



Determination 2009/107

Refusal to issue a code compliance certificate for a one-year-old house at 242C Minden Road, Te Puna, Tauranga



1. The matters to be determined

- 1.1 This is a determination under part 3, subpart 1 of the Building Act 2004¹ (“the Act”). It is 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 the Department. The applicants are the owners, C and L Gates (“the applicants”), acting through an agent. The other party is the Western Bay of Plenty District Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The matter for determination arose from the decision by the authority to decline to issue a code compliance certificate for the house because it was not satisfied that certain aspects of the building work complied with the Building Code (First Schedule, Building Regulations 1992).
- 1.3 The matter to be determined² is therefore whether the authority was correct to refuse to issue a code compliance certificate. In making this decision, I have been required

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

² Under section 177(b)(i) of the Building 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.

to consider whether the house's external cladding and roofing systems comply with Clauses B2 Durability and E2 External Moisture of the Building Code

- 1.4 In making my decision, I have considered the applicants' submission, a report by an expert engaged by the Department ("the expert"), and the other evidence in this matter.

2. The building work

- 2.1 The building work consists of a three level house built on a rural property at 242C Minden Road, Te Puna, Tauranga. The site slopes to the northeast and is in a high wind zone in terms of NZS 3604³. It has a concrete block basement, a concrete first floor, and a timber upper floor. The balance of the house is light timber framed with a truss roof. The house is complex in form, has two decks to the first floor and a balcony to the second floor. The first floor decks are concrete tiled, with glass balustrades side fixed to upstands, with one deck sited above the pool lounge. The enclosed second floor deck has timber decking (treated to H3.1) with a waterproof membrane over a ply substrate and is sited above the first floor dining room.
- 2.2 The 25° pitch hipped roof is clad with a ply substrate and an asphalt shingle roofing system. Overhangs are provided to roof edges. The timber-framed walls are clad with a polystyrene exterior insulation and finish system, with the block basement plastered to match. The windows and doors have aluminium joinery. The plans note the exterior wall framing is to be treated to H1.2 and, given the date of construction, I consider the framing for this house is likely to be treated to a level that will provide resistance to fungal decay if the framing gets wet and is unable to dry.

3. The background

- 3.1 The applicants originally contracted a building company to build the house and work started in February 2006. However, when construction was almost complete, the company went into receivership and its principal left New Zealand. The applicants then engaged their agent, a project management service, to oversee completion of the house. The agent found some major issues with the original construction of the house and these were rectified.
- 3.2 From what I can establish two consents were issued for the building work (No.'s 73788 and 76289). I have not seen either building consent. The authority carried out a final inspection of the house on 20 June 2008. The report from that inspection detailed nine items that the applicants would have to address before the inspection could be passed and a code compliance certificate issued. These included requirements to provide producer statements for the roofing and external cladding systems.
- 3.3 In a letter dated 4 December 2009 to the authority, the applicants set out how they had addressed the outstanding items from the inspection report and supplied most of the additional information that the authority had requested. However, they were unable to supply the producer statements for the roofing and external cladding systems. This was because the original suppliers of these products had decided to

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

withhold their producer statements until they were paid by the contracted building company. The applicants had already paid the contracted building company for the products, but the payment had not been passed on.

- 3.4 In their letter of 4 December 2009 the applicants asked that the letters from the roofing and cladding suppliers (which said that they would provide producer statements once payment had been received), should 'be treated as equivalent to a formal producer statement'. These letters from the suppliers were dated 30 May 2007 and 6 June 2007 respectively. On 12 February the authority noted that it had not seen the letters, and these were duly supplied by the applicants to the authority on 2 April 2009.
- 3.5 The authority then verbally advised the applicants that it would not issue a code compliance certificate for the house until it had received the outstanding producer statements. It also advised the applicants that they had the option of applying for a code compliance certificate, which the authority would decline, enabling the applicants to apply for a determination on the matter. This advice was repeated in a letter from the authority to the applicants dated 4 August 2009.
- 3.6 The applicants made an application for a determination which was received by the department on 22 July 2009. Further information was requested from the applicant and the authority, and the application was accepted on 10 August 2009.

4. The submissions

- 4.1 In their submission accompanying the application, the applicants stated that both the roofing and cladding suppliers had indicated in their letters that, should payment be received, then producer statements would be issued. They went on to say that:

This in itself proves that they are satisfied with the installation of their products. This is merely a source of leverage to receive monies owed by Alfa Homes from the [applicants]. If this was to happen, [the applicants] would be paying twice for the same service. Our client has already suffered immensely by way of stress – financial and delays in completion (project has taken in excess of three years for completion).

The two products have been installed for approximately two and a half years. There are no signs of any failures or water ingress since installation...

As there are no physical performance issues with the cladding or roof, we request a determination in favour of [the applicant] and the issue of CCC from Western Bay of Plenty District Council.

- 4.2 The applicants also enclosed with their submission:
- a copy of a letter dated 2 April 2009 to the authority with respect to the outstanding producer statements
 - copies of other producer statements
 - copies of plans, specifications and engineering calculations for the house.

- 4.3 The authority acknowledged receipt of the application for a determination on 3 July 2009, but made no submission.

- 4.4 As there had been no copies of correspondence from the authority outlining their reasons for declining the code compliance certificate, the Department sought to have this clarified by the authority. The authority responded in an email dated 27 July 2009 confirming that the code compliance certificate was declined due to a lack of producer statements for specific items.
- 4.5 A draft determination was issued to the parties for their comment on 8 October 2009. Both parties accepted the draft without comment.

5. The expert's report

- 5.1 As mentioned in paragraph 1.4, I engaged an expert to carry out an inspection of the building. The expert is a member of the New Zealand Institute of Surveyors. The expert inspected the building on 9 September 2009 and provided a report that was completed on 10 September 2009.
- 5.2 The expert stated that the house appeared to have been constructed in accordance with the plans supplied and that, although considerable rework and remedial work had subsequently been done, this had all been inspected by the authority. The expert made several comments to the effect that the house had been constructed and finished to a high standard, and that he was:
- satisfied with the standard of work that has been executed on this project and confirms that there are no issues that will prevent the roof and wall cladding continuing to perform as required by B2 and E2 of the New Zealand Building Code.
- 5.3 With respect to Clause E2, the expert took non-invasive moisture readings of the interior of the house's external walls and found that they were 'all within the low range' (being typically below 18%).
- 5.4 The expert made the following observations with respect to Clause B2:
- ground clearances and overlap details – were all satisfactory
 - sill, head and jamb flashings – had been installed on doors and windows and were observed in some areas
 - roof flashings – had adequate clearance from the cladding edge to the roof, and apron flashings had had been fitted with purpose-made kick outs
 - cladding control joints – were not required under 6m
 - cladding – had been well executed and had no visible cracks
 - balconies, balustrade walls and junctions – had been well executed, with sloping tops, cavities, membrane flashings and handrail balustrades side fixed
 - balcony and deck flashings – had been well designed and sealed with continuity behind obstructions
 - as far as could be observed the manufacturers instructions had been complied with.
- 5.5 Based on his observations, the expert concluded that the house's roofing and external cladding comply with the requirements of the Building Code.

6. Discussion

6.1 The authority refused to issue a code compliance certificate for the applicants' house because it was not satisfied that certain aspects of the building work (namely the external cladding and roofing systems) complied with the Building Code. The reason that the authority was not satisfied was because it had requested producer statements for the house's external cladding and roof systems and the applicants had been unable to supply these. It therefore became necessary for me to first decide whether the house did comply with the Building Code, before I could consider whether the authority was correct to refuse a certificate.

6.2 Compliance with the Building Code

6.2.1 In deciding whether or not the applicants' house complies with the Building Code, I have taken into account:

- the expert's report
- the authority's inspections
- the letters from the suppliers of the roofing and external cladding systems.

6.2.2 As set out in paragraph 5, the expert was satisfied that the house did, and would continue to comply with, Clauses B2 and E2 of the Building Code. The expert was satisfied that the house had been constructed and finished to a high standard, including the subsequent remedial work.

6.2.3 The authority has carried out a large number of inspections of the applicants' house, as it was being and after it was built. In total, 27 inspections were carried out between January 2006 and June 2008. The final inspection was carried out on 20 June 2008 and from this nine items were identified that needed to be addressed before the authority would issue a code compliance certificate. The applicants subsequently addressed the items identified and advised the authority of this. The only matters left outstanding were the producer statements for the external cladding and roofing systems.

6.2.4 From this, I assume that in all other respects the authority is satisfied that the house complies with the Building Code. In other words, were it not for the missing producer statements, the authority would be prepared to issue a code compliance certificate for the house.

6.2.5 I have also taken into account the letters dated 30 May 2007 and 6 June 2007 from the roofing and cladding suppliers. These letters indicate that the suppliers are satisfied with the way their products have been installed on the applicants' house and that producer statements for their products would have been issued if they had been paid.

6.2.6 On the basis of the above evidence I am satisfied that the house's external cladding and roofing systems comply with Clauses B2 and E2 of the Building Code.

6.3 The decision not to issue a code compliance certificate

- 6.3.1 The authority stated in its letter to the applicants dated 4 August 2009, that the reason that it would not issue a code compliance certificate was because of the two outstanding producer statements.
- 6.3.2 Section 43(8) of the former Act states that an authority may, at its discretion, accept a producer statement establishing compliance with all or any provisions of the Building Code. This section, or equivalent, is absent from the Building Act 2004.
- 6.3.3 There is no basis in the Building Act 2004 for an authority to demand a producer statement as a condition for establishing compliance and for issuing a code compliance certificate particularly if it had not made the receipt of one a condition of the consent. Accordingly, I do not believe that, in this case, the request to provide a producer statement can be enforced in terms of a refusal to issue the code compliance certificate.
- 6.3.4 Though the authority was entitled to accept the producer statements if they were offered, it should not have relied on them to the exclusion of other evidence that demonstrated code compliance. The authority had a long history of involvement in this building project, with more than the usual number of inspections being carried out. It was entitled to rely on the expertise of its inspectors to assess whether or not the building complied.
- 6.3.5 In my view the receipt of a producer statement by an authority does not lessen its liability in establishing code compliance. An authority accepts a producer statement at its discretion in the belief that the author of the producer statement is creditable.
- 6.3.6 As I believe that the external cladding and roofing systems as completed are code compliant and that the authority cannot demand a producer statement before it will issue a code compliance certificate, I am of the opinion the authority should now issue a code compliance certificate for the building work.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I determine that:
- the external cladding and roofing system complies with Clauses B2 Durability and E2 External Moisture of the Building Code
 - and accordingly I reverse the authority's decision to refuse to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 4 December 2009.

John Gardiner
Manager Determinations