



## Determination 2014/021

# Regarding the authority's exercise of its powers of decision in respect of issuing a qualified code compliance certificate requiring a Record of Work for basement tanking at 7 Marsh Way, Kaiwharawhara, Wellington

### 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, Tony Marshall, Manager Determinations and Assurance (Acting), 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 A and P Lloyd ("the applicants")
  - 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 decision of the authority to issue a qualified code compliance certificate, as it holds the view that the basement tanking is Restricted Building Work and therefore requires a Record of Work signed off by a Licenced Building Practitioner ("LBP").
- 1.4 The matter to be determined<sup>2</sup> is the authority's exercise of its powers of decision in issuing a qualified code compliance certificate requiring a Record of Work for the basement tanking.
- 1.5 In making my decision I have considered the submissions of the parties and the other evidence in this matter. The relevant legislation is included in Appendix A. The Licensed Building Practitioner Rules 2007 are referred to herein as the LBP Rules.

### 2. The background

- 2.1 The three storey building consists of concrete block foundation and retaining walls with timber framing to the upper levels. There is a low pitch roof with aluminium joinery and weatherboard cladding. The site is located in a very high wind zone.
- 2.2 The tanking work uses a fibreglass reinforced bituminous self-adhesive membrane which is 2mm thick. The product has a current BRANZ appraisal.
- 2.3 On 15 January 2013 the authority issued building consent number 271515 for the building work. The building consent approved the tanking membrane, and noted:

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<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 section 177(1)(b) and 177(2)(d)

...tanking membrane to be applied by an approved installer only in accordance with the BRANZ Appraisal and Manufacturers installation instruction and an Installers certificate to be provided to the [authority] on completion...

- 2.4 On 30 April 2013 the authority completed a site inspection of the tanking work. A copy of the inspection report has been provided by the applicants and shows the authority approved the tanking work.
- 2.5 The applicants applied for a code compliance certificate around 7 January 2014.
- 2.6 Between 14 January 2014 and 28 January, in a series of email correspondence, the applicants and the authority discussed the issuing of a code compliance certificate (refer also paragraphs 3.1 and 3.2).
- 2.7 On 14 January 2014 and 24 January 2014 the applicants sought advice from Ministry officials on the issue (refer also paragraph 3.1.1).
- 2.8 On 10 February 2014 a code compliance certificate was issued with the following statement included in the position description:
- note: [Record of Work] for block wall membrane excluded from [code compliance certificate]
- 2.9 The applicants applied for a determination on 18 March 2014.

### 3. The submissions

#### 3.1 The applicants

3.1.1 The applicants provided a coversheet with their application. Their submission is set out in the email correspondence between the parties dating 14 January 2014 to 28 January 2014. In summary:

- The applicants had the tanking work applied by a certified and approved applicator and provided a manufacturer's warranty. The tanking work was inspected and approved by the authority on 30 April 2013. The applicants submit that the test of reasonable grounds has been met and should not hold up the code compliance certificate.
- The advice received from the Ministry official was that tanking is not considered restricted building work and therefore does not need a licence to undertake the work. The applicants refer to the Carpentry Guide to Restricted Building Work ("the guide")<sup>3</sup>. The advice also stated:

There must be a licensing class with scope to cover the work as provided in the [LBP Rules]. There is no work that fits the description of tanking in the LBP rules and therefore there is no license class for the work. Subsequently, it would not be possible for a Record of Work to be supplied.

- The applicants referenced Determination 2013/030<sup>4</sup> following further advice from a Ministry official (see also paragraph 4.2).

3.1.2 The submission included the following supporting documentation:

- building consent approval from the authority
- notice of advice from the authority regarding LBP's required for building works

<sup>3</sup> *Guide to Restricted Building Work (RBW)* published by the then Department of Building and Housing, January 2012.

<sup>4</sup> Determination 2013/030: Regarding the authority's exercise of its powers of decision in respect of a refusal to amend a building consent for Restricted Building Work carried out to a relocated house

- inspection sheet and inspection list from the authority
- code compliance certificate
- warranty information from the tanking membrane company
- a copy of the guide

### **3.2 The authority**

3.2.1 The authority's view on the matter is set out in the email correspondence between the parties dating 14 January 2014 to 28 January 2014. In summary:

- Tanking is an integral part of the moisture management system of a building and as such fits within the definition of Restricted Building Work.
- The authority relies on the definitions supplied in the Building (Definition of Restricted Building Work) Order 2011 (“the Building Order”)<sup>5</sup>. The authority states

[tanking] fits within the definition of Restricted Building Work as cited in [the Building Order]. Also by its description as defined in section 3 and section 5 “Work that must be carried out or supervised by a [LBP]”
- Schedule 1, Foundations licensing class, competency 4.1.3 (refer appendix) (“competency 4.1.3”) of the LBP Rules for the foundation licence class clearly covers damp proofing in its area of practice. The LBP Rules state that competencies for the areas of practice must be demonstrable and include, but are not limited to, performance indicators of the foundation licence class competencies. Within these competencies or performance indicators are references to NZS 3604 and parts of the Building Code, all of which cover Clause E2 External moisture and management of moisture relating to a building.
- The authority has received legal advice that damp proofing, be it referred to as weather proofing, tanking, or damp proofing, is Restricted Building Work.

### **3.3 The draft determination**

3.3.1 A draft determination was sent to the parties for comment on 25 March 2014. The applicants responded accepting the draft on 28 March 2014.

3.3.2 Despite a further reminder on 10 April 2014, the authority made no response to the draft determination.

## **4. Discussion**

### **4.1 Restricted Building Work**

4.1.1 Restricted Building Work includes the design, construction or alteration of the primary structure or external moisture management system of a house or a small-to-medium apartment building, including the design, construction or alteration of foundations work.

4.1.2 Tanking in itself is not covered by a license class under the LBP Rules. Whilst competency 4.1.3 mentions membrane or emulsion which can be used as types of tanking, it is given as an example of damp proofing. It is not intended, nor

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<sup>5</sup> Sections 3 and 5 Building (Definition of Restricted Building Work) Order 2011

reasonable that someone with a foundations license be able to carry out tanking work.

- 4.1.3 Conversely a specialist tanking applicator would not likely satisfy the competence requirements under Schedule 1 of the Foundations licensing class. Part 1 of the LBP Rules, Rule 4 (refer appendix) requires the LBP to meet all of the competencies set out in Schedule 1 of the licence class – including all other aspects of foundation works. A specialist tanking applicator would not likely hold a foundation licence.
- 4.1.4 Damp-proofing is covered by the LBP Rules and therefore requires an LBP to undertake or supervise installation. In this regard a record of work would be required from the LBP to satisfy section 88 of the Act.
- 4.1.5 In conclusion, tanking in itself is not Restricted Building Work therefore a Record of Work is not specifically required for tanking.

## **4.2 The Code Compliance Certificate**

- 4.2.1 Section 94 of the Act outlines the matters which a building consent authority must consider in deciding to issue a code compliance certificate. A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 4.2.2 Section 94 lists a number of other matters that a building consent authority must have regard to before issuing a code compliance certificate. The absence of a Record of Work is not one of them. The Record of Work simply records the name of the LBP who carried out or supervised the Restricted Building Work and forms the basis for accountability of the LBP to the Building Practitioners Board<sup>6</sup>. The Record of Work has nothing to do with the code-compliance of the work and whether the work that has been carried out complies with the building consent.
- 4.2.3 I note that the Ministry's Guide to Restricted Building Work is a guidance document for Building Officials. It advises that a lack of Restricted Building Work documentation does not play any part in whether the building consent authority is satisfied on reasonable grounds that the building work complies with the building consent.
- 4.2.4 The applicants' tanking work has been approved in the building consent, and noted by the authority as passed following a site inspection. A warranty has been provided. The work carried out clearly complies with the building consent; therefore an unqualified code compliance certificate should have been issued.
- 4.2.5 I note that the building consent application documentation from the authority states at paragraph 5:
- before a code compliance certificate is issued, the following documentation is required:
- Record of building work from licensed building practitioners who carried out or supervised restricted building work.
- 4.2.6 This statement is incorrect; a lack of the required Record(s) of Work is not grounds to refuse a code compliance certificate. I advise that this statement be removed or modified for future use of the authority's building consent application forms.

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<sup>6</sup> The Building Practitioners Board has oversight of the LBP scheme; including investigating and hearing complaints about the conduct of LBP's

## **5. The decision**

- 5.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its power of decision by issuing a qualified code compliance certificate requiring a Record of Work for tanking.
- 5.2 The authority is to modify the code compliance certificate to remove the reference to the Record of Work.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 24 April 2014.

Tony Marshall  
**Manager Determinations and Assurance (Acting)**

## Appendix A

A.1 Sections from the relevant legislation include:

The Building Act 2004:

- 3 external moisture-management system, in relation to a building,—**
- (a) means a system (whether comprising only one or 2 or more building elements) that is intended to provide—
    - (i) resistance to the penetration of the building by moisture from outside it; or
    - (ii) resistance to the accumulation within the building's fabric of moisture that has penetrated it from outside the building; and
  - (b) includes any of the building's building elements that are or form part of damp-proofing, roof cladding or a roof cladding system, a ventilation system, wall cladding or a wall cladding system, or waterproofing; and
  - (c) includes any part of its external moisture-management system
- 94 Matters for consideration by building consent authority in deciding issue of code compliance certificate**
- (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
    - (a) that the building work complies with the building consent; and

Building (Designation of Building Work Licensing Classes) Order 2010

- 5 Declaration of building work that must be carried out or supervised by licensed building practitioner**
- (1) This clause applies to building work of a kind set out in subclause (2) when the building work is the construction or alteration of
    - (a) the primary structure of a house or a small-to-medium apartment building; or
    - (b) the external moisture-management system of a house or a small-to-medium apartment building.

The Licensed Building Practitioner Rules 2007

### Part 1

#### Rule 4: Minimum standard of competence for each class of licence

- (1) The minimum standard of competence for a class of licence is meeting all of the competencies set out for that class of licence in Schedule 1.
- (2) In determining whether a person meets a competency, regard must be had to the extent to which the person meets the performance indicators set out for that competency in Schedule 1.

#### Schedule 1 Licensing Class Competencies

##### Licensing Class: Foundations

##### Competency 4: Carry out foundation work

*This competency may be demonstrated by meeting some or all of the performance indicators in one or more of the following areas of practice.*

**Area of practice 1: Concrete foundation walls and concrete slab-on-ground**

4.1.3 Excavate and prepare for footings and slab on ground in accordance with documentation.

*May include but not limited to – prepare and carry out excavations taking into account position, size, line, level and depth, assess bearing capacity of soil is adequate for foundation type, dispose of excavated soil, place graded hardfill, apply damp proofing material (membrane or emulsion).*