



Determination 2012/062

Regarding the refusal to issue a code compliance certificate for 6-year-old additions and alterations to a house at 163 Church Street, Opotiki



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, Ministry of Business, Innovation and Employment (“the Ministry”)², for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- Zmacs Trust, the owner of the house (“the applicant”)
- Opotiki District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the authority’s refusal to issue a code compliance certificate on the grounds that insufficient inspections had been carried out and as a consequence the authority could not be satisfied as to compliance of the building work with certain clauses of the Building Code³ (Schedule 1 of the Building Regulations 1992). The authority also has concerns regarding the durability of the building elements given the age of the building work.

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

² After the application was made, and before the determination was completed, the Department of Building and Housing was transitioned into the Ministry of Business, Innovation and Employment. The term “the Ministry” is used for both.

³ In this determination, unless otherwise stated, references to sections are to sections of the respective Building Acts and references to clauses are to clauses of the Building Code.

- 1.4 The matter to be determined⁴ is therefore whether the authority correctly exercised its powers when it refused to issue a code compliance certificate for the house. In making this decision I must consider the grounds on which the authority made its decision, and whether the building work 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 the other evidence in this matter.

2. The building work

- 2.1 The building work in question consists of alterations and additions to a single-story house (“the house”) situated on a level site in a high wind zone for the purposes of NZS 3604⁵. The expert considers that the house is also at high risk of windblown sea spray salt deposits as defined by NZS 3604.
- 2.2 The additions and alterations included a new garage to the south with internal access via a new entrance lobby, the removal of the existing southern wall to extend a bedroom, the addition of an ensuite, and new cladding on parts of the existing south, east and west elevations. Open timber decks were also added to the west and east elevations and a new ranchslider installed in place of an existing window.
- 2.3 The house and additions are of timber-frame construction with suspended timber floor on piles to the living areas, and a concrete floor slab to the garage. The new and existing pitched roofs are clad with corrugated metal, and generally have eaves and verge projections ranging in width from 320mm to 1000mm.
- 2.4 Apart from the north and east bedrooms and the rumpus rooms, which retained their original profiled metal cladding, the new and existing external house walls are faced with a proprietary rusticated PVC weatherboards directly fixed to the framing over building wrap. New powder-coated aluminium joinery units were installed in the areas of new cladding, with the exception of two existing windows retained to the kitchen and the northwest bedroom.
- 2.5 The expert observed that a drawing note specified ‘H3.1 bottom plate’ but no indication of treatment was visible on the exposed bottom plates and the framing looked identical to the wall framing which is untreated. Taking into account the expert’s observations and lack of other evidence I consider the framing is not treated.

3. Background

- 3.1 On 18 October 2005, the authority issued a building consent, (which I have not seen), for the additions and alterations.
- 3.2 The authority undertook two inspections, footings and slab on 1 December and 11 December 2005 respectively. It appears that no more inspections were carried out during construction and the building work was completed in early 2006.

⁴ Under sections 177(1)(b) and 177(2)(d) of the Act

⁵ New Zealand Standard NZS 3604:1999 Timber-framed buildings

- 3.3 On 16 August 2011, the authority undertook a final inspection and documented a list of 12 items that required attention. According to the owner, these items were attended to, and the authority undertook a further inspection on 21 October 2011; there appears to be no record of this inspection.
- 3.4 On 3 November 2011, following a request from the applicant for a code compliance certificate, the authority wrote refusing to issue a code compliance certificate based on the following:
- The length of time since the building consent was granted (18 October 2005) and when the first final inspection was called for.
 - The last recorded inspection was undertaken by Council staff on 11 December 2005. This has resulted in a number of inspections not being carried out as required.
- 3.5 Email correspondence continued between the parties, and in a letter dated 28 November 2011 the authority described the inspections that it had undertaken and listed those inspections that had not been carried out, stating that it ‘will be very difficult, in fact impossible, to carry out retrospective inspections’. The authority also noted another reason for not issuing a code compliance certificate was ‘due to the age of the consent and the durability clause in the New Zealand Building Code B2 Durability’.
- 3.6 The applicant then sought clarification from the authority as to the specific matters of non compliance and relevant Building Code clauses. In an undated letter to the applicant, the authority listed the following Building Code Clauses ‘that apply in this instance’:
- B1 – Structure
 - B2 – Durability
 - E2 – External moisture
 - E3 – Internal moisture
 - G12 – Water supplies
 - G13 – Foul water
- 3.7 The Ministry received an application for a determination in respect of the house on 29 May 2012.

4. The submissions

- 4.1 In a covering letter forwarded with the application, the applicant described the building work undertaken and set out the background to the dispute. The applicant considered that the work undertaken had been built ‘properly and professionally’ and the ‘final inspection, even being as late as it was, complied’.
- 4.2 The applicant provided copies of:
- the plans of the house
 - the authority’s final inspection document
 - the correspondence with the authority

- a set of photographs showing some stages of the construction.
- 4.3 The authority did not acknowledge the application or make a submission in response.
- 4.4 A draft determination was issued to the parties on 31 July 2012. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.
- 4.5 The applicant responded to the draft by letter dated 29 August 2012, and sought clarification as to the matter of a modification of Clause B2.3.1.
- 4.6 The authority responded by email on 15 September 2012, accepting the draft subject to correction of the wind zone noted by the expert. The authority also noted that agreement had been reached with the applicant as to the date of substantial completion being 18 October 2006.

5. The expert's report

- 5.1 As described in paragraph 1.5, I engaged an expert, who is a registered building surveyor, to assist me. The expert inspected the additions on 13 June 2012 and produced a report that was completed on 20 June 2012. Copies of this report were sent to the parties on 27 June 2012.
- 5.2 The report described the house, the risk factors present for weathertightness, and some of the background to the dispute. The expert noted some minor differences between the house as constructed and the consented plans. The expert observed that the house was generally well presented and maintained but considered that there was 'low quality construction' with a 'lack of attention to detail at window perimeter junctions'.
- 5.3 The expert carried out a series of invasive moisture tests and found elevated readings of 16%, 18%, and 33% at three external framing locations and a reading of 96% in the ensuite particle board flooring.
- 5.4 In respect of the external envelope the expert made the following observations:
- The junction between the new and existing claddings at the northwest corner of the house lacked a flashing. A moisture reading of 18% was taken at this location through the wrap, which is starting to disintegrate.
 - One weatherboard soaker adjacent to the garage east door had not been effectively fixed in place.
 - There was only a minimal flashing cover at the unprotected south elevation eaves.
 - The new sliding door in the rumpus room south wall had no eaves protection and an elevated moisture reading (33%) was obtained at the base of the jamb liner. The jamb channel trim finished short of the head flashing and the required end plugs to the rustications in the PVC weatherboard cladding ("the end plugs") were missing. No clearance was provided between the timber

decking and the joinery or cladding. Moisture entry via the joinery unit mitres was possible.

- The flange of the lounge west sliding door was cut back to the door opening, the cladding junctions were unsealed, and the cladding junctions lacked end plugs.
- The head flashing to the reused kitchen window had '15mm play' in it and the ends of the flashing were not sealed. While end plugs were installed, there were gaps between the window frame and the cladding.
- The garage west door lacked channel trims to ends of PVC weatherboards and end plugs. There was no cover provided by the window jamb flange to one PVC weatherboard.
- The garage windows lacked sill tray flashings, channel trims, and end plugs. The cover provided by the window jamb flanges over the PVC weatherboards was inadequate.
- The garage south window had an unsealed head flashing and channel trims that were 20mm short at the top. End plugs were also missing.
- The garage west window was fitted with a reverse slope on the head flashing that channelled water over the unsealed head flashing junctions.
- The head flashing to the retained northwest bedroom window is turned down behind the window flange forcing any moisture to the end of the flashing and into the timber facing at the jambs.

5.5 The expert also noted the following

- The cladding clearances at the garage east wall, the deck, between the garage floor and the paving, and between the west lounge flooring and the deck, were less than those recommended by the cladding manufacturer. However, there was no evidence of moisture ingress at these locations.
- There were unsealed gaps at the head flashing junctions of the new east entry door and no jamb channel trims were installed. However, the door had good eaves protection.
- While the retained northwest bedroom window had large gaps between the frame and reveals, the window was solidly fixed and had good eaves protection
- No head flashing had been installed above the main garage door. However, the door was sheltered by the eaves.

5.6 In regards to the other relevant code clauses and building elements the expert noted:

Clause B1

- No visible signs of structural settlement, movement or other problems either under the house or externally. Doors were found to be not "sticking".

Clause B2

- Corrosion on the sheltered apron flashing at the junction between the original house and the addition and also on the soffit mould fixings and a downpipe fixing.

Clause E3

- The particle board flooring adjacent to the ensuite shower was saturated and highly decayed and moisture reading of 96% was obtained at this location.
- Apart from the particle board flooring adjacent to the shower, no other evidence of internal moisture issues was observed.

Clause G12

- The hot and cold water pressure and delivery was normal, and the hot water was tempered.
- Leaks into the sub-floor space at a pipe connected to the pressure reducing valve and also at another pipe connection. The expert's photographs show the water supply pipework simply laying on the ground under the timber floor.

Clause G13

- The expert was of the opinion that the foul water system was functioning correctly. However, the kitchen waste pipe in the sub-floor was not supported.
- The exiting gully trap into which the kitchen waste discharges was located under the floor and should have been relocated to the building's exterior.

Clause H1

- The hot water pipework was only partially lagged.
- The expert's photographs show some subfloor foil insulation was damaged.

6. Discussion

6.1 In order to determine whether the authority correctly exercised its power in refusing to issue a code compliance certificate, I must consider the grounds on which the authority made its decision and whether the building work complies with the Building Code.

6.2 The authority's refusal

6.2.1 The authority notified the applicant that it was refusing to issue a code compliance certificate on the following grounds:

The length of time since the building consent was granted (18 October 2005) and when the first final inspection was called for.

The last recorded inspection was undertaken by Council staff on 11 December 2005. This has resulted in a number of inspections not being carried out as required.

- 6.2.2 The issuing of a code compliance certificate is subject to the requirements of section 94 of the Act, which in essence, requires an authority to issue a code compliance certificate if the completed work has been built in accordance with the building consent. I consider that the period of delay between the grant of a building consent and the request for a final inspection or code compliance certificate is not a ground for refusing to issue a code compliance certificate.
- 6.2.3 In respect of the first reason given by the authority: the length of time since the consent was granted does not prevent the authority making a decision with respect to compliance. However, I acknowledge that this does raise the issue of the durability of the building work, and hence compliance with the Building Code taking into account the age of the building work and I have addressed this matter in paragraph 6.4. I note the provisions of section 93 require an authority to make a decision in respect of issuing a code compliance certificate within 20 working days after the second anniversary of the granting of the consent (or further period agreed)⁶.
- 6.2.4 In respect of the second reason given by the authority: the authority's refusal was based on the lack of inspections undertaken during construction. I acknowledge the authority's position, but the lack of inspections does not prevent the authority from conducting an assessment of the visible elements and taking account of the performance of the building in use. Together these may reveal that further evidence is necessary to determine compliance, which the authority can reasonably require an owner to provide. In this case the building work has a low level of complexity, and the assessment of the hidden elements is relatively straightforward, and the authority also completed the scheduled inspections of the foundations.
- 6.2.5 The authority did not provide reasons for refusing the code compliance certificate as it is required to do under section 95A of the Act. In my view the reasons for refusal should be given in terms of non-compliance with the Act or Building Code where the breaches are identified. It is important that an owner be given clear reasons why compliance has not been achieved so the owners can either then act on those reasons, or apply for a determination if the reasons are disputed.
- 6.2.6 In this instance the information contained in the approved building consent is limited. The as-built work does not fully accord with the approved plans, nor does the work comply with the Building Code (refer paragraph 6.3). As such I consider the authority was correct to refuse to issue the code compliance certificate; however the authority exercised its powers incorrectly in respect of the basis on which it reached that decision.

6.3 The code-compliance of the building work

- 6.3.1 I consider the expert's report establishes that the current performance of the external envelope is not adequate because there is evidence of moisture penetration into the timber framing in some areas. Consequently, I am satisfied that the house does not comply with Clause E2 of the Building Code.
- 6.3.2 In addition, the building envelope is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy

⁶ refer Determination 2008/040

all the objectives of the Building Code throughout its effective life, and that includes the requirement for the building work to remain weathertight

- 6.3.3 Because the faults identified by the expert occur in discrete areas, I am able to conclude that satisfactory investigation of the items outlined in paragraph 5.4 will result in the external envelope being brought into compliance with Clauses B2 and E2 of the Building Code.
- 6.3.4 In addition I consider the following building elements of the additions and alterations do not comply with the requirements of the Building Code:
- Corrosion on the sheltered apron flashing at the junction between the original house and on the soffit mould fixings and a downpipe fixing (Clause B2).
 - The ensuite where the particle board flooring adjacent to the shower is decayed (Clause E3).
 - The leaking subfloor water pipes (Clause G12). The water supply pipework and associated fittings should also be properly supported.
 - The unsupported kitchen waste pipe in the sub-floor. The gully trap into which it discharges is located in the subfloor space (Clause G13).
 - Repairs requires to damaged subfloor foil insulation (Clause H1).
- 6.3.5 I note the expert's observations as summarised in paragraph 5.5 and I accept those elements as adequate in the circumstances.
- 6.3.6 The hot water pipework under the house is partially lagged with felt. Felt lagging provides little or no insulation to hot water pipework: Compliance Document G12/AS1 describes suitable insulation as cell foam or fibre glass.
- 6.3.7 The expert has investigated the structural aspects of the building and is of the opinion that, in this respect, the house is code-compliant. Taking into account the expert's findings and the record of the two inspections undertaken by the authority, I am satisfied that additions and alterations comply with the requirements of Clause B1 Structure.
- 6.3.8 In conclusion, in accordance with the observations set out above I am of the view that the house did not comply with the building consent or with the Building Code at the time of the authority's last inspection, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

6.4 The durability considerations

- 6.4.1 There are concerns regarding the durability, and hence the compliance with the building code, of certain elements of the building taking into consideration the age of the building work completed in 2006.
- 6.4.2 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).

6.4.3 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.

6.4.4 In this case the delay since the completion of the building work in 2006 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.

6.4.5 It is not disputed, and I am therefore satisfied, that all the building elements in respect of the alterations and additions, excluding those items that are to be rectified as described in paragraphs 5.4 and 6.3.4 of this determination, complied with Clause B2 on 18 October 2006 (refer paragraph 4.6)

6.4.6 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.

6.4.7 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 the building elements if requested by an owner
- (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 2006.

6.4.8 I strongly recommend 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.

7. What happens next?

7.1 I note that the authority has not issued a notice to fix. The authority now should issue a notice to fix; taking into account the findings of this determination, identifying the items requiring remedial work as listed in paragraphs 5.4 and 6.3.4, and referring to any further defects that might be discovered in the course of investigation and rectification but not specifying how those defects are to be fixed. It is not for the notice to fix to stipulate directly how the defects are to be remedied and

the house brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.

- 7.2 The applicant should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably experienced person, as to the rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 7.3 Once the building work has been rectified to its satisfaction, the authority can issue a code compliance certificate in respect of the amended building consent as outlined in paragraph 6.4.

8. The Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that the authority incorrectly used its powers in its refusal to issue a code compliance certificate on the grounds given. However, I determine that the additions and alterations do not comply with either the building consent or with the Building Code and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.
- 8.2 I also determine that:
- (a) all the building elements installed in the building, apart from the items that are to be rectified as described in this determination, complied with Clause B2 on 18 October 2006.
 - (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 18 October 2006 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in Determination 2012/062.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 September 2012.

John Gardiner
Manager Determinations