



Determination 2009/91

Determination regarding the issue of a notice to rectify for a 6-year-old addition to a house at 13 Orchard East Road, Ngatea



1. The matters 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.
- 1.2 The building is owned by Mr R Gundesen and Mrs EM Noble Gundesen. The parties to the determination are:
- Mr R Gundesen, who is the applicant for the determination (“the applicant”), represented by a legal adviser
 - Mrs E M Noble Gundesen, who is the occupier (“the occupier”), represented by a legal adviser
 - Hauraki District Council (“the authority”) carrying out its duties as a building consent or territorial authority.
- 1.3 The determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to rectify for an addition to an existing single level dwelling because it was not satisfied that the building work was completed in accordance with the Building Code (First Schedule, Building Regulations 1992).

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

- 1.4 In order to determine² whether the decision of the authority to refuse to issue a code compliance certificate and to issue a notice to rectify was correct, I must consider whether the building work within the addition complies with the Building Code.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and other evidence in this matter.

2. The building work

- 2.1 The house is a single storey house situated on a level site in a high wind zone for the purposes of NZS 3604³.

The original house

- 2.2 The original house was built in the early 1900s. It is founded on piles with a light timber-framed superstructure. The original house is clad with weatherboards and corrugated iron and has a single pitched roof with parapets. The window and door joinery is wooden

The addition

- 2.3 The addition to the original house is founded on timber piles and the construction is of light timber framing and fibre-cement weatherboards. The addition has a lean-to roof that falls to a centre gutter, with parapet walls, and is clad in metal roofing. The window and door joinery is aluminium. The plans for the addition comprise three A3 sheets, which I understand was prepared by the builder. The plans show the addition would be founded on a concrete slab with a 500mm wide reinforced concrete footing to the edge of the slab.

3. Background

- 3.1 The authority issued a building consent for the addition to the house (No 16701) on 8 February 2002. I have not seen a copy of the building consent or any conditions attached thereto.
- 3.2 The records of inspections the I have seen, and the notes from the records are:

Date	Inspection	Notes from inspection record
8 May 2002	Footing	Steel cage 4 – D12’s and stirrups in place. Okay to pour concrete.
10 May 2002	Site inspection	Note for file that [the builder] has not completed work properly re piles, lintel and kitchen finish are contrary to Building Code. Will have to issue notice to rectify.
24 February 2003	Site visit	Lining inspection
5 March 2003	Inspection	This place is a ... mess. I will have to serve notice on the so called builder, flashings haven’t been installed properly or not at all in some places.

² Under of section 177(a), 177(b)(i), 177(b)(iv) and section 435 of the Act. 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

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

3.3 There have been significant amounts of correspondence between the parties since the construction of the addition. The following table is a summary of the correspondence that I have seen.

Date	Parties	Contents
13 March 2003	Notice to rectify from authority to applicant and builder	<p>Action required to be taken:</p> <ol style="list-style-type: none"> 1. Flashing over join to addition to original house allows ingress of weather, this is to be made good to comply with the [Building Code]. 2. Window flashings not completed, these need to be sealed properly. 3. Parapet and roof internal guttering to be made good, the roof is leaking. 4. Complete internal work to comply with [the] Building Code. 5. Exterior to be paint finished.
4 May 2004	Letter from authority to occupier	<p>The letter listed the faults to the addition as follows:</p> <ol style="list-style-type: none"> 1. Flashing to the walls where old meets the new addition needs to be finished properly to the Code. 2. It appears that the sub floor bearers are not H3. 3. The roof construction should be rebuilt, there are gaps and flashings are inadequate, I also believe that the internal gutter has been installed incorrectly. 4. Windows are not flashed to the Code. 5. There may be other items that cannot be seen, however, the interior needs to be completed in a tradesman like finish.
2 November 2004	Letter from occupier's legal adviser to local government representatives	<p>As it stands, our client is left with a building which is clearly deficient, which has been passed by [the authority's] inspector when it does not match the approved plans, and she has lost her right of recourse to the Disputes Tribunal.</p>
23 December 2004	Letter from occupier to local government representative	<p>I still say the [authority] is at fault here as the inspector didn't do his job as he should have insisted [the builders] come back and fix the roof. The guttering itself is the wrong size, also the building is not square so whether the builders were paid by contract or hourly they took my money and they never finished the job.</p>
13 January 2005	Letter from authority to occupier	<p>...inspectors do not operate as "Clerks of Works" but rather undertake a series of statutory inspections to ensure works are to the required standard prior to the issuing of a [code compliance certificate].</p> <p>Any legal action taken by the [authority] to seek a legal remedy would have to be taken against yourself rather than the labour only contracted builder. You may be able to pursue civil actions against the various builders and if you wish to pursue this action I recommend you engage a solicitor to advise you.</p>
18 December 2008	Letter from authority to applicant	<p>The notice to rectify is still a record of the non compliance but the statutory time frame to take legal action against you as an owner for failure to comply is 6 months and this has obviously expired. [The authority] has not had a further request to inspect the building work for compliance with the [Building Code] and we can not confirm as to whether the work under the building consent has been completed or not. Accordingly a code compliance certificate has still not been issued.</p> <p>Because of the time that has now passed since the issue of the notice to fix, [the authority] can not now be reasonably assured that the building work complies with the [Building Code] and in particular that the durability of building elements have not been compromised by the ingress of moisture.</p>

3.4 The correspondence summarised above includes matters of both contractual nature and code compliance. Under Section 177 of the Building Act, I am only able to determine whether particular matters comply with the Building Code and the correctness of the Council's decisions in that regard. Matters of a contractual nature do not fall within the ambit of section 177 of the Act and are not commented on in this determination.

3.5 The Department received an application for a determination on 20 July 2009.

4. The submissions

4.1 The applicant provided copies of letters between the parties, the notice to rectify dated 13 March 2003, and copies of the consented drawings for the addition.

4.2 A copy of the application was provided to the other parties, who made no submission in response.

4.3 A draft determination was issued to the parties for comment on 10 September 2009. Each of the parties accepted the draft determination without comment.

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 17 August 2009 and furnished a report that was completed on 20 August 2009.

5.2 The expert said the building addition was not built in accordance with the consented plans noting that:

- the floor structure had been changed from a concrete slab on grade to timber-framed floor on piles and particle board
- the three-light windows in the living area have been changed for a door.

The expert noted that details of these variations did not appear to have been covered by any building consent amendment. The expert made comments critical of the general standard of workmanship used in completing the addition, noting that 'no aspect of this building has been completed in a tradesman-like manner'.

5.3 The expert carried out invasive moisture readings internally and externally. Moisture levels above 18% recorded after cladding is in place generally indicate that external moisture is entering the structure. The expert noted the following elevated readings:

Non invasive moisture readings at internal walls

- laundry around window frame – 20%
- living area around aluminium window – 20%
- living area door frame – 22%

Invasive moisture readings

- below window frame at left hand side bottom plate at west elevation – 18%
- below window at floor joist on west elevation – 21%
- below door at floor joist at north elevation – 24%.

- 5.4 The expert also noted that water is entering around the door frame at the north elevation, and the under floor foil below the door holds water which runs down the bearers. The underside of the particle board floor is saturated. The expert observed water stains on the floor near the door and noted that the door sill was wet.
- 5.5 There was no damp proof course to the top of the pile, however, the timber sample taken of the bearer showed the timber was most likely treated to a level of H3.2.
- 5.6 The expert observed the following defects:

Flashings at windows and doors

- there is no overlap at the edges of flashings – the aluminium frames are installed over timber facings around openings
- there are no seals between facings and flanges of window frames
- the aluminium door frame at the lounge does not appear to be certified as suitable for a high wind zone, as required by the plans

Roof construction and parapets

- the roof flashings are poorly detailed and fitted
- there is no sealant between surfaces
- roof sheets have been poorly fitted with no upturn under apron flashings
- there are no downturns at gutter edge
- some sheets are short at gutter
- the parapet flashings are not sealed at the joints and the linings are in poor condition

The joint between the original house and addition

- the internal box gutter discharge is poorly detailed and gaps allow water ingress
- the joint has been roughly closed up and the fibre-cement weatherboards to the addition have no weathertightness details where they join the original house
- there are no scribes or flashings at the top
- the timber work has not been primed at the joint on the east elevation

5.7 The expert noted the original house roof has been repaired with used roofing sheets, and there are numerous unsealed nail holes.

5.8 A copy of the expert's report was provided to the parties on 24 August 2009.

6. Discussion

Generally

6.1 It is clear from the expert's report that many aspects of the construction of the addition are unsatisfactory and require rectification. This includes the weathertightness of the external envelope (Clauses B2 and E2) and questions arising from the significant variation of the as-built foundations from that consented (Clause B1).

The weathertightness performance of the cladding

- 6.2 It is clear from the expert's report that the addition is unsatisfactory in terms of its weathertightness performance. The addition has been poorly constructed and there is significant water penetration through defects in many locations. Consequently, I am satisfied the external envelope of the addition does not comply with Clause E2.
- 6.3 In addition, the parts of the building covered by this consent are also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the external envelope faults in the addition are allowing the ingress of moisture, the addition does not comply with the durability requirements of Clause B2.
- 6.4 I find that, because of the extent of the faults that have been identified with the building, I am unable to conclude the extent of remediation of the identified faults, which could include partial or full re-cladding and re-roofing and reinstallation of the joinery, would result in compliance with Clause E2.
- 6.5 I consider that final decision on the extent of remediation required to achieve code compliance can only be made after a more thorough investigation of the external envelope. This will require careful investigation and analysis by an appropriately qualified person. The investigation should also involve the systematic survey of all risk locations, in order to establish the extent of the timber damage already sustained.
- 6.6 Once that decision is made, the chosen remedial option should be submitted to the authority for its comment and approval.

The foundations to addition

- 6.7 The expert has noted the change to the foundations from that consented to what has been built (concrete slab with 500mm wide perimeter footing, to piles and timber frame. I have seen neither the PIM nor LIM for the property, and I do not know what conditions were placed on the consent with respect to the nature of the ground, and with respect to the inspection and verification of the foundations during construction.
- 6.8 However, the foundations as consented has a greater footing width than the normal requirements of NZS 3604, which suggests the existence of poor ground conditions. In my opinion, the piled foundation should therefore be assessed for approval as an amendment to the concrete foundations as consented.

7. What is to be done now?

- 7.1 The authority has issued a notice to rectify under the former Act which the authority should withdraw. In its place the authority should issue a notice to fix that requires the owners to bring the addition into compliance with the Building Code, identifying the defects listed in paragraphs 5.6, and referring to any further defects that might be discovered in the course of investigation and rectification. The notice to fix may reference matters arising from the consideration of the foundations (refer paragraphs 6.7 and 6.8). The notice to fix should not specify how those defects are to be fixed and the addition brought into compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.

- 7.2 I suggest the parties adopt the following process to meet the requirements of paragraph 7.1. Initially, the authority should issue the notice to fix. The owner should then produce a response to this in the form of a technically robust proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can be referred to the Chief Executive for a further binding determination.
- 7.3 I consider the piled foundation should be assessed for compliance with the Building Code as an amendment to the consented concrete foundations.
- 7.4 I note that changes from the consent drawings have been identified and I leave the matter of appropriate documentation of these changes for the authority to resolve with the applicant.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- the external envelope does not comply with Building Code Clauses B2 and E2,
 - accordingly I confirm the authority's decision to refuse to issue a code compliance certificate, and
 - the authority's decision to issue the notice to rectify under the former Act is confirmed, however the authority is to withdraw the notice to rectify and issue a notice to fix to take into account the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 October 2009.

John Gardiner
Manager Determinations