



Determination 2010/142

The authority's exercise of its decision making powers in respect of the Building Code compliance of an 11-year-old house at 1829B River Road, Flagstaff, Hamilton

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. The applicants are the owners R and R Porter (“the applicants”) acting through an agent, and the other party is the Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 The matter to be determined² is whether the authority was correct in its ‘refusal to exercise [its] ... power of decision’ in relation to the issue of a code compliance certificate for the house, because it was not satisfied that the house complied with Clause³ B2 Durability of the Building Code (First Schedule, Building Regulations 1992) due to its age (refer paragraph 3.5).
- 1.3 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 The building work consists of a single-storey detached house. The large site is long and narrow; and slopes down to the river to the east, with an excavated level building platform. Although the site is large, its exposure appeared to be moderated by mature trees so it is assumed to be in a medium wind zone for the purposes of NZS 3604⁴.

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 sections 177(1)(b) and 177(2)(d) of the Act

³ 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.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.2 The three-bedroom house is an 'L' shape, with a 22.5° pitch hipped roof with several small gables, including a gabled entrance canopy supported on reinforced concrete columns. The roof generally has eaves and verge projections of more than 600mm overall. The house is reasonably simple in plan and form.
- 2.3 Construction is conventional light timber frame, with concrete foundations and floor slabs, monolithic cladding, aluminium windows fitted with double-glazed safety glass through out, and pressed metal tile roofing. Given the date of construction of the house in 1998, the observation of framing timber during a site visit (refer paragraph 5) and the lack of other evidence, I consider that the external wall framing is untreated.
- 2.4 The wall cladding is a form of monolithic cladding, which consists of 60mm thick EIFS⁵ fixed through the building wrap to the framing, and finished with an applied textured coating system.

3. Background

- 3.1 The authority issued a building consent for the house (No. 98/2148) on 21 October 1998 under the Building Act 1991. I have not seen a copy of the building consent.
- 3.2 The authority's inspection records are limited to a handwritten inspection summary. Construction commenced in October 1998 and the authority carried out various inspections, including a 'pre-lining' inspection on 15 November 1998.
- 3.3 The authority carried out a final inspection on 16 March 1999, and the inspection summary indicates that this was generally satisfactory, with a note referring to the code compliance certificate. The only item noted as requiring attention was the earthquake restraint to the hot water cylinder. No further inspection was carried out and in 2007 the authority developed a policy for managing building consents issued under the Building Act 1991 where code compliance certificates would not be issued for consents issued under the former Act.
- 3.4 It appears that the applicants did not seek a code compliance certificate until 2010. The authority visited the house on 25 May 2010. I have not seen a record from that visit, but it appears that the inspection was limited to assessing the house for 'health and safety issues'.
- 3.5 In a letter to the applicants dated 8 June 2010, the authority noted that their visit confirmed the house was 'safe and sanitary'. However, the authority refused to issue a code compliance certificate 'due to the age of the consent'. The authority stated:

Code compliance certificates (CCC) can not be issued for outstanding building consents where the building consent was issued prior to the Building Act 2004 (either before the Building Act 1991 or in terms of the Building Act 1991) because:

Council can not be satisfied on reasonable grounds that the provisions of the building code for:

1. Durability in terms of B2 and/or
2. Weather tightness in terms of E2 and/or
3. Other appropriate provisions of the building code.

Have been met and maintained in the period since the issue of the building consent.

⁵ EIFS - External Insulation and Finish System

- 3.6 The Department received an application for a determination on 10 August 2010. In a letter to the parties dated 17 August 2010, the Department asked the authority to clarify its basis for the view that the house did not comply with the Building Code.

4. The submissions

- 4.1 The applicants made a detailed submission that focussed on past determinations that had considered amending the building consent to allow the durability provisions to commence from the substantial completion of the building. The applicants noted that they 'would be happy with a [code compliance certificate] with the durability period starting on the date of the last inspection being 16/3/1999'. The applicants also noted that the authority passed the weathertightness of the cladding during the final inspection, stating:

The refusal of [the authority] to issue a [code compliance certificate] due to B2, E2 & 'other appropriate provisions of the building code' are irrelevant because the house was built as per the approved Building Consent in 1998/99...

- 4.2 The applicants forwarded copies of:

- the consent drawings
- the authority's inspection summary
- the letter from the authority dated 8 June 2010.

- 4.3 In a letter to the Department dated 30 August 2010, the authority stated it would not issue a code compliance certificate for the building work as eleven years have elapsed since construction, which meant that the authority 'cannot be satisfied that the dwelling has been maintained to a standard required to ensure continued compliance with the provisions of the Building Code, and that the authority 'does not believe the dwelling complies with B2 insofar as it relates to E2'.

- 4.4 In a letter to the Department dated 30 August 2010, the authority stated it would not issue a code compliance certificate for the building work because:

[The authority] cannot be satisfied on reasonable grounds that the building will meet the provisions of the Building Code for:
Durability in terms of B2
Weathertightness in terms of E2

...[the authority] cannot be satisfied that the dwelling has been maintained to a standard required to ensure continued compliance with the provisions of the Building Code. The ongoing compliance of B1 and B2 is dependent on the maintenance and performance of the cladding system. On this basis [the authority] does not believe the dwelling complies with B2 insofar as it relates to E2.

The first draft determination

- 4.5 The first draft determination was issued to the parties on 4 October 2010. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.
- 4.6 The parties agreed that compliance with Clause B2 was achieved on 16 March 1999.

- 4.7 The applicants accepted the draft without comment. The authority did not accept the draft. In a letter to the Department received on 26 October 2010, the authority questioned why the Department had not completed its own inspection noting this was a '10 year old house one which is [clad] in a direct fixed monolithic cladding system with previous history of failure'.
- 4.8 The letter acknowledged that the authority had inspected and passed the cladding 'however this was back in 1999'. The inspection completed in May 2010 'only focused on the outstanding items from the final inspection in 1999 and deemed the dwelling to be safe and sanitary.' The authority requested 'an independent building compliance report be undertaken to support such a determination'.
- 4.9 I do not agree that the authority's response to the draft determination is consistent with the requirements of section 95A of the Act, regardless of a building's age. Section 95A of the Act provides that if the authority refuses to issue a code compliance certificate the authority must give the applicant 'written notice of the refusal and the reasons for the refusal'. In my view, section 95A requires the authority to at least identify the particular aspects of the building that do not comply with the building code. Instead, the authority simply made a generalised refusal to issue a compliance certificate on the basis of the age of the building.
- 4.10 Given that the authority had inspected the building work while it was being undertaken and then had the benefit 10 years later of observing how the building had performed over that period of time it is not too much to expect the authority to identify those aspects of the building that it considers do not comply with the building code. The authority's approach takes no account of the attributes of the particular building such as the cladding system used, the level of workmanship, the maintenance of the building, the building's risk features, and the level of code compliance to date; and results in the owner not being given any specific advice why a code compliance certificate is being refused.

The second draft determination

- 4.11 In response to the authority's submission, a site inspection was undertaken by an officer of the Department (refer paragraph 5) and a second, amended, draft determination was issued to the parties for comment on 26 November 2010.
- 4.12 The determination was amended and a site inspection was undertaken (refer paragraph 5) in response to the authority's submission. The second draft determination was issued to the parties for comment on 26 November 2010.
- 4.13 The applicants did not accept the second draft. In a submission to the Department dated 9 December 2010, the applicants submitted that, in summary:
- The second draft determination contradicts the transition provisions of the Act (s (436)) which says '[a]n application for a code of compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed'.
 - The authority had undertaken nine inspections and had 'signed off all aspects of weather tightness and structural integrity between 29 October 1998 and 16th March 1991'. The authority has now signed off the one outstanding item,

therefore, 'under section 436 a [code compliance certificate] must be granted because those aspects were all approved by [the authority] at that time [and] complied with the [Building Act 1991]'.

4.14 In response to the applicant, I note the following:

- The determination has considered the compliance of the building against the requirements of the Building Code, which in most respects has not changed to any significant extent in the period since the work was consented. Under the Building Act 1991 a code compliance certificate can be issued if the building work concerned complies with the requirements of the Building Code.
- While some aspects of the house may have complied fully with the requirements of the Building Code at the time it was built, they do not now, for example, the height of ground levels adjacent to the cladding. I do not accept that a code compliance certificate can be issued in respect of work that does not comply with the requirements of the Building Code.
- Section 43 of the Building Act 1991 required owners to seek a code compliance certificate 'as soon as practicable' after the building work had been completed. In this instance there has been a delay of over 10 years.

4.15 The authority also did not accept the second draft determination. In a submission to the Department dated 20 December 2010, the authority submitted that, in summary:

- The authority believed it had met the requirements of section 95A and disputed the determination's view that it had not.
- The authority considered that the determination went beyond what section 188 provided for.
- The authority sought to have the determination amended to reflect its submission.

4.16 In response to the authority, I note that the purpose of section 95A is to provide owners with information about the aspects of their buildings that do not comply with the Building Code, so as to enable them to fix up those parts of the building work and thus obtain a code compliance certificate. If an owner applies for a code compliance certificate and simply receives a generalised statement that a code compliance certificate cannot be issued because of the age of the building the owner has no idea what aspects of the building must be fixed up in order to obtain a code compliance certificate.

4.17 This determination confirms the authority's decision to refuse to issue a code compliance certificate and so I do not agree with the authority's comment that the determination goes beyond the scope of section 188. That provision specifically provides for a determination to 'confirm, reverse or modify the decision or exercise of power to which it relates'.

4.18 I have considered the party's responses and amended the determination as appropriate.

5. The site inspection

- 5.1 An officer of the Department visited the property on 17 November 2010 to conduct a detailed inspection to ascertain whether there was sufficient evidence as to whether the building complied with the Building Code.
- 5.2 The house was found to be very well maintained, in very good condition throughout with good quality materials used. The house had a low weathertightness risk. The as-built work was in general accordance with the consented drawings with the exception of the cladding (EIFS used in place of fibre-cement) and the window joinery (aluminium in place of uPVC).
- 5.3 The inspection concluded that there was evidence that the house did not comply with the Building Code in respect of the following:
- The base of the EIFS cladding, in places, was buried in the paving and in very close proximity to garden areas and plants. (It is likely the ground levels were satisfactory immediately following the completion of the consented work.)
 - The detailing to the junctions to the door and window openings was generally satisfactory. However, the detailing of the glazed doors on to the paved deck to the north and west of the house should be verified.
 - Some penetrations (water pipe and vent to the clothes dryer) to the cladding did not appear to be adequate.
 - Loose insulation installed to the ceiling was observed to be in close contact with downlights.
- 5.4 It was noted that no smoke detectors were installed in the house. Although this was not a requirement of the Building Code at the time the building consent for the work was issued and cannot now be required, I strongly suggest that these be installed.

6. The authority's decision to refuse to issue the code compliance certificate

- 6.1 I am satisfied that sufficient evidence was gathered during the site inspection for me to conclude that the building work does not currently comply with the Building Code and therefore a code compliance certificate should not be issued at this time. However, in my opinion the authority failed to satisfy the requirements of section 95A as it did not even attempt to identify the aspects of the building work that did not comply with the building code. A generalised refusal to issue a code compliance certificate that fails to identify the aspects of the building that do not comply with the building code is not in my view sufficient to comply with the requirements of section 95A (refer also paragraphs 4.8 and 4.9).
- 6.2 If the authority does not believe code compliance has been achieved in any given situation it should formally advise an owner of the reasons for the refusal. If necessary, it can issue a notice to fix requiring the non-complying matters to be brought into compliance with the Building Code.

7. The durability considerations

- 7.1 The authority has concerns regarding the durability, and hence the compliance with the building code, of certain elements of the house taking into consideration the age of the building work completed in 1999.
- 7.2 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods (“durability periods”) “from the time of issue of the applicable code compliance certificate” (Clause B2.3.1).
- 7.3 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 7.4 In this case the delay between the completion of the building work in 1999 and the applicant’s request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today’s date. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at a date in 1999.
- 7.5 It is not disputed, and I am therefore satisfied, that all the building elements installed in the house, with the exception of the items that are to be rectified, complied with Clause B2 on 16 March 1999. This date has been agreed between the parties, refer paragraph 4.6.
- 7.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.
- 7.7 I continue to hold that view, and therefore conclude that:
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements.
 - (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued in 1999.

7.8 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

8. What is to be done now?

8.1 The authority should issue a notice to fix requiring the owners to bring the building into compliance with the Building Code. The notice should identify the defects listed in paragraph 5.3 and refer to any further defects that might be discovered in the course of investigation and rectification. The notice should not specify how those defects are to be fixed and the building brought into compliance with the Building Code, as that is a matter for the owners to propose and the authority to accept or reject.

8.2 In response to the notice to fix, the owners should produce a detailed proposal describing how the defects are to be remedied. The proposal should be submitted to the authority for approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

9. The decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority did not exercise its powers correctly when it refused to issue the code compliance certificate. However, I confirm that there is building work that does not comply with the Building Code and therefore I confirm the authority's decision to refuse to issue the code compliance certificate.

9.2 I also determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 16 March 1999.
- (b) the building consent is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 16 March 1999 instead of from the time of issue of the code compliance certificate for all the building elements, with the exception of those items that are to be rectified as set in Determination 2010/142.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 December 2010.

John Gardiner
Manager Determinations