

Determination 2007/133

Determination regarding a code compliance certificate for a house at Curraghs Road, West Melton



1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the owners T and S Haydon (“the applicants”); acting through an agent, Clark Boyce Lawyers (“the lawyer”) and the other party is the Selwyn District Council (“the territorial authority”). The applicants have identified the designer of the house (“the designer”) and Prime Building Compliance Ltd (which, for the purposes of this determination, is referred to as “the building certifier”) as interested parties in this matter.
- 1.2 The matter for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for a 4-year old house is correct. The refusal arose because the building work had been undertaken under the supervision of the building certifier which was duly registered as a building certifier under the former Building Act 1991, but which lost its approval to undertake projects of this monetary value before it had issued a code compliance certificate for the building work. The

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

territorial authority considers it cannot be satisfied that the building work as a whole complies with the Building Code² (First Schedule, Building Regulations 1992).

1.3 In order to determine that matter, I must address the following questions:

- (a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? If so, a code compliance certificate can be issued.
- (b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? If so, a code compliance certificate can be issued in due course.

I address question a) in paragraph 5 and question b) in paragraph 8. In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

1.4 I note that a detached garage building was constructed on the property under a separate building consent (BC 050810). According to the territorial authority, this building was issued with a code compliance certificate on 6 March 2006, and this determination is therefore limited to the main building on the site.

1.5 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The building

2.1 The building work consists of a very large house situated on a flat rural site, which is in a moderate wind zone for the purposes of NZS 3604³. The building consists of a central 2-storey portion providing living and bedroom areas, with a single storey garage to the south and a large single storey wing to the north accommodating additional living areas and an indoor pool with associated spaces.

2.2 The majority of the construction is specifically engineered. The lower level has concrete slabs and foundations, steel portals and skillion roofs to the pool wing, concrete block structural walls that support a suspended concrete first floor slab and stone veneer cladding over a cavity. The construction of the attached garage and the upper level is conventional light timber frame, with stone veneer cladding extended up to eaves level. The building is complex in plan and form, with 35° pitch hipped roofs and several small areas of flat membrane roof cladding. Eaves projections are generally 600 mm overall, with verge projections of 450 mm, and deeper roof overhangs, which are supported on steel columns encased in polystyrene, are provided above the main entry and along the eastern wall of the pool wing.

2.3 Cantilevered concrete decks, with open timber and metal balustrades, extend from 5 upper level bedrooms and the main stairwell landing.

2.4 The specification states that timber framing shall generally be “Treated Radiata Pine (H1)”, and also states “untreated kiln dry framing may be used in wall and roof

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

framing where protected. Not to block wall strapping.” However, given the date of construction in 2002, I am unable to determine the particular level and type of treatment that is described as “H1” in the specification. I therefore consider that the wall framing of this building is unlikely to be treated to a level that will provide resistance to fungal decay.

3. Background

- 3.1 The territorial authority issued a building consent (No. 011303) in December 2001, supported by a building certificate dated 5 December 2001 issued by the building certifier. I have not seen a copy of the building consent or the building certificate.
- 3.2 Site inspection records and engineer site notes indicate that the structural engineer (“the engineer”) carried out 8 inspections of concrete and concrete block reinforcing, steel portals and beams, bracing and other structural elements between 24 January and 16 April 2002.
- 3.3 The building certifier carried out a total of 16 inspections during construction, including the following types:
- Foundations and slabs on 11, 19 and 27 February 2002 (which passed).
 - Stone veneer on 30 May 2002 (which passed).
 - Building and plumbing prelines on 25 June and 19 July 2002 (which passed).
 - Drainage on 15 August, 20 September and 9 October 2002 (which passed).
 - Final inspections on 25 July 2003 and 29 April 2004 (requiring reinspection following completion of various outstanding items).
- 3.4 On 22 November 2004, the building certifier’s approval to operate as a building certifier was renewed. From this date, new insurance limits were imposed in regard to the monetary value of building work that the building certifier was able to undertake. (I note that, at that stage, the building work was substantially completed.)
- 3.5 In a pro-forma letter to the owners dated 13 December 2004, the building certifier advised that a code compliance certificate had not yet been issued for the building, and a final inspection should be arranged, noting:
- Due to the changes to parts of the Building Code, various standards and the new Building Act, it is important that you complete your job and ensure a Code Compliance Certificate is issued prior to March 31 2005.
- 3.6 The owners passed the above letter to the designer, who arranged for the outstanding items identified during the final inspections to be completed. In a letter to the building certifier dated 4 March 2005, the designer described the work undertaken and requested a final inspection of the building.
- 3.7 The building certifier carried out a final inspection on 11 March 2005, and the inspection record notes that all outstanding items were satisfactorily completed, that the work did not require reinspection, and that a code compliance certificate could be issued once the following documentation requirements were attended to:

- Ensure Engineer's Producer Statement/Construction Review Certificate has been provided.
- Effluent field Producer Statement/Construction required for effluent field installers.
- Provide Electrical Certificate of Compliance.
- Provide Gas installation certificate/copy of Dangerous goods license.

3.8 The designer subsequently forwarded the following outstanding documentation to the building certifier under cover of a letter dated 22 April 2005:

- Drainlayer's Statement dated 13 September 2002.
- Gasfitting Certification Certificate dated 16 November 2002.
- Sewerage Effluent Disposal System Producer Statement dated 1 April 2005.
- Electrical Certificate of Compliance dated 13 April 2005.
- Producer Statement – PS4 – Construction Review dated 14 April 2005.

3.9 In a letter dated 12 May 2005 (which I have not seen) the building certifier subsequently asked the territorial authority to issue a code compliance certificate for the building. The territorial authority responded in a facsimile to the building certifier dated 20 May 2005, noting:

Further to your letter dated 12 May 2005, I advise that the Council does not intend to issue a Code Compliance Certificate for the above job the value of which is outside your scope of limitations.

3.10 In two letters to the designer and the owners dated 24 May 2005, the building certifier explained that, although the project had been within its scope of approval at the time the building consent was issued, recent limitations had been imposed that meant that the value of the building work was now beyond the current scope of approval. Because of this, the building certifier had been trying to arrange for the territorial authority to issue a code compliance certificate for the project. However, this had been unsuccessful although all inspections had been completed with no outstanding "items of non compliance". The building certifier could not "understand the logic of the Council's refusal" (refer paragraph 3.9), and stated:

We have now formally handed this job over to the Council under section 57(3) of the Building Act 1991 and section 446 of the Building Act 2004. The Council is required to undertake whatever inspections it deems necessary to prove the building work complies with the Building Code. The Council may also use all of our inspection records and any other documentation supplied by Prime to satisfy itself of compliance.

The Council is required by law to advise you why they refuse to issue the CCC and they must issue a notice to rectify stating what rectification work is required.

3.11 Under cover of a letter to the territorial authority dated 24 May 2005, the building certifier provided a "final building certificate and amended scope of engagement", together with site inspection records, engineer site notes, producer statements and energy certificates for the building, noting:

The owner is aware that this job is being handed back to the Council for the issue of the Code Compliance Certificate pursuant to section 57(3) of the Building Act 1991 and section 446 of the Building Act 2004.

Prime cannot issue the final Code Compliance Certificate as the value of the dwelling is outside its scope of limitations.

- 3.12 In a letter to the territorial authority dated 27 June 2005, the designer asked for an indication of when a code compliance certificate could be issued, or whether an additional inspection would be required.
- 3.13 Following a telephone discussion on 6 July 2005, the designer recorded that the territorial authority official had “explained that it was just a programming problem to get a time sequence for the holding of the necessary inspection.”
- 3.14 The building certifier’s approval as a building certifier expired on 25 November 2005. I note that the building certifier now operates as a contractor, using the same name, providing building regulatory services to another territorial authority.
- 3.15 I have received no records of any further communications until the end of 2005, when the designer wrote to the territorial authority on 19 December 2005 about code compliance certificates for the main building and for a garage building built under a separate building consent (refer paragraph 1.4). The designer asked the territorial authority to book an inspection. The designer sent a follow-up letter to the territorial authority on 1 February 2006.
- 3.16 The territorial authority carried out a final inspection 1 March 2006, and the inspection record noted several minor items to be attended to, which are summarised as follows:
- Alterations to downpipes in two locations.
 - Lowering of garden levels below stone veneer and gully traps.
 - Written verification of backflow protection to water supply (which I note was not previously listed by the certifier on 11 March 2005).
 - Provision of a Dangerous goods license for the LPG station.
- 3.17 According to the territorial authority, the separate garage building was issued with a code compliance certificate on 6 March 2006 (refer paragraph 1.4).
- 3.18 In a letter to the territorial authority dated 14 September 2006, the designer noted that all required items had been completed and requested a re-inspection of the work. Further information was supplied by the designer on 29 November 2006. I have not seen any correspondence that confirms the territorial authority carried out the re-inspection and confirmed that the items listed in paragraph 3.16 had been satisfactorily completed.
- 3.19 The designer subsequently followed up the matter of the code compliance certificate by phoning the territorial authority on 29 January, 14 February, 26 February, 8 March and 13 March 2007, apparently without success.
- 3.20 In an attempt to resolve the matter, the applicants engaged the lawyer to act on their behalf. In a letter to the territorial authority dated 27 June 2005, the lawyer gave notice that court proceedings would take place unless a code compliance certificate

was issued. The lawyer set out the background to the situation, including the following summarised points:

- The construction had been completed about 4 years ago.
- Works identified by the territorial authority's final inspection had "long since been remedied, repaired or implemented, as the case may be."
- There was evidence of considerable correspondence and numerous phone calls to the territorial authority from the designer on the issue of a code compliance certificate for the dwelling.
- All queries raised by territorial authority officials had been satisfied.
- There was no apparent reason why the code compliance certificate had not been issued.

3.21 A follow up phone call from the lawyer's office to the territorial authority on 26 July 2007 (querying when a response to the letter of 27 June 2005 could be expected) indicated that the territorial authority would reply as soon as the relevant official had returned to the office on 30 July 2007.

3.22 I am not aware of any further communication about the matter, and the Department received an application for a determination from the lawyer on behalf of the owners on 7 September 2007.

4. The submissions

4.1 In a statement accompanying the application, the lawyer (on behalf of the applicants) submitted that the building work complied in all respects with the relevant statutory provisions by 12 May 2005 (refer paragraph 3.9), and the owners have therefore been entitled to a code compliance certificate since that time. In support of this contention, the lawyer analysed the evidence, including the following points:

- By 12 May 2005, when a code compliance certificate was first requested from the territorial authority, the building certifier and the designer were satisfied that the building work complied with the provisions of the building code applicable at that time.
- The territorial authority's refusal was based on the technicality that the building certifier was not at that time qualified to certify the work as complete.
- Even if this refusal had been valid, the territorial authority should have undertaken any inspections that it considered necessary to satisfy it that the work was lawful.
- The building certifier supplied all available records and documentation necessary to enable the territorial authority itself to confirm the compliance of the building work and to issue a code compliance certificate.

The lawyer concluded that the evidence clearly indicates:

- (a) that the SDC has failed, as it was obliged to do, to view the building works for the purpose of issuing a COC to ensure that they comply with the provisions of the Building Act 1991 and the Building Code then applicable. The additional

requirements stipulated from time to time by the SDC clearly indicate that they are wrongly viewing the work as having to comply with the Building Act 2004.

- (b) whether the contention in subparagraph (a) above is valid or not, the evidence in items “H” to “V” inclusive clearly indicates that the SDC have failed to issue a COC or to carry out their obligations in terms of either the Building Act 1991 or the Building Act 2004 in a proper manner. Their failure to reply to correspondence and requests for the issue of a COC can, in the circumstances, be viewed in no other way than as a refusal to issue a COC.

4.2 The applicants forwarded copies of:

- the drawings and specifications
- the building certifier’s inspection records
- the structural engineer’s site notes and details
- the final building certificate dated 24 May 2005
- correspondence between the parties
- records of telephone calls to the territorial authority
- various producer statements, certificates and other information.

4.3 In a letter to the Department dated 19 September 2007, the territorial authority outlined the history of the project and noted that, on 22 November 2004, the building certifier’s insurances imposed a limit on the monetary value of work that it was able to certify. The territorial authority contended that the Final Inspection Notice dated 11 March 2005 (refer paragraph 3.7) was therefore invalid, concluding:

Unless verification of all work carried out on the building up to the 11/02/2004 (sic) is obtained and the Council can verify compliance of the remainder, the Council would be unable to satisfy itself that all work complies with the Building Code so that a Code Compliance Certificate could be issued.

Doubt exists that the specific inspections listed by Prime, verifies that all work carried out on the building complies with the requirements of the Building Code to the 11/02/2004 (sic) . . .

4.4 Copies of the submissions and other evidence were provided to each of the parties.

4.5 The designer responded to the applicants’ submission in a letter to the Department dated 12 September 2007, noting that all building work had been completed prior to 31 March 2005 with “some items of paper work” following on 22 April 2005 (refer paragraph 3.8). The designer stated:

We are adamant that the Code of Compliance Certificate for this contract can be issued and that all construction has taken place in accordance with the former Building Act.

The construction work had been observed by this office and the engineering work by [the engineer], (for which a construction review was issued).

4.6 The building certifier responded to the territorial authority’s submission in an email to the Department dated 24 September 2007, and noted that the submission incorrectly referred to 11 February 2004, as the date when the monetary limit was imposed, when the correct date was 22 November 2004. The building certifier stated:

I am also concerned that the [territorial authority's] summary piece does not comment on the relatively minor nature of the items that were inspected by Prime on 11/03/2005 nor the correspondence, site visits or time undertaken by Council subsequent to our last inspection to attend to these issues.

The issue as I see it is simply does the dwelling comply with the Building Code as at the date the CCC would be issued and how can the Council be satisfied on reasonable grounds that the evidence provided to it attends to this issue . . .

5. Grounds for the establishment of code compliance

- 5.1 In order for me to form a view as to code compliance, I need to establish what evidence is available and what additional evidence can be obtained if necessary, considering that the building work is now completed.
- 5.2 The territorial authority believes that it has insufficient evidence to be satisfied that the building work complies with the building code, so I first need to decide if I can rely on those inspections that were undertaken by the building certifier, particularly in regard to inaccessible building components.
- 5.3 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the inspections undertaken by the building certifier, along with other supporting evidence.
- 5.4 In the case of this building work, the evidence consists of the:
- building certifier's inspection records which indicate satisfactory inspections throughout the construction
 - engineer's site notes which indicate satisfactory inspections of the structural components during construction
 - Drainlayer's Statement dated 13 September 2002
 - Gasfitting Certification Certificate dated 16 November 2002
 - Sewerage Effluent Disposal System Producer Statement dated 1 April 2005
 - Electrical Certificate of Compliance dated 13 April 2005
 - Producer Statement – PS4 – Construction Review dated 14 April 2005
 - final building certificate dated 24 May 2005
 - territorial authority's additional final inspection on 1 March 2006.
- 5.5 Taken together, the available sources of information allow me to form a view as to the code compliance of the building work as a whole. I therefore consider that the records outlined in paragraph 5.4 provide me with sufficient evidence, without the need to seek further evidence in corroboration.

6. The draft determination

- 6.1 I forwarded copies of a draft determination to the parties for comment on 26 October 2007.
- 6.2 The applicants' lawyers responded in a letter to the Department dated 5 November 2007. The submission referred to the outstanding items that were noted by the territorial authority in its final inspection and which are described in paragraph 3.16. A letter from the designer to the lawyers dated 2 November 2007 was attached to the letter and this confirmed that all the minor works had been completed. The designer provided supplementary documentation relating to the work that had been carried out. Two typographical errors in the draft determination were also identified.
- 6.3 The territorial authority responded by email and letter on 13 November 2007. The territorial authority accepted the draft determination, explained some of the issues that had been raised, and noted that it still had concerns regarding the backflow prevention system to the well which, in the territorial authority's opinion, did not fully protect the domestic water supply.
- 6.4 The applicants' lawyers forwarded to the Department on 20 November 2007 a copy of a response that they had made to the territorial authority, regarding the territorial authority's submission described in paragraph 6.3. The lawyers had been instructed by the applicants that all the concerns listed in paragraph 3.16, including the backflow issue, had been addressed. Accordingly, the territorial authority was requested to forward a code compliance certificate for the building work.

7. Discussion

- 7.1 I note that, with the exception of several minor items, all building work was completed prior to the imposition, on 22 November 2004, of a monetary limit to the building certifier's scope of approval (refer paragraph 3.4). I observe that the imposition of a monetary limit to the building certifier's scope of approval does not reflect adversely on the certifier's ongoing competence after 22 November 2004.
- 7.2 I note that the territorial authority has expressed doubts regarding the inspections undertaken by the building certifier (refer paragraph 4.3) but these doubts appear to be based on hearsay and are not supported by any evidence.
- 7.3 On examination of the evidence, I am of the opinion that the records of inspections and site visits by the building certifier and the engineer are clear and comprehensive. These records appear to demonstrate a thorough and careful oversight of this building during its construction, which is further supported by the producer statements, compliance certificates and other statements produced for the building.
- 7.4 I now consider that, apart from the territorial authority's concerns regarding the backflow prevention valves to the well, I have received enough evidence to accept that the outstanding items set out in paragraph 3.16 have been attended to.

7.5 I therefore consider that the evidence provided by the applicants (as outlined in paragraph 5.4), together with the additional inspection by the territorial authority, provides reasonable grounds for me to conclude, with the possible exception of the backflow prevention valves to the well, that the consented building work as a whole complies with the building code.

8. The appropriate certificate to be issued

8.1 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a territorial authority may, on application, issue a certificate of acceptance.

8.2 In the case of this building work, I note that the applicants have requested a code compliance certificate, rather than a certificate of acceptance (refer paragraph 4.1). Section 436 provides for a territorial authority to issue such a certificate if it is satisfied that the building work complies with the building code that applied at the time the building consent was granted.

8.3 In this situation, where I have reasonable grounds to conclude that the consented building work as a whole complies with the Building Code, I am of the view that a code compliance certificate is the appropriate certificate to be issued.

9. The decision

9.1 In accordance with section 188 of the Building Act 2004 I determine that, once the code compliance of the backflow prevention valves to the well has been resolved to the satisfaction of the territorial authority, the building will comply with the Building Code. Accordingly, once code compliance had been established I instruct the territorial authority to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 29 November 2007.

John Gardiner
Manager Determinations