

Council decisions on new home's code compliance certificate unreasonable

Legislation	Ombudsmen Act 1975
Agency	Christchurch City Council
Ombudsman	Peter Boshier
Case number(s)	540576
Date	8 August 2022

New home was not designed or constructed in compliance with the Building Code – Council's decision that it was homeowner's responsibility to fix the non-compliance was unreasonable – Council failed to maintain communication – Council did not propose suitable remedies - Chief Ombudsman recommended mediation, ex gratia payment and independent investigation of underlying failings in the consenting process.

Background

'Turnkey homes' (also called 'house and land packages') are offered by many house building companies across New Zealand. Typically, responsibility for the design and construction of the property rests with the developer, with local consenting authorities responsible for assessing compliance.

In late 2016, a Christchurch family signed a contract with a developer for a turnkey home, which was being built on a new subdivision. The Christchurch City Council (Council) was the consenting authority.

As building work approached completion, a family member went to view the property and became concerned that neither the driveway nor garage were fit for purpose. The family member approached the Council and advised it would be impossible to enter or exit the garage without performing a multi-point turn, there was minimal manoeuvring space and exit could be done only by reversing more than 40 metres.

The Council assessed the property, advised it was Building Code compliant and granted a Code Compliance Certificate. At this point the family became contractually obliged to take ownership of the home from the developer.

Concerned with the Council's decision, the family requested the Ministry of Business, Innovation and Employment (MBIE) make a determination.¹

On 9 September 2019, MBIE determined the property's garage and access driveway was non-compliant, the Council had been wrong to grant building consent and a Code Compliance Certificate, and the Council's suggestion of widening the garage doorway would not achieve compliance. MBIE reversed the Code Compliance Certificate.

On 11 September 2019, the Council wrote to the family. The letter explained their Code Compliance Certificate had been refused and concluded *'it is recommended that the building owner submit an application for amendment to the building consent to ensure what is constructed complies with the building consent and Building Code'*.

The family complained to the Ombudsman.

Investigation

The Ombudsman investigated:

1. The Council's decision that it was the homeowner's responsibility to fix the building non-compliance.
2. The Council's decision that it was not permitted, nor required, to advise on design solutions.
3. A concern that the Council's channels of communication had not been maintained.

Building non-compliance

When reviewing the Council's decision that it was the homeowner's responsibility to rectify building non-compliance:

The Ombudsman observed that MBIE had explicitly determined that the Council had incorrectly granted the building consent and Code Compliance Certificate. As a direct consequence of the Council's decision to grant consent, the family had become the owners of a home which was not built to code, which featured a largely unusable garage and had a suppressed market value due to the absence of a Code Compliance Certificate. The Ombudsman considered the Council's decision that it bore no obligation to help remedy the situation *'wholly unreasonable'*.

¹ Determinations are legally binding decisions made by the Ministry of Business, Innovation and Employment (MBIE). They are for matters of dispute to do with building work outlined in the Building Act and Building Code. See <https://www.building.govt.nz/resolving-problems/resolution-options/determinations/>.

Design solutions

The Ombudsman accepted that the Council's obligations under the Building Act 2004 did not extend to design work. However, he was not persuaded that the Council was precluded from offering assistance to the family or prevented from doing so.

Following MBIE's decision to reverse the Code Compliance Certificate, the Council had suggested redefining the garage as a 'storage shed', widening the garage and indicated that it believed another MBIE determination was required. The Ombudsman viewed this level of engagement to be disproportionate to the harm suffered by the family. Furthermore, he considered that the proposals made by the Council did not represent proportionate, reasonable or fair remedies to its errors.

Channels of communication

The Ombudsman acknowledged that much of the correspondence sent to the Council by the family discussed complex issues, consequently quick responses were often not possible. Likewise, when decision-making requires input from multiple departments and individuals, delays are not uncommon.

However, when viewing the timeline of exchanges, the Ombudsman observed significant periods of inactivity, several instances of the family requesting updates, and on occasion promised responses from the Council were not forthcoming. The Ombudsman concluded that the Council had failed to maintain channels of communication to a satisfactory standard.

Outcome

The Ombudsman formed the opinion that the Council's decisions were unreasonable, and indicated that the Council's stance in relation to the family's predicament would '*appal*' most fair-minded New Zealanders. The Ombudsman noted that the onus rested with the Council to take reasonable steps to right the wrongs.

The Ombudsman recommended:

1. The Council and the family take part in mediated talks (with the costs met by the Council) with the aim of identifying a solution. To ensure both parties were confident in the impartiality of the mediation process, it was suggested that an independent organisation be asked to appoint a mediator.
2. The Council make an ex gratia payment to cover the costs incurred by the family.
3. The Council engage an independent reviewer to investigate the underlying causes of the failure in the consenting processes, and where appropriate implement any necessary changes.

The Ombudsman viewed the last recommendation as essential to avoid erosion of public trust in council officials and the Council's consenting and building inspection processes.

The Council accepted and actioned the Ombudsman's recommendations.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.