centres each way to the reinforced concrete block walls to the outdoor fireplace. Similar fixings were specified to secure the stone to 9mm thick fibre cement sheets on timber framing for the chimney located at the west end of the Living Room. A "cladding junction" detail on plan 10 specifies a 110mm x 50mm flashing was required at the corner where the stone schist meets the bevel-back weatherboards.
- 3.79. As noted above, the absence of a producer statement is not in itself valid grounds for refusing to issue a code compliance certificate. The basis for requiring a PS3 is not clear other than the authority's reference to a 'consent condition'.⁴¹ Regardless, one of the owners, who is a Licensed Building Practitioner (LBP) and Master Builder, states they supervised the stone mason who completed the work and has subsequently provided a Producer Statement – Construction (PS3) for the stone veneer, stating that the work has been "done to code and all brick ties and backing boards were installed correctly".⁴² The owners submit that the stone veneer has

³⁹ On 21 October 2021, the authority confirmed a "consent condition called for a number of PS3's including the...chimney stone veneer". I have not received a copy of the consent conditions.

⁴⁰ The authority's inspection record dated 9 September 2009 states, "Flashings to schist [and] weatherboard junction of chimney to be sighted".

⁴¹ As noted in a 'Durability CCC summary sheet' prepared by the authority, dated 21 October 2021.

⁴² Dated 3 March 2023. Description of building work "Schist stone veneer to exterior chimney", and "Stone has been stacked against hard backing board on a cavity as per plans".

been in place for 12 years (as of February 2022) and is performing well, though have not provided details of any investigations to establish its performance.

3.80. I note that the PS3 was provided after the application for determination was made and does not explicitly refer to the flashings. It is for the authority to consider whether the provision of the PS3 means it now has reasonable grounds to be satisfied the building work complies with the building consent. As with other matters considered in this determination, I note the authority can also take into account evidence of in-service performance and there are options available to the owner to confirm the construction details.

Pergola

3.81. The authority has confirmed that it is satisfied that the building work relating to the pergola is outside the scope of the building consent. However, the authority also noted the pergola is connected to the house rafters and the pergola roof discharges onto the house roof; the authority submits this may result in non-compliance of the building work that is in scope of the building consent.

3.82. I agree this structure is not within the scope of the building consent.⁴³ In regard to the attachment of this structure to the house rafters and the discharge of rainwater onto the roof and the capacity of the roof guttering and downpipes, it is for the authority to consider whether this building work complies with the Building Code.

Conclusion

3.83. I conclude the authority had grounds for its decision in 2018 to refuse to issue the code compliance certificate. But because the letter dated 7 December 2018 did not meet the requirements under section 95A(b) I am reversing the authority's decision.

3.84. In regard to the items identified by the parties as remaining in dispute, I am satisfied that the foundations, energy works, and as-built floor slab and chimney foundations comply with the building consent.

3.85. Regarding items where there has been insufficient information for me to conclude they comply, it remains for the owner to provide further information to the authority for it to be satisfied that the building work complies with the building consent. For those matters I have concluded the building work does not comply with the building consent, they are matters for the owner to resolve.

3.86. On application for a code compliance certificate, it will then be for the authority to make a new decision under section 94 that takes into consideration the findings of this determination and any further information or evidence provided by the owner.

⁴³ Whether the structure is a 'pergola' and whether it was exempt from the requirement to obtain building consent is outside the scope of this determination. However, even if the building work did not require building consent, it must comply with the Building Code.

4. Decision

- 4.1. In accordance with section 188 of the Building Act 2004, I determine that the authority did not adequately specify its reasons for refusing to issue the code compliance certificate as required under section 95A(b), and I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 November 2024.

Peta Hird

Lead Determinations Specialist