

# Determination 2025/010

## Refusal to issue a code compliance certificate

### 394 Tomahawk Road, Ocean Grove, Dunedin

#### Summary

This determination considers an authority's decision to refuse to issue a code compliance certificate for the construction of a two-storey detached dwelling. The determination considers the reasons for the refusal and whether they meet the requirements of section 95A of the Building Act 2004.



Figure 1: View of property looking southeast

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](http://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](http://www.building.govt.nz).

## 1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor Determinations, for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Ministry”).<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. S Stewart and P Baynes, the owners of the property who applied for this determination (“the owners”)
  - 1.2.2. Dunedin City Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from a decision by the authority to refuse to issue a code compliance certificate for the construction of a detached two-storey dwelling in relation to building consent ABA-2015-1080.
- 1.4. The authority’s reasons for the refusal are based in part on “various defective building work”; the building work is described in two schedules prepared by the owners that are attached to an amended statement of claim.<sup>2</sup>
- 1.5. The owners believe “the reasons given by the [authority] in refusing the [code compliance certificate] application are insufficient” and do not meet the requirements of section 95A(b).
- 1.6. The matter to be determined, under section 177(1)(b) and (2)(d), is the authority’s decision to refuse to issue the code compliance certificate.
- 1.7. In deciding this matter, I consider the reasons for the refusal<sup>3</sup> and whether these meet the requirements of section 95A(b).

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

<sup>2</sup> Dated 24 May 2024. A second amended statement of claim is currently before the High Court (Dunedin Registry), reference CIV-2022-012-097. However, I note the matters before the High Court do not include the decision by the authority to refuse to issue the code compliance certificate.

<sup>3</sup> The reasons for the refusal were included in a written notice (dated 7 August 2024) issued by the authority, to the owners, pursuant to section 95A(a). However, this determination does **not** consider any matters arising from the installation of a solid fuel heater, and ‘stormwater drainage and ground movement’, both of which were also included in the written notice.

- 1.8. The determination does not consider the compliance of the building work with the building consent or the Building Code.

## 2. The building work and background

- 2.1. The owners' property is an elevated section at a coastal location south-east of Dunedin. Refer to figure 1.<sup>4</sup>
- 2.2. The owners' building is a two-storey detached dwelling constructed from reinforced concrete foundations, blockwork and floor slab, timber framing, structural steelwork, and lightweight roof and wall claddings.<sup>5</sup>
- 2.3. The authority conducted a number of inspections during the construction of the dwelling between August 2016 and July 2020.
- 2.4. On 11 July 2022, the owners applied for a code compliance certificate.<sup>6</sup> The application stated the building work was completed on 28 July 2020.<sup>7</sup>
- 2.5. On 7 August 2024, the authority issued a written notice to the owners stating the application for the code compliance certificate had been refused following an inspection by the authority<sup>8</sup>. Aside from the two matters that are out of scope of this determination, the reason for the refusal include:

In particular, the [authority] notes that [the owners] have filed a second amended statement of claim dated 24 May 2024, which alleges, at **Schedule One** and **Two**<sup>9</sup> [my emphasis], various defective building work that [the owners] say has not been completed in accordance with the building consent and / or the Building Code. The Schedules identify alleged defects, the nature of the alleged defects and the technical requirements allegedly not met.

There is no indication to suggest Schedules One and Two were attached to the authority's written notice.

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<sup>4</sup> Figure 1 has been reproduced from Google Maps NZ 'Streetview' (accessed on 5 February 2025).

<sup>5</sup> I have not received a complete copy of the plans and specifications that accompanied the application for building consent, or details of any revised design to the foundations.

<sup>6</sup> Form 6 of the Building (Forms) Regulations 2004. It appears a similar application for a code compliance certificate was lodged by the owners, with the authority, 'in or about December 2017'; this was refused by the authority also in December 2017. I have not considered the authority's decision in respect of this first application for a code compliance certificate.

<sup>7</sup> I note I have received conflicting information regarding when the building work was completed. A separate document provided by the owners indicates 'a practical completion date of 18 [January] 2018'.

<sup>8</sup> On 4 April 2024. I have not received a copy of the authority's inspection record, which also appears to have not been attached to the authority's letter of 7 August 2024.

<sup>9</sup> I understand Schedules One and Two have been complied by the owners, to form part of the statement of claim in court proceedings, in reliance of expert reports commissioned by the owners. I have not been provided these reports.

### 3. Submissions

#### The owners

##### 3.1. The owners submit (in summary):

- 3.1.1. The authority “failed to give adequate reasons under [section] 95A” when deciding to refuse to issue the code compliance certificate.
- 3.1.2. “In order for a property owner to remedy any work that does not comply with the building consent and/or the Building Code, they need to be given adequate reasons for the refusal”.
- 3.1.3. Referred to a High Court decision *Hollander v Auckland Council*<sup>10</sup> where it was held “Context is important when determining the extent to which it is necessary for reasons to be given” and “If the purpose for which reasons are required were to enable a party to determine whether to pursue a right of general appeal, the reasons must identify each material issue (legal and factual) relevant to that decision”.
- 3.1.4. The reason given by the authority “does not clearly identify and particularise each material issue relevant to the refusal decision”, and referring to “alleged defects” is insufficient and does not give the owners “clarity on what the [authority] says needs to be remediated”. It would be appropriate for the authority “to inspect the property and make its own assessment of what work (if any) is non-compliant”.
- 3.1.5. The authority “has clearly failed to identify specific findings of actual failure or building work it considers does not comply with the Building Code and provide sufficiently explicit, clear and appropriate reasons which identify specific Building Code clause performance criteria for which a non-compliance exists together with sufficient description of the non-compliant building work”.

#### The authority

##### 3.2. The authority submits (in summary):

- 3.2.1. “In refusing the application for [code compliance certificate], the [authority] amongst other things referred to the fact that the [owners] own claim alleges various building defects which are not code compliant”.
- 3.2.2. It “maintains it correctly issued the refusal of the [code compliance certificate] pursuant to [section] 95A of the Act” based “on the extensive

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<sup>10</sup> *Hollander v Auckland Council* [2017] CIV-2016-404-2322 NZHC 2487 at paragraph [53].

defects and non-compliances with the...Building Code and Act” in the “Schedules referred to and attached to the amended statement of claim”.

- 3.2.3. “By referring to the Schedules, the [authority] provided the level of particularity required for a refusal under [section] 95A”.
- 3.2.4. It “must be able to have relied on the Schedule of defects in full” when refusing to issue the code compliance certificate.

## 4. Discussion

- 4.1. The matter to be determined is the authority’s decision to refuse to issue the code compliance certificate for the building work to construct the owners’ dwelling in relation to building consent ABA-2015-1080. In deciding this matter, I must consider the reasons for the refusal and whether these meet the requirements of section 95A(b).

### Legislation

- 4.2. Section 17 provides that all building work must comply with the Building Code to the extent required by the Act. Section 49 requires a building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work is completed in accordance with the plans and specifications.
- 4.3. Section 94 provides an authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent.
- 4.4. Section 95A applies where an authority refuses to issue a code compliance certificate. This requires the authority to give the applicant written notice of the refusal and the reasons for the refusal.
- 4.5. Previous determinations<sup>11</sup> have considered the requirements for written notices issued under section 95A, including the appropriate reasons. I hold the same views as discussed in Determination 2020/005<sup>12</sup> regarding what is expected of an authority when giving reasons for a refusal.
- 4.6. The requirement of section 95A<sup>13</sup> is for the authority to provide sufficiently explicit, specific, clear and valid reasons why compliance with the building consent, and/or

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<sup>11</sup> For example, Determination 2022/007 *Regarding the proposed or purported refusal by an authority to issue two code compliance certificates and grant two certificate of acceptance for building work* (dated 30 May 2022), and Determination 2013/015 *The refusal to issue a code compliance certificate and simultaneous issue of a notice to fix for a 14-year-old house* (dated 8 April 2013).

<sup>12</sup> Determination 2020/005 *Regarding the refusal to issue a code compliance certificate for a 22-year-old house* (dated 7 May 2020), see paragraphs 5.2.4 to 5.2.14 inclusive.

<sup>13</sup> In combination with sections 17, 49 and 94.

the Building Code, has not been achieved so the owners can consider the work required to remedy the situation and obtain a code compliance certificate. A generalised refusal is not sufficient for an authority to meet its obligations under section 95A.

## The authority's refusal

- 4.7. In this case, I am only considering the authority's decision to refuse to issue the code compliance certificate under section 95A, where it's issued written notice refers to Schedules One and Two of the owners' second amended statement of claim. The schedules set out, according to the authority's section 95A notice, alleged defective building work.
- 4.8. The schedules were prepared by the owners for a particular purpose, a statement of claim to support court proceedings. The authority has referred to the schedules and they have formed the basis for part of the authority's reasons for the refusal of the code compliance certificate. However, the authority did not attach them to their section 95A notice, and have referred to the content of the schedules as 'alleged defective building work' rather than identifying specific building work and non-compliance.
- 4.9. Schedule One details six "structural engineering defects" regarding the foundations constructed in accordance with an amended design. Schedule Two details 37 other "defects".
  - 4.9.1. Both schedules include some details of the building elements, the nature of "defect", their location, a 'Technical Requirements Not Met / Guidelines Not Observed' section, and some reference to building consent plans and specifications.
  - 4.9.2. The Schedules also include (under the sub-heading 'NZ Building Code Clauses Not Achieved') some general references to B1 *Structure* and E2 *External Moisture* etc., as well as two performance clauses E1.3.3 and H1.3.1. Many of the entries state 'N/A' (not applicable), and other entries refer to an 'increased risk' of failure, or a 'potential failure'.
- 4.10. The owners believe the authority "failed to give adequate reasons" to meet its obligations under section 95A(b). Conversely, the authority believes it should have been able to rely "on the Schedule of defects in full".
- 4.11. In this case the authority's section 95A written notice refers to "**alleged** defects" and "the technical requirements **allegedly** not met" [my emphasis]. Further, there is no indication to suggest the Schedules were attached to or enclosed with the notice; just making a reference to documents used for a different purpose is problematic. Together, this implies the authority did not make a compliance decision in respect of section 94 (or section 17), and the authority did not provide any additional, or sufficiently specific, information that identified why it considered

the building work did not comply with the building consent or the Building Code as required by sections 94 and 95A.

- 4.12. The authority did not provide sufficiently explicit, specific and clear reasons that considered the specific Building Code clause performance criteria for each item of non-compliance or identify how the building work did not comply with the building consent.

## **5. Decision**

- 5.1. In accordance with section 188 of the Building Act 2004, I determine the authority's reasons for refusing to issue the code compliance certificate in relation to building consent ABA-2015-1080 did not meet the requirements of section 95(b) when referencing Schedules One and Two of the owners second amended statement of claim dated 24 May 2024. I therefore reverse that decision and invite the authority to make a new decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 February 2025.

**Andrew Eames**

**Principal Advisor Determinations**