



## Determination 2013/056

### Regarding the refusal to issue a code compliance certificate for 11- to 13-year-old alterations and additions to a house at 1 Sillary Street, Hamilton



#### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the 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 owners of the house, R Yee and F Mafileo (“the applicants”)
  - Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for 11- to 13-year-old additions and alterations to an existing house.
- 1.4 The matter to be determined<sup>2</sup> is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this, I must consider:
  - whether the building work complies with the clauses<sup>3</sup> of the Building Code (First Schedule, Building Regulations 1992) relevant to these additions and alterations (I consider this in paragraph 6)
  - whether the authority correctly exercised its powers of decision in respect of a refusal to issue a code compliance certificate (I consider this matter in paragraph 7).

<sup>1</sup> The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

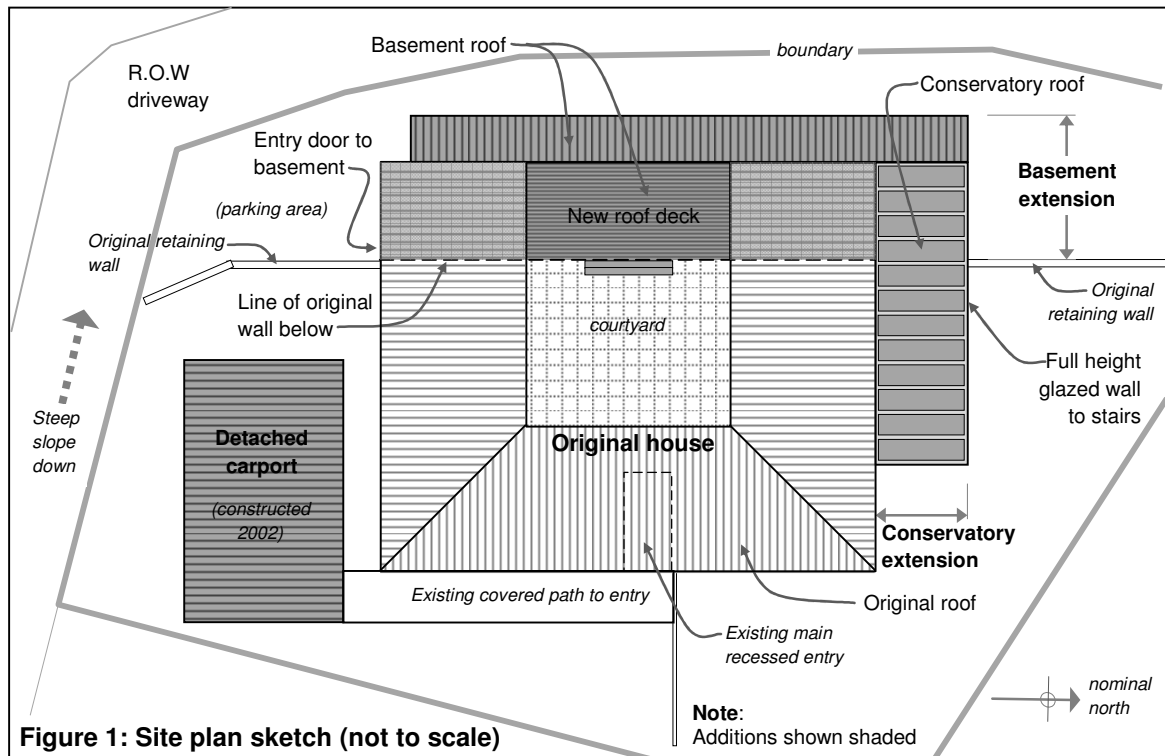
<sup>2</sup> Under sections 177(1)(b) and 177(2)(d) of the Act

<sup>3</sup> In this determination, references to sections are to sections of the Act and references to clauses are to clauses of 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 Ministry to advise on this dispute (“the expert”) and the other evidence in this matter.

## 2. The building work

- 2.1 The building work consists of alterations and additions to a detached house situated on a steeply sloping site in a medium wind zone<sup>4</sup> for the purposes of NZS 3604<sup>5</sup>. Vehicle access from the street above is via a shared right-of-way driveway. The expert has taken the main entry as facing east, and this determination follows that convention as shown in Figure 1:



## 2.2 The original house

- 2.2.1 The original single-storey house was constructed in the mid-1950’s, with a simple U-shaped plan of about 150m<sup>2</sup> around a west-facing courtyard. A concrete block retaining wall extended across the site; under the north and south wings, the edge of the courtyard and the edge of a small deck to the northwest corner. A covered walkway extended from a south parking area to an east recessed entry.
- 2.2.2 Construction appears to have been generally conventional light timber frame, with a mix of concrete and tile pile foundations, vertical shiplap cladding, timber joinery and profiled metal roofing to the low-pitched roof.

## 2.3 The 2000 building consent

- 2.3.1 The alterations and additions included under the building consent were
- construction of a part basement along the west elevation; extending from the original retaining wall to about 1.4m beyond the ground floor, providing

<sup>4</sup> According to the LIM report

<sup>5</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2 bedrooms, a bathroom and a living area with kitchen facilities
- full height glazing and doors opening to the north from the living area
- a flat membrane roof which infilled the area between the original north wing, the edge of the courtyard and the south wing, with removable timber decking installed over the membrane
- a lean-to roof along the west elevation
- additions to the original deck area to provide a conservatory, which includes
  - extending the floor above the original paving to the north and east, with stairs to the basement living area below
  - a steel framed structure supporting a double-glazed aluminium lean-to roof, with full-height glazed walls that extend down with the staircase
- a free-standing carport structure to the south.

## 2.4 The completed house

### 2.4.1 The completed house provides

- a two-bedroom self-contained unit in the basement with
  - two bedrooms and a bathroom
  - an open kitchen/living area opening to an external area to the north
  - a separate entry from a south parking area
- in the main ground floor
  - living, dining and kitchen areas in the north wing
  - a conservatory to the north, with a staircase to the basement below
  - two bedrooms, a bathroom and a sitting room in the south wing
  - the main entry to the east, adjacent to the laundry and a study.

2.4.2 Construction is generally conventional light timber frame construction with some specifically engineered components. The house has concrete, concrete block and timber pile foundations, concrete floor slabs, some timber framed floor areas, cedar shiplap vertical board cladding, aluminium windows and profiled metal roofing. The 10° pitch trapezoidal metal roofs have no eaves or verge overhangs.

2.4.3 The expert was informed by the builder that the framing to the addition was untreated Douglas fir. Given the age of the original house, the majority of the original wall framing is likely to be borax-treated or rimu timber. I therefore consider that most of the wall framing in this house is likely to provide some limited resistance to fungal decay.

## 3. Background

3.1 I have received very little information on the background of this building work, so the following is based on the limited information available to me.

3.2 The authority issued building consent No. 627/2000 on 15 May 2000 under the Building Act 1991. I have not seen a copy of the building consent, but the authority's inspection summary notes the consent number and issue date.

### 3.3 The house alterations and additions

3.3.1 The consent documents included a Producer Statement (Design) dated 6 April 2000 for structural elements in the additions. The structural engineer also provided the authority with a letter dated 6 April 2000 confirming that he had been engaged ‘to inspect the structural engineering content’ for the specifically engineered elements.

3.3.2 According to the inspection summary, it appears the authority carried out the following inspections during 2000:

- foulwater drainage on 19 June
- foundations on 30 June
- concrete floor on 12 July
- pre-line plumbing on 8 August
- pre-line building on 12 October, which was the last inspection recorded.

3.3.3 The date of the pre-line inspections indicates the building work was substantially completed by 2001, although no final inspection was carried out.

### 3.4 The carport

3.4.1 It seems that the carport was not constructed until 2002, as the ‘as-laid drainage plan’ dated April 2002 shows the carport outline, with only the south wall of the house shown and the downpipe to the southwest corner of the basement addition labelled as ‘existing DP’.

3.4.2 The carport stormwater was apparently intended to discharge into a catch pit on the right-of-way, which required an easement. A letter dated 19 October 2002 from a technical services officer of the authority’s drainage unit noted that the carport’s stormwater disposal was a change from the building consent and expressed a neighbour’s concern at the lack of progress. The letter concluded:

Can you please attend to this as soon as practicable and the building consent code of compliance can be issued.

3.4.3 The carport stormwater was finally inspected on 24 February 2004, but no final inspection of all building work under the consent was recorded. It appears that the applicants were not aware of any unresolved matters and I have no record of any further advice from the authority on the building work.

3.5 In 2007 the authority developed a policy for managing building consents issued under the Building Act 1991; and its ‘Building Unit Policy’ dated 25 May 2007<sup>6</sup> outlined the policy as (in summary):

- Code compliance certificates will not be issued for consents issued under the former Act.
- Consent records will be removed from circulation and stored.
- Applications for code compliance certificates will be refused and owners given options to:
  - apply to the Ministry for a determination, or
  - obtain a building report from an independent expert to lodge on the file.
- Any information on the property file will be made available on the LIM.

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<sup>6</sup> Sourced from another determination for a house inspected by the same authority

- 3.6 According to the applicants, they remained unaware of the situation despite seeking assurance from authority staff on several occasions as to whether ‘there were any issues or things we needed to attend to.’ They had also interpreted the authority’s letter of 19 October 2002 (see paragraph 3.4.2) as indicating a code compliance certificate would be issued as soon as the drainage easement was resolved.
- 3.7 It appears that the applicants did not discover that the alterations lacked a code compliance certificate until finding it recorded in the LIM report when selling the house. At a meeting with the authority, the applicants were apparently informed that no code compliance certificate would be issued without a determination.
- 3.8 The authority did not inform the applicants in writing of the refusal and the reasons for that decision. As far as I am aware, the authority has not inspected the building work in response to the request for a code compliance certificate nor has it made any attempt to assess the work’s compliance (I address this further in paragraph 7).
- 3.9 The Ministry received an application for a determination on 22 May 2013 and sought further information from the authority on the reasons for its apparent refusal to issue a code compliance certificate. Despite repeated requests, no response was received from the authority.

#### **4. The submissions**

- 4.1 The applicants made a brief submission dated 17 May 2013, noting that the authority had told them that no code compliance certificate would be issued without a determination as the work was ‘outside the ten year time frame’.
- 4.2 The applicant forwarded copies of
- the consent drawings
  - the inspection summary
  - various certificates, producer statements and other information.
- 4.3 The authority made no submission and submitted no information, and did not acknowledge the application for determination.
- 4.4 In making no submission and not responding to requests for clarification, the authority has not provided any evidence as to why it believes the building work is not code-compliant. I do not believe that this is acceptable. It is important that, should an owner be declined a code compliance certificate, they be given clear reasons why. This requirement is set out in section 95(a) of the Act. The owner can either then act on those reasons or apply for a determination if they dispute them (I address this further in paragraph 7).
- 4.5 A draft determination was issued to the parties for comment on 19 August 2013.
- 4.6 Both the applicants and the authority accepted the draft without further comment in responses received on 3 September and 9 September respectively.

## 5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert inspected the house on 3 July 2013, providing a report dated 16 July 2013 which was provided to the parties on 17 July 2013.

5.2 The expert noted that the consent drawings were 'rather brief and sketchy' and as a result are difficult to interpret. However, he noted a number of changes, including:

- In lieu of timber, the conservatory glazing is a proprietary aluminium system with a double-glazed roof. (I also note that the enclosed conservatory area appears to have increased)
- The glazing system was installed by the window suppliers and includes a full-height glazed wall above the foundation wall to the stairs, in lieu of a full-height concrete block wall as shown on the elevations.
- The layout of the basement has changed as follows:
  - Two bedrooms in lieu of three, with a bathroom replacing a bedroom.
  - Kitchen facilities added and the living area extended into the former bathroom area shown on the drawings.(I also note that the store to the south appears to have been deleted, with an external entry added to make the unit self-contained, and that the consent site plan does not show the carport.)

### 5.3 The exterior claddings

5.3.1 The expert noted that the cedar shiplap is 'well installed' and the stained finish is in good condition. All flashings appeared 'tidy, effective and compliant' and interior linings, trim and finishes were also in good condition. The expert considered that the 'overall quality of finish, the materials used and the workmanship involved is generally of a high standard' and the level of maintenance is also 'very good.'

5.3.2 The expert noted that aluminium windows and doors appeared 'well installed with good detailing observed'. Windows are face-fixed against the cladding, with head flashings projecting beyond the jambs. Jambs appear to be satisfactorily sealed, and drainage gaps are provided under sill flanges and above head flashings.

5.3.3 The expert also observed that cladding clearance above ground and paving was generally satisfactory at 150mm or more above the adjacent pebble strip, with the shiplap boards overlapping the foundation walls by a minimum of 50mm.

5.3.4 The timber deck extending from the original courtyard is constructed above the new membrane roof to the basement. The membrane is butyl rubber on a plywood substrate and the decking is constructed as floating panels to allow removal for maintenance of the roof below. The deck appeared 'well constructed' and there was no evidence of leaks in the basement below.

### 5.4 Moisture testing

5.4.1 The expert inspected the interior of the house and noted no evidence of moisture. The expert took non-invasive moisture readings internally and all readings at ground floor level were within acceptable levels.

5.4.2 However in the basement, there were signs of moisture at the bottom of the glazed north stairwell wall. The expert peeled carpet back at the bottom of the stairs;

revealing minor corrosion to fixings and a 26% invasive moisture reading in the bottom plate. The expert considered that garden soil and plants against the bottom of the stairwell glazing was the reason for the elevated moisture.

- 5.4.3 The expert took a sample invasive reading above the roof/wall junction, through the sill reveal into the sill plate, recorded at 18%. Further invasive moisture readings through internal linings into the bottom plate of the west basement wall varied from 16% to 18%.
- 5.4.4 Moisture levels over 18% indicate that moisture is likely to be penetrating into the framing and further investigation and remedial work is required. I also note that the expert's testing was undertaken in winter during 'overcast and showery weather and therefore consider that readings will represent the higher level of seasonal variation.

## **5.5 Compliance with the relevant code clauses**

- 5.5.1 In regard to claddings (Clauses E2 and B2), the expert noted that ground levels are too close to the glazed stairwell wall on the north wall of the basement; allowing moisture to penetrate into the bottom plate at the bottom of the stairs.
- 5.5.2 The expert also commented on the compliance of the alterations with other relevant clauses of the Building Code and I have included his observations in paragraph 6. The only other area of non-compliance noted was that the lack of a handrail to the basement stairs (in regard to Clause F4 Safety from falling).
- 5.5.3 The expert concluded that, apart from those items noted above, his investigations had found that the building work 'generally complies in all respects' with the Building Code that was current at the time the consent was issued.

## **6. The code-compliance of the house**

- 6.1 Taking account of the expert's report and the other limited evidence; I have assessed the compliance of these additions and alterations with relevant clauses of the Building Code. The following addresses those clauses.

### **6.2 Clause B1: Structure**

- 6.2.1 The engineer's producer statement for design covered 'bracing portals' and his letter to the authority dated 6 April 2000 clearly confirmed his intention to 'inspect the structural engineering content'. I consider it likely that the engineer did inspect specifically designed structural elements during construction in 2000; however I have seen no records or a Producer Statement (Construction Review).
- 6.2.2 The remaining building work is fairly simple and conventional; the inspection summary shows that the authority carried out inspections of foundations, the concrete floor slab and the timber framing/bracing at pre-line stage in 2000. I also note that all structure is visible for the free-standing carport.
- 6.2.3 The expert noted no visible signs of structural settlement, movement or other 'signs of distress regarding the structural integrity of the additions', with no 'springy floors, sticking doors or cracked linings'.

### **6.3 C Clauses: Fire safety**

6.3.1 I note that the additions have provided for a self-contained unit in the basement level with kitchen and bathroom facilities and separate access. There is nothing preventing a single household unit from having two separate sets of kitchen and hygiene facilities, or separate access; however, prior to issuing any code compliance certificate the authority should satisfy itself as to whether the building is a multi-unit dwelling and if so the compliance in respect of the associated fire safety clauses.

### **6.4 Clause E1: Surface water**

6.4.1 The expert observed no evidence of unsatisfactory surface water discharge; noting that the builder indicated that the authority advised him to connect all stormwater to an existing catchpit on the site as soakholes were not permitted in the area. (I assume the builder's comment refers only to stormwater from the 2000 basement addition.)

6.4.2 The 2002 construction of the carport resulted in carport stormwater being discharged into an existing catchpit on the right-of-way and an easement required to achieve this resulted in the carport drainage inspection being delayed until 24 February 2004.

### **6.5 Clause E2: Weathertightness**

6.5.1 The claddings generally appear to be installed in accordance with good trade practice at the time of construction and have been well maintained since that time. However taking account of the expert's report, I conclude that investigation and remedial work is necessary in respect of ground levels beneath the sloped bottom of the glazed north wall and the elevated moisture in the bottom plate at the bottom of the staircase.

6.5.2 Because there is evidence of moisture penetration in the above area, I am satisfied that the additions and alterations do not comply with Clause E2 and Clause B2 of the Building Code. However, this is limited to a discrete area and I am able to conclude that satisfactory investigation and rectification of that area will result in the claddings being brought into compliance with Clauses E2 and B2 of the Building Code.

### **6.6 Clause E3 Internal moisture**

6.6.1 The expert observed no areas of non-compliance resulting from the accumulation of internal moisture.

### **6.7 Clause F2 Hazardous building materials**

6.7.1 The expert noted that safety glass had been used in all areas where required.

### **6.8 Clause F4 Safety from falling**

6.8.1 The expert observed that restrictor stays had been fitted to many windows and I note that the upper deck is protected with a 2m high glazed screen. However, although there is a balustrade around the top of the stairs, the expert noted that the stair down to the basement had no handrail.

### **6.9 Clause G1 to G8 (Personal hygiene, Laundering, Food preparation, Ventilation, Interior environment, Natural light, Electricity and Artificial light)**

6.9.1 There appears to be sufficient kitchen, bathroom and laundry facilities provided, along with adequate provisions for natural light.



6.9.2 The expert noted that natural ventilation and artificial lighting appeared satisfactory, and extract fans vented to the outside were provided in bathrooms. No evidence of non-compliance was observed.

## **6.10 Clause G12 Water Supplies and G13 Foul Water**

6.10.1 The authority carried out inspections of foulwater drainage and pre-line plumbing. The expert noted that there were no apparent problems, with vented water traps to sinks and basins provided and water emptying satisfactorily from sanitary fittings.

6.10.2 The expert noted that hot water was provided from an external gas fired heater mounted on the east wall and provided 40° water at 15 litres per minute.

## **6.11 Clause H1 Energy Efficiency**

6.11.1 The expert removed electrical face plates in the exterior wall of the basement and confirmed that fibreglass insulation had been installed.

## **6.12 Conclusion**

6.12.1 Taking account of the above observations and the expert's report, I conclude that investigation and remedial work is necessary in respect of the following areas:

- in regard to the claddings (Clauses E2 and B2):
  - investigation of the bottom plate at the bottom of the staircase to assess the condition of timber where moisture has penetrated
  - the inadequate clearance along the north staircase glazed wall.
- the lack of a handrail to the staircase (Clause F4)
- the possible use of the building as a multi-unit dwelling and the associated fire safety requirements (Clause C).

6.12.2 I consider that the expert's report, the authority's inspection records, the authority's assessment and the other documentation has provided me with reasonable grounds to conclude that the building work complies with the remaining clauses of the Building Code.

6.12.3 The as-built construction appears to vary in a number of significant ways from the original consent drawings (see paragraph 5.2). I have no information as to whether amendments to the building consent were approved to cover these changes and I leave this matter to the parties to resolve in due course.

6.12.4 Effective maintenance is important to ensure ongoing compliance with the Building Code and is the responsibility of the building owner. The Ministry has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

## **7. The authority's refusal**

7.1 Regardless of a building's age, Section 95A of the Act states that an authority must give an owner 'written notice of the refusal and the reasons for the refusal' to issue a code compliance certificate. In my view, that requires the authority to at least identify the particular aspects of the building work that do not comply. In this case,

the authority provided no written notice but simply indicated that it would not issue a code compliance certificate on the basis of the age of the alterations and additions.

- 7.2 The authority did not inspect the building work in order to observe how the alterations had performed over the past 10 to 12 years, which would have allowed it to identify any non-compliant aspects. No account was taken of particular attributes such as the cladding type, workmanship and maintenance levels, risk features and the current compliance level. The applicants were given no specific reasons for the refusal, and consequently no information on what was required in order to obtain a code compliance certificate.
- 7.3 In my opinion, the authority has failed to satisfy the requirements of section 95A as it did not attempt to identify whether the building work was code compliant. A generalised verbal refusal that fails to identify non-compliant aspects of the building work is not sufficient to fulfil the authority's obligations under section 95A. If the authority believes code compliance has not been achieved in any given situation it must formally advise an owner of the reasons for the refusal and, if necessary, issue a notice to fix requiring the building work to be brought into compliance with the Building Code.

## **8. What is to be done now?**

- 8.1 The applicants should bring the alterations into compliance with the Building Code (refer to the items listed in paragraph 6.12.1) and investigate and repair any further defects that might be discovered in the course of investigation and rectification of those items. I suggest that the applicants submit a proposal on the remedial work to the authority for approval.

### **8.2 Durability**

- 8.2.1 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).
- 8.2.2 In this case the delay since the completion of the building raises concerns that many 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.
- 8.2.3 I have considered this issue in many previous determinations and I maintain the view that
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all 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 at the time of substantial completion.
- 8.2.4 I therefore leave the matter of amending the building consent to modify Clause B2.3.1 to the parties.
- 8.3 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 of decision correctly when it refused to issue the code compliance certificate without the provision of reasons under section 95A.

9.2 Notwithstanding the above, I also determine that

- the basement addition does not comply with Building Code Clauses B2 and E2
- the staircase to the basement does not comply with Clause F4

and accordingly, I confirm the authority's refusal to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 23 September 2013.

John Gardiner

**Manager Determinations and Assurance**