



Determination 2013/017

Regarding the refusal to issue a code compliance certificate for a 13-year-old house constructed under the supervision of a building certifier at 22A Phillip Street, Johnsonville, Wellington



1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are
- the current owner of the building, Brands Property Limited (“the applicant”)
 - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or a building consent authority.
- 1.3 This determination arises from the authority’s decision to refuse to issue a code compliance certificate. The authority’s concerns relate to the age of the building work, that it does not consider the work complies with the Building Code² (First Schedule, Building Regulations 1992), and the fact that the work was carried out under the supervision of Nationwide Building Certifiers (“the building certifier”), which was duly registered as a building certifier under the Building Act 1991 (“the former Act”) but ceased operating as a certifier before it had issued a code compliance certificate for 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 In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code

- 1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers in refusing to issue a code compliance certificate. In making this decision, I must consider
- the grounds on which the authority based its decision to refuse to issue the code compliance certificate, and
 - whether the decision to refuse to issue the code compliance certificate was correct. In making this decision, I must also consider whether the completed building work complies with the relevant provisions of the Building Code that was current at the time the building consent was issued.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry to advise on this dispute (“the expert”), and the other evidence in this matter.
- 1.6 The relevant sections of the current Act are set out Appendix A.

2. The building work

- 2.1 The building work in question consists of a two-storey house with an inclusive garage situated on a sloped site benched into a hill below a steep hill face. The site is in a medium wind zone for the purposes of NZS 3604⁴ and the expert has noted that the house is generally protected from north-westerly and southerly winds.
- 2.2 The house is timber-framed, is supported on a piled concrete ring foundation, and is of a simple shape in plan and form. The sloping roof is clad with painted corrugated iron and has projecting eaves. The exterior walls are generally clad with rusticated Douglas Fir bevel-back weatherboards and the north elevation of the lower level is clad with plywood sheet. The external joinery is of a light weight aluminium construction.
- 2.3 A timber-framed deck is constructed on the west elevation over the garage, and a connected small semi-circular cantilevered timber-framed deck is situated outside the north elevation main bedroom. Both decks are covered with liquid-applied membranes over plywood substrates and have balustrades consisting of timber posts, rails, and spaced palings. From the information that I have received, it appears that the decks were resurfaced in early 2010.
- 2.4 The treatment of the external wall framing timber has not been confirmed by the expert. However, given the date of construction during the late 1990’s and the lack of information otherwise I consider it likely that the framing timber is not treated to a level that provides resistance to decay if it absorbs and retains moisture.

3. Background

- 3.1 The authority issued building consent No 43311 for the house on 12 June 1998 under the Building Act 1991.
- 3.2 The authority carried out two inspections of the building work in late 1999 related to house foundations and piling and a retaining wall.

³ Under sections 177(1)(b) and 177(2)(d) of the current Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 3.3 On 7 January 2000, the original owner wrote to the authority informing it that he had elected to use the building certifier to carry out the remainder of the inspections. The owner also requested copies of the inspections that the authority had already carried out.
- 3.4 On 14 January 2000, the authority issued to the original owner a notice to rectify (the equivalent to a notice to fix under the Building Act 2004). The Particulars of Contravention attached to the notice listed the following elements that the authority considered did not comply with the requirements of the Building Code:
- Lack of foundation backfilling protection.
 - Insufficient ground clearances.
 - Sub-floor framing issues.
 - Use of wall angle bracing for the roof framing.
 - Insufficient inter-floor connectors and bottom plate fixings.
 - Use of roof strapping to provide wall bracing and pile to bearer connections.
 - The house not being built in accordance with approved or amended drawings.
- 3.5 No further information has been provided to me on inspections that may have been carried out by the building certifier, and it appears that the original owner did not seek a code compliance certificate. The building certifier's approval as a certifier expired on 30 December 2004.
- 3.6 Some 5 to 6 years after purchasing the property the applicant sought to obtain a code compliance certificate.
- 3.7 In an email to the applicant dated 25 October 2012, the authority stated that it could not issue a code compliance certificate for the house. The authority noted the limited inspections it had carried out and that the building certifier had not supplied sufficient or adequate documentation regarding its involvement. The authority also forwarded a copy of its 14 January 2000 notice to rectify.
- 3.8 The Ministry received an application for a determination on 2 November 2012.

4. The submissions

- 4.1 The applicant did not make a formal submission in support of the application but attached copies of
- the email from the authority dated 25 October 2012
 - the Particulars of Contravention issued by the authority on 14 January 2000
 - invoices regarding the deck re-surfacing and the supply of a ventilation system.
- 4.2 The authority acknowledged the application for determination but made no formal submission in response. The authority provided copies of
- the building consent documentation
 - some of the plans and the specifications
 - the authority's 1999 inspection record

- the notice to rectify issued by the authority on 14 January 2000
- correspondence with the original owner and with the applicant.

4.3 A draft determination was issued to the parties for comment on 25 March 2013.

4.4 The applicant and authority both accepted the draft without further comment in responses received on 4 and 11 April 2013 respectively.

5. The expert's report

5.1 As described in paragraph 1.5, I engaged the services of an expert, who is a registered building surveyor, to assist me. The expert examined the house on 22 February 2013 and produced a report completed on 1 March 2013. Copies of this report were forwarded to the parties on 7 March 2013.

5.2 General

5.2.1 The report described the house in general terms and gave some of the background to the dispute. In the expert's opinion, the construction was of a 'roughly finished' construction quality and the external cladding was currently substandard.

5.2.2 The expert noted the following differences between the fitout as constructed and the consented plans:

- The internal layout had been amended and some of these alterations had changed the size and profile of the main deck and exterior north-western wall.
- An additional external door had been installed to give laundry access and the lounge external doors had been moved.
- An additional deck had been constructed on the north elevation over the garage. This deck, which joins the consented cantilevered deck, replaced a proposed roof.
- The lower level storage area had now been lined and an additional window had been installed.

5.3 Moisture testing

5.3.1 The expert carried out non-invasive moisture measurements at locations around the building and recorded the following high levels of moisture penetration:

- 60% adjacent to the north-western deck.
- 70% in areas below the vinyl around the shower area.

5.3.2 The expert also observed the following areas of moisture damage:

- Badly decayed internal framing to the bathroom/laundry partition wall.
- 'Softness' in the northwest deck indicative of decayed framing below.
- Damaged, but currently dry, ceiling framing and linings in the garage below the northwest deck.
- Badly deteriorated building wrap and damaged fixing in areas where wall or subfloor framing is exposed.

5.4 Code compliance

5.4.1 The expert examined various elements of the house and specifically the items listed in the particulars of contravention attached to the notice to rectify. I summarise the expert's comments below.

Clause B1 – Structure

- The foundations appear adequate with no failures observed.
- The one foundation wall that the expert was able to observe was adequately protected from the backfilling adjacent to it.
- The expert was of the opinion that there were no major problems regarding the other items raised by the authority in relation to the sub-floor framing, the inter-floor connections, bottom plate fixings, and the wall and roof strapping. The expert also observed that the house had stood undamaged from high winds for 13 years, which indicated that it was sufficiently braced.
- Additional bracing and strengthening was required where the garage corner stud had been cut away to accommodate the meter box.
- The laundry cupboard, which contains a tub and a washing machine, has moved away from the wall lining, suggesting floor movement pulling the two walls apart. Structural flooring repairs had been completed, however there was still badly decayed internal framing in place.

Clauses E2 – External moisture and B2 – Durability

Cladding

- The foundation wall is coated in a bitumen-type product with evidence of black plastic sheet and is then protected with a fibre-cement board. There were no indications of failures.
- While the ground level clearances to the cladding did not meet the requirements of NZ 3604, the expert considered that given the location and the adjoining hard-draining surface, there was no failure to comply with Clause E2.
- The lower-level plywood cladding is incomplete and poorly finished, with missing sections and gaps between sheet joints clearly showing exposed framing, damaged fixings and building wrap.
- The upper-level weatherboard cladding finish detail is poor with multiple locations where water will be able to penetrate such as; no plugs at the junctions with the external joinery, proud vertical battens with no flashings, and no flashings around the meter box.
- The weatherboards had not been installed so as to protect some sub-floor framing and there was no cladding fixed below the meter board.
- The head flashings to the exterior joinery were inconsistent and one widow lacked a head flashing.
- The unpainted fibre-cement eaves soffit lining is also not finished at its junctions with the walls
- North elevation roof gutters were blocked with plant growth.

Decks

- The membrane to the cantilevered deck was not carried up under the adjacent weatherboards and the deck joists were not flashed where they penetrated the cladding.
- The northwest deck lacked falls, was holding water, had no controlled drainage, and had moisture ingress problems.
- The deck barrier posts penetrations to the decks were inadequately constructed.

Exterior envelope in general

- The expert was of the opinion that the building was not compliant with Clauses B2 and E2. However, as the external envelope had the ability to drain moisture and dry out, the expert expected that there would only be discrete localised areas of framing damage.

Clause C2 – Means of escape

- The single smoke alarm installed in the kitchen was not working and no alarm had been installed to cover the lower bedroom. (Refer paragraph 6.2.3).

Clause E3 – Internal moisture

- Vinyl floor coverings do not adequately meet the shower/bath junctions and the silicon sealant has failed and was mouldy. High moisture readings were recorded in areas below the vinyl around the shower area.

Clause F4 – Safety from falling

- The deck balustrades were not firmly secured.
- The internal stair handrail was poorly fixed.

Clause G12 – Water supplies

- The bathroom vanity tap was running continually and could not be turned off or on.

Clause G13 – Foul water

- A plastic sub-floor waste pipe had a broken bracket.
- The terminal roof vent lacked a vent cap.

5.4.2 The expert investigated the house in respect of other Building Code elements and commented as follows:

E1 – Surface water

- Other than the blocked northern roof gutter the remaining storm water system, which drains via a number of collection sumps before entering exit drainage, appears to be adequate and working without signs of obvious problems.

F2 – Hazardous building materials

- All appears satisfactory with a small high bathroom window being compliant.

G4 – Ventilation

- All areas have adequate ventilation with opening windows and or mechanical extractors.

G7 – Natural light and G8 – Artificial light

- No issues noted.

G11 – Gas as an energy source

- Gas supplies the kitchen hob and heats water via an outdoor caliphont. (No issues noted)

H1 – Energy efficiency

- Insulation observed in visible internal walls behind the lower bedroom and within the ceiling cavity.
- Sub floor foil in place.

5.4.3 In respect of Clauses G1 – Personal hygiene, G2 – Laundering, and G3 – Food preparation and prevention of contamination; the expert noted that while the facilities when they were installed would have been code-compliant, he held concern as to whether they would now be considered sanitary.

6. Discussion**6.1 The application of section 95A**

6.1.1 Section 95A of the current Act states that if an authority refuses to issue a code compliance certificate, it:

... must give the applicant written notice of—
the refusal; and
the reasons for the refusal.

6.1.2 The provisions of section 95A apply irrespective of the involvement of a building certifier: if an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which is likely to include a detailed assessment of the work concerned. In cases involving a building certifier an authority may suggest an owner to apply for a certificate of acceptance if the issue of the code compliance certificate is refused.

6.1.3 In this instance I note the authority has not carry out an inspection recently and based its refusal on the particulars of contravention listed in the notice to rectify issued in 2000, the fact that the building work was constructed under the supervision of a building certifier, and that the authority has no record of inspections having been carried out by that certifier. Neither has the applicant sought the advice of a building surveyor to provide a report on compliance of the building work (as suggested in the authority's email of 25 October 2012).

- 6.1.4 I consider the authority did not place itself in a position where it could make an informed decision about the code compliance of the building work; accordingly I conclude the authority incorrectly exercised its powers under section 95A in respect of the reasons provided for its refusal to issue a code compliance certificate.

6.2 Compliance with the Building Code

- 6.2.1 The test whether compliance has been achieved for consents issued under the former Act applies irrespective of the involvement of a building certifier or not. Section 436 requires the assessment of code compliance to be made against the requirements of the Building Code that were in force at the time the consent was issued. The involvement of a building certifier does not effect the application of the transitional provisions.
- 6.2.2 Taking into account the expert's comments, the following table summarises my conclusions on items in the notice to rectify and the other items identified by the expert during his assessment:

Items in the notice to rectify	My conclusions	Clauses	Paragraph references
Lack of foundation backfilling protection	Complies	E2, B2	5.4.1
Insufficient ground clearances	Complies	E2	5.4.1
Sub-floor framing issues	Complies	B1	5.4.1
Use of wall angle bracing for the roof framing	Complies	B1	5.4.1
Insufficient inter-floor connectors and bottom plate fixings	Complies	B1	5.4.1
Use of roof strapping to provide wall bracing and pile to bearer connections	Complies	B1	5.4.1
The house not being built in accordance with approved or amended drawings	As-built drawings to be provided	n/a	5.2.2 & 7.3
Other non-compliant items identified	My conclusions		
Structure			
Garage corner stud where cut away to accommodate the meter box.	Additional bracing and strengthening required	B1	5.4.1
Decayed internal framing to the laundry/bathroom partition wall	Remedial action required	B1, B2	5.4.1
Northwest deck framing	Further investigation and remedial action required.	B1, B2	5.3.2
Damaged fixing and/or framing in areas where wall or subfloor framing is exposed.	Further investigation and remedial action required.	B1, B2	5.3.2
External envelope (cladding and decks)			
Incomplete plywood cladding to the lower-level plywood cladding	Remedial action required	E2	5.4.1
Lack of cladding below weatherboard and inadequate installation to protect sub-floor framing	Remedial action required	E2	5.4.1
Detailing to upper level weatherboard cladding; including but not limited to those details identified by the expert as noted in this determination.	Remedial action required	E2	5.4.1
Head flashings to exterior joinery	Remedial action required	E2	5.4.1
Fibre-cement offits not finished at wall junction and not painted	Remedial action required	E2	5.4.1

Plant growth in north elevation roof gutters	Maintenance required to ensure ongoing compliance	B2 (E2)	5.4.1
Missing knots and painting/staining of cladding	Maintenance required to ensure ongoing compliance	B2 (E2)	5.4.1
Membrane application at cladding juncture	Remedial action required	E2	5.4.1
Flashing to deck joists where penetrating cladding	Remedial action required	E2	5.4.1
Falls to deck, deck drainage, and barrier post penetrations	Remedial action required	E2	5.4.1
Internal moisture			
Floor to bath/shower junctions	Remedial action required	E3	5.4.1
Failed and mouldy silicone sealant	Maintenance required to ensure ongoing compliance	B2 (E3)	5.4.1
Safety from falling			
Deck balustrades were not firmly secured	Remedial action required	F4	5.4.1
The rear stair handrail	Remedial action required	F4	5.4.1
Water supplies, foul water, piped services			
The laundry tap	Remedial action required	G12	5.4.1
Broken bracket to plastic sub-floor waste pipe	Remedial action required	G13	5.4.1
The terminal roof vent lacked a vent cap	Remedial action required	G13	5.4.1
Fire safety			
Smoke detectors	Not required at time consent was issued	F7	6.2.3

6.2.3 In respect of the expert's observations regarding smoke detectors, I note that the provision of domestic smoke detectors in the Acceptable Solution for Building Code Clause F7 "Warning Systems", F7/AS1, did not come into effect until April 2003. The building consent was issued in June 1998, and subsequent changes to the Building Code (and any associated changes to the relevant Acceptable Solutions) cannot be enforced retrospectively. However, irrespective of this, I strongly suggest that an additional smoke detector be installed and the existing one re-activated.

6.2.4 In respect of the expert's comments regarding the current state of the personal hygiene, laundry and food preparation areas; I note that the test for compliance is against the performance requirements of the Building Code and I consider that matters of housekeeping are relevant only in terms of maintenance of the facilities themselves to meet the durability requirements of those building elements.

6.2.5 Based on the expert's report, I consider that the building work complies with the remaining clauses of the Building Code that was current at the time of the issue of the consent.

Conclusion

6.2.6 I consider the expert's report clearly establishes that the current performance of the building envelope is not adequate because there is evidence of moisture penetration and of decay. Consequently, I am satisfied that the house does not comply with Clause E2 of the Building Code.

- 6.2.7 In addition, the building is required to comply with the durability requirements of Clause B2. Clause B2 also 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 cladding faults on the house will continue to allow the ingress of moisture in the future and as there is already damage and decay present in some areas of the framing, I consider the house does not comply with Clause B2.
- 6.2.8 Given the non-compliance with Clause E2, the likelihood of a lack of treatment to the external framing, and the expert's limited investigation, the building's current and ongoing compliance with Clause B1 must also be considered in any further investigation. The rectification of the building will require careful investigation into the causes, extent, level and significance of moisture ingress, and any required timber replacement in the framing. I note here that the cladding materials in the house are already around 12 years old and nearing the minimum effective life required for these elements.
- 6.2.9 Given the above, and in addition the further items of non-compliance identified by the expert, I am satisfied that the house does not comply with the Building Code that was in force at the time the consent was issued and that the authority was correct in its decision to refuse to issue the code compliance certificate.

6.3 The appropriate certificate to be issued

- 6.3.1 Section 437 of the current 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 building consent authority may, on application issue a certificate of acceptance. Section 437 does not prevent an authority from issue a code compliance certificate if it believes the work is fully compliant. In the case of this building, the applicant was seeking a code compliance certificate.
- 6.3.2 Where there is reasonable grounds to conclude that the building work can be brought into compliance with the Building Code that was in force at the time the building consent was issued, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.
- 6.3.3 I also accept that, in considering the issue of a code compliance certificate, the age of the building work raises 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.
- 6.3.4 I continue to hold the views expressed in previous relevant determinations; that an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009⁵). However, because of the extent of further investigation required for this house and the potential impact of such an investigation on the external envelope, I am not satisfied that there is sufficient

⁵ Codewords articles are published by the Ministry and are available on the Ministry's website at www.dbh.govt.nz/codewords-index

information on which to make a decision about this matter at this time and I leave this matter to the parties to resolve in due course.

- 6.3.5 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.

7. What happens next?

- 7.1 The authority should now issue a notice to fix that requires the owner to bring the building into compliance with the Building Code. The notice to fix should list the items identified as non-compliant in paragraph 6.2.2 and the investigation required as noted in paragraph 6.2.8, and refer to any further defects that might be discovered in the course of investigation and rectification but should not specify how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the building 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 In response to the notice to fix, the owner 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. I note that should remedial work not be undertaken potential future degradation may make the building a 'dangerous building' under section 121 of the current Act.
- 7.3 I also note that the expert has identified changes from the consent drawings, and I leave these to the parties to resolve once the appropriate remedial work is satisfactorily completed.

8. The Decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that
- the authority incorrectly exercised its powers in respect of the reasons provided for refusing to issue the code compliance certificate
 - the house does not comply with Clauses B1, B2, E2, E3, F4, G12, and G13 of the Building Code that was current at the time the building consent was issued, and accordingly I confirm the decision of the authority to refuse to issue a code compliance certificate for consent No 43311.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 April 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal.

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code 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.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.