



Determination 2014/006

Regarding the refusal to issue a code compliance certificate for a 13-year-old house with monolithic cladding at 46 Stott Drive, Darfield



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 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 building owners, JM & HH Frew (“the applicants”), acting through a legal adviser as an agent
- Selwyn District Council, carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).

1.3 I have also identified the following as persons with an interest in respect of this determination:

- the previous building owners, DJ & WD Grice acting through the builder as an agent (“the builder”).

1.4 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the house because it was not satisfied that the building work complied with certain clauses of the Building Code² (Schedule 1, Building Regulations 1992). The authority’s concerns relate to durability due to the age of consent (refer paragraph 3.3) and that the authority would remain liable for a further ten years from the date of issue of any code compliance certificate.

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 to sections are to sections of the respective Building Acts and references to clauses are to clauses of the Building Code.

- 1.5 The matter to be determined³ is therefore the authority's exercise of its powers of decision when it refused to issue a code compliance certificate for the house for the reasons given to the applicants. In making this decision I must consider whether the building work, in particular the external envelope, complies with the Building Code that was in force at the time the building consent was issued.
- 1.6 In making my decision, I have considered the submissions, 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 considered in this determination consists of a single-storey house ("the house") situated on a flat site located in a high wind zone for the purposes of NZS 3604⁴. The house is moderately complex in plan and form, and is assessed as having a low to moderate weathertightness risk.
- 2.2 The construction of the house is generally conventional light timber frame, with a concrete floor slab and foundations, recessed aluminium joinery and pressed metal tiles over a hip and gable roof. The wall cladding is a proprietary form of monolithic cladding system known as EIFS⁵, consisting of plastered 60mm polystyrene backing sheets direct fixed to the timber framing. Eaves are 600mm to most walls with raking parapets at gable ends.
- 2.3 The expert noted that testing indicated the timber framing was most likely untreated *Pinus Radiata*. Given this and the date of construction in 2000/2001, I consider that the external wall framing is unlikely to be treated.

3. Background

- 3.1 On 9 October 2000 the authority issued building consent No. 002092 for the house under the Building Act 1991. The authority carried out inspections during construction and an interim code compliance certificate was issued on 30 March 2001. Seven outstanding work items were noted for rectification on the notice of inspection dated 21 March 2001.
- 3.2 No further documentation related to code compliance appears to be recorded on the authority's file for some ten years, with the following subsequent activity:
- Independent report ("the cladding report") by a building surveyor dated 16 December 2011 identifying various at-risk cladding details.
 - Authority inspection dated 16 April 2012, noting that outstanding work items recorded in the previous 21 March 2001 inspection were completed.
 - Written statement ("the work statement") by a plasterer dated 15 May 2012 detailing various repairs and cladding maintenance undertaken.
 - Authority letter dated 29 May 2012, inviting notification on completion of six required items identified in an inspection carried out on 7 June 2012.
 - Application for a code compliance certificate lodged on 31 May 2012.
 - Authority inspection on 7 June 2012, listing seven outstanding items to complete.

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

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ Exterior Insulation and Finish System

- 3.3 On 14 June 2012 the authority wrote to the then owners declining issue of a code compliance certificate. The authority gave its reasons as being (in summary):
- Durability given the age of the building work.
 - A lack of regular maintenance, moisture penetration, inadequate ground clearances and unsealed penetrations, with areas of unprotected cladding and unpainted plaster (based on the cladding report).
 - Under Section 393 of the Act the authority would remain liable for a further ten years from the date of issue of any code compliance certificate.
- 3.4 The Ministry received an application for a determination on 5 August 2013.

4. The submissions

- 4.1 In a covering letter forwarded with the application, the builder described the building work undertaken, provided a timeline and set out the background to the dispute. The builder considered that the house had been built to manufacturer's recommendations and the requirements of the Building Code in force at the time the consent was issued.
- 4.2 The builder advised that the authority was faxed on 18 June 2003 confirming all outstanding items were complete and the builder had assumed that the certificate had been sent out to the then owners.
- 4.3 The builder provided copies of:
- the contract documents
 - the plans of the house and other consent documentation
 - the inspection notices and interim code compliance certificate
 - the correspondence with the authority
 - other documentation including contract documents, producer statements, guarantee, cladding report and work statement.
- 4.4 The builder expressed concern that despite all points on the list provided with the interim code compliance certificate being addressed, the "goal posts" keep moving and new better practice requirements are raised.
- 4.5 I note here that the performance requirements of Clause E2 have not changed to any significant extent since the Building Act came into force; there is however a better understanding of the performance of particular materials and construction methods and changes had been made to the Acceptable Solutions.
- 4.6 The authority responded to the builder's submission on 17 September 2013, making various points including the following:
- while the authority had an opinion on the original cladding this is now irrelevant as 'the work has been redone'; the unsigned work statement from the plasterer lacks any detail or evidence to demonstrate compliance
 - the authority has no record of receiving a fax from the builder on 18 June 2003
 - the cladding report does not support the view that the building work was in accordance with the Building Code and manufacturer's requirements

- no investigation was undertaken to determine the extent of any fungal growth or decayed timber present in the walls and bottom plates (as recommended in the cladding report).
- 4.7 The authority provided copies of additional inspection notices to augment those supplied by the builder and the interim code compliance certificate.
- 4.8 In a letter to the Ministry dated 30 October 2013, the builder acknowledged receipt of the expert report and stated that the various outstanding building matters would be addressed. The builder was of the opinion that there are only minor matters to address and that a code compliance certificate should be issued on completion.
- 4.9 A draft determination was issued to the parties for comment on 2 December 2013.
- 4.10 The authority initially responded on 16 December 2013, and did not accept the draft determination. The authority noted some errors and omissions, which have subsequently been corrected, and submitted that
- a photograph in the expert's report shows lichen on the plaster parapet and this is not indicative of the building being well maintained; the BRANZ appraisal for the cladding requires regular maintenance including removal of grime and washing down
 - non-compliance with Clause B1 should be included to take into account the expert's comments on the decay to the entrance canopy gable truss bottom chord.
- 4.11 The builder responded to the draft in a letter dated 13 December 2013 on behalf of the previous owners, requesting the authority issue a notice to fix based on the items identified in paragraphs 5.4 and 5.5.
- 4.12 The applicants' agent responded to the draft in a letter dated 30 January 2014, noting that the applicants generally accepted the findings of the draft and wished to establish what work is required and who is responsible for completing that work. The applicants also requested that the authority 'identify exactly the defects that require remedial work'.
- 4.13 In an email to the Ministry of 31 January 2014, the authority noted that the identifying who was responsible for completing remedial work was likely outside the scope of the determination. In regards to the authority identifying the defects that require remedial work, the authority suggested the owners engage a suitably qualified profession to review the determination and the expert's report; the authority would review any subsequent proposal for the remedial work.
- 4.14 I have taken into account the submissions received and amended the determination as I consider appropriate. I note that establishing who is responsible for the remedial work is outside of the matters that I can determine under section 177 of the Act.

5. The expert's report

- 5.1 As described in paragraph 1.6, I engaged the services of an expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert examined the house on 26 September 2013 and produced a report completed on 16 October 2013. The expert also attached the full report from the biodeterioration consultant on 5 October 2013. Copies of both reports were forwarded to the parties on 24 October 2013.

- 5.2 The expert's report described the house in general terms and gave some of the background to the dispute. In the expert's opinion, the house had generally been finished to an 'acceptable trade standard', although with some poor detailing giving vermin access and allowing moisture entry resulting in decay. The house was tidily presented with reasonably new paint and there was no evidence of the building not having been maintained.
- 5.3 The expert carried out a series of invasive moisture tests and recorded one elevated reading of 23% and two readings of 16% below the arched windows to the lounge.
- 5.4 In respect of the external envelope (relevant to Clauses E2 and B2) the expert made the following observations:
- The curved head flashings over the arched lounge windows do not deflect surface water to the exterior of the building. An elevated moisture reading of 23% was taken in the bottom plate at the base of one of the windows and further investigation revealed swollen and waterstained skirting boards. Laboratory testing indicated dense fungal growths in the timber but found no established decay.
 - The gable parapets above the front entrance and lounge are retro-fitted with metal cappings. The tip of the adjacent roof truss is waterstained and laboratory testing confirmed the presence of decay (I note this is also relevant to Clause B1).
 - Diverters at the ends of apron flashings are adequate, but cladding cracks and raw polystyrene place the adjacent cladding at risk.
 - Vermin have been entering the roof space through a 50mm gap in the roof lounge flashings and there is polystyrene exposed to sunlight and vermin attack.
- 5.5 With regard to other building elements the expert observed some roof insulation was misplaced; down-lights were covered in some areas (Clauses C1 and G9.3.1(e)) and gaps left in other areas (Clause H1).
- 5.6 In addition the expert noted:
- The rims of all aluminium joinery were buried in the plaster; however there were no indications of moisture ingress and no elevated moisture readings in those areas.
 - Cladding clearance around the house is generally 60mm, apart from at the laundry exterior door where there is only 20mm cover. This location is well protected by roof overhang and soffit.
 - The step down from finished floor level to paving level on the west elevation is only 70-80mm, with cladding clearance of 10-20mm. There is only 5mm cladding clearance to the master bedroom timber deck.
 - The concrete block garden wall is in contact with the cladding, preventing maintenance to the cladding.
- The expert observed no evidence of moisture ingress in those areas with minimal clearance, and noted that there was adequate fall to paving and wide soffits and roof overhangs also provided some protection.

6. Discussion

6.1 I note that the original building consent was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under that consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.

6.2 In order to determine the authority's exercise of its powers of decision in refusing to issue a code compliance certificate because of its durability concerns, I must therefore consider whether the building work complies with the Building Code that was in force at the time the consent was granted.

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. In addition there are also items of non-compliance with Clauses H1, C1 and G9.3.1(e). Consequently, I am of the view that the house does not comply with clauses B1, B2, E2, H1, C1 and G9 of the Building Code that was current at the time the consent was issued.

6.3.2 Because the identified faults occur in discrete areas, I am able to conclude that satisfactory investigation and rectification of the areas outlined in paragraphs 5.4 and 5.5 will result in the building work being brought into compliance.

6.4 The durability considerations

6.4.1 I accept that when the issue of a code compliance certificate is being considered, concerns may be raised 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.

6.4.2 Clause B2 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 cladding to remain weathertight for a period of 15 years from the date a code compliance certificate is issued.

6.4.3 I continue to hold the views expressed in previous relevant determinations that, where appropriate, an authority, following the appropriate application from the owner, has the power to grant a modification to the requirements of Clause B2.3.1 of the Building Code for an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009).

6.4.4 The authority is aware of its ability to amend the building consent so that the durability periods in Clause B2.3.1 commence from when the work was substantially complete, and not from the date a code compliance certificate is issued. This matter has been canvassed in many previous determinations involving the authority, and a determination is not required to undertake that process. I therefore leave the modification of Clause B2.3 1, and the agreement of a suitable date, to the parties.

6.4.5 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.

6.5 The delay in seeking a code compliance certificate

6.5.1 The authority included in its letter dated 14 June 2012 that ‘if the BCA were to issue the Code Compliance Certificate it could be subject to civil proceedings for a period of 21 years rather than the 10 years intended by the Act.’

6.5.2 I consider that the period of delay between the issue of a building consent and the request for a final inspection or code compliance certificate does not prevent the authority making a decision with respect to compliance, and is not a ground under the Act for refusing to issue a code compliance certificate. I also note that it is an owner’s responsibility to seek a code compliance certificate on completion of work undertaken under a building consent.

6.5.3 Section 393 provides that, in respect of the issue of a code compliance certificate, the 10 year long-stop limitation period commences from the time the code compliance certificate is issued (section 393(2) and (3)(a) of the Act).

6.5.4 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions.

7. What happens next?

7.1 The authority may issue a notice to fix that requires the owner to bring the building work into compliance with the Building Code, including the defects identified in paragraphs 5.4 and 5.5, together with 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 a notice to fix to specify how the defects are to be remedied and the building 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 Alternatively the authority may elect to deal with the matter via its refusal to issue the code compliance certificate, issued under section 95A of the Act.

7.3 The applicant can then produce a response, to either the notice to fix or the notice issued under section 95A, 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.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work does not comply with the Building Code that was in force at the time of the issue of the consent and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 February 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 The relevant sections of the Act

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.
- (1) 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.
- (2) 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.

A.2 The relevant performance provisions of the Building Code are:

B1 Structure

B1.3.2 Buildings, building elements and sitework shall have a low probability of causing loss of amenity through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during construction or alteration when the building is in use.

B2 Durability

B2.3.1 Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:

- (a) The life of the building, being not less than 50 years, if:
 - (i) Those *building elements* (including floors, walls, and fixings) provide structural stability to the *building* or
 - (ii) Those *building elements* are difficult to access or replace or
 - (iii) Failure of those *building elements* to comply with the *building code* would go undetected during both normal use and maintenance of the *building*
- (b) 15 years if:
 - (i) Those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or
 - (ii) Failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance.
- (c) 5 years if:
 - (i) The building elements (including services, linings, renewable protective coatings, and fixtures) are easy to access and replace, and

- (ii) Failure of those building elements to comply with the building code would be easily detected during normal use of the building.

C1 Outbreak of fire

C1.3.2 Fixed appliances shall be installed in a manner that does not raise the temperature of any building element by heat transfer or concentration to a level that would adversely affect its physical or mechanical properties or function.

E2 External moisture

E2.3.2 Roofs and external walls must prevent the penetration of water that could cause undue dampness, damage to building elements or both.

E2.3.5 Concealed spaces and cavities in buildings must be constructed in a way that prevents external moisture being accumulated or transferred and causing condensation, fungal growth, or the degradation of building elements.

E2.3.7 Building elements must be constructed in a way that makes allowance for the following:

- (a) the consequences of failure

G9 Electricity

G9.3.1 The electrical installation shall incorporate systems to: ...

- (e) Protect *building elements* from risk of ignition, impairment of their physical or mechanical properties, or function, due to temperature increases resulting from heat transfer or electric arc,

H1 Energy efficiency

H1.3.1 The building envelope enclosing spaces where the temperature or humidity (or both) are modified must be constructed to—

- (a) provide adequate thermal resistance; and
- (b) limit uncontrollable airflow.