



Determination 2015/054

Regarding the refusal to issue a code compliance certificate for a 21-year-old house at 44B Upper Wainui Road, Raglan

Summary

This determination discusses the code compliance of a 21-year old house set in a rural location. The determination also considers building elements that have satisfied their required durability requirements under Clause B2 and the maintenance of such items.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations 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 this determination are:

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

1.3 This determination arises from the authority’s decision to refuse to issue a code compliance certificate for the 21-year-old house because it was not satisfied that the building work complied with certain clauses of the Building Code (First Schedule, Building Regulations 1992)².

1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers of decision when it refused to issue the code compliance certificate. In deciding this, I must consider:

1.4.1 Matter 1: The code compliance of the building work

Whether the building work complies with the relevant clauses of the Building Code that was current at the time the building consent was issued, both in general and with regards to the specific matters of concern raised by the authority. I consider this matter in paragraph 6.

1.4.2 Matter 2: The durability of the building work

Whether the building elements comply with Clause B2 Durability of the Building Code, taking into account the age of the house. I consider this in paragraph 6.4.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.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 Act and references to clauses are to clauses of the Building Code.

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

- 1.5 I note that the owner will be able to apply to the authority for a modification of durability provisions to allow the durability periods specified in Clause B2.3.1 to commence from the date of substantial completion in about 1994. Although I leave this matter to the parties to resolve in due course, I comment on the matter in paragraph 6.1.2.
- 1.6 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 is a 55m² two-bedroom house located on a sheltered rural site approximately 1km from the coast at Raglan.
- 2.2 It is constructed on a concrete floor with timber framed walls and timber roof trusses. The wall cladding is a fibre-cement weatherboard with metal soakers at the four corners. Over the trusses and building paper is fixed long-run, ribbed, powder-coated metal roofing.
- 2.3 A proprietary synthetic rubber flashing has been used around the only roof penetration for the terminal vent. The 15° pitched roof is a simple gable with a 600mm overhang to each of the long sides of the house, and an approximately 300mm overhang to each of the gable end walls. Exterior doors and windows are coated aluminum.

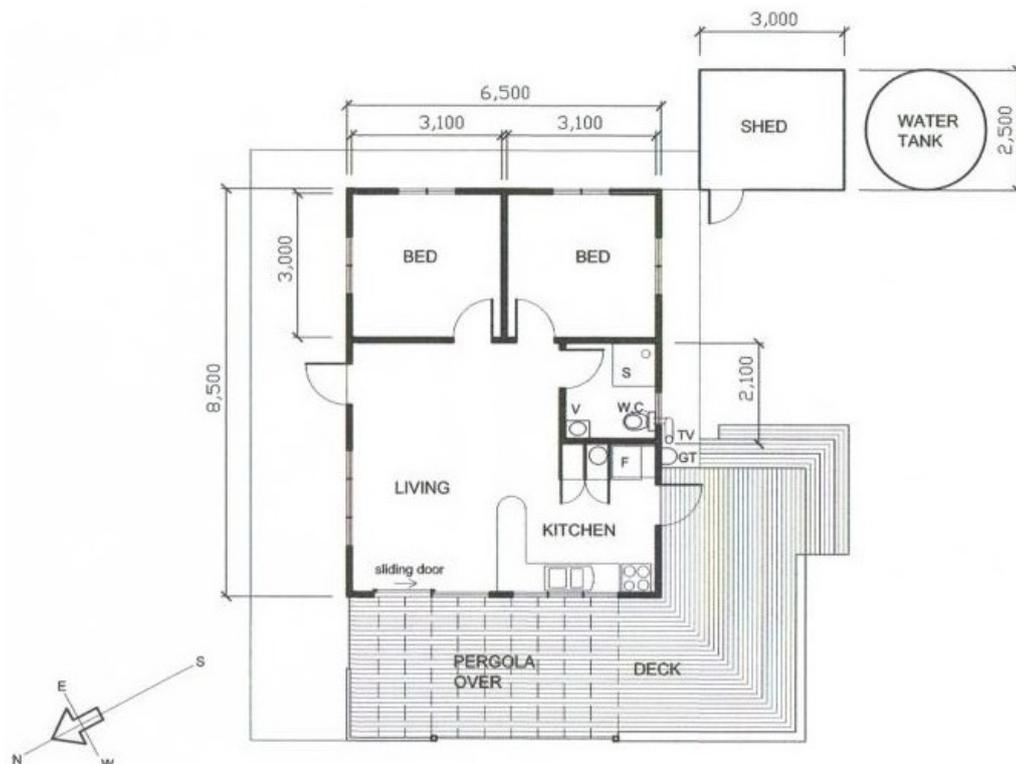


Figure 1: Floor plan (not to scale)

- 2.4 All the interior walls and ceilings are lined in painted plaster board.
- 2.5 The house has a large timber deck on its north-east and south-east sides. The deck is constructed over timber piles with timber baseboards. It is partially covered by a pergola and has steps down to the back lawn.

3. Background

- 3.1 A building consent was issued to previous owners of the property for the construction of the house in February 1994 under the Building Act 1991 (“the former Act”). No information is available about when the building was actually constructed, and there are no records of inspections carried out during construction.
- 3.2 Although I have not been provided with a copy of the application for a code compliance certificate, I assume that the applicant applied sometime around the end of 2014.
- 3.3 On 28 January 2015, the authority conducted a site visit, following which it advised by email dated 29 January 2015 that it ‘cannot issue a code compliance certificate’ for the building work. The authority did not provide reasons for the refusal, but noted that there were outstanding maintenance issues and the authority did not have a record of inspections carried out during construction, although the inspections may have occurred.
- 3.4 Correspondence subsequently passed between the parties and on 17 March 2015 the authority conducted a final inspection of the house. On 30 March 2015, the authority advised the applicant in a letter that ‘the building does not meet the performance requirements of the New Zealand Building Code so therefore [the authority] refuses to issue a Code Compliance Certificate.’ The letter listed 49 items (refer Table 1 at paragraph 6.2.2) that in the authority’s opinion needed to be rectified to make the building work compliant.
- 3.5 In the interim, the applicant applied for a determination; the application was received by the Ministry on 20 February 2015.

4. The submissions

- 4.1 The applicant provided copies of the original building consent application and relevant correspondence between the parties.
- 4.2 The authority provided a copy of its letter of 10 March 2015 in which it refused to issue a code compliance certificate.
- 4.3 The draft determination was issued to the parties for comment on 18 June 2015.
- 4.4 The applicant accept the draft on 2 July 2015 but noted that the ‘completion or otherwise of the maintenance issues referred to in the draft determination should not prohibit the issue of a code compliance certificate by the authority.’
- 4.5 The authority accepted the draft on 26 June 2015. The authority also noted, in summary, that:
- It was recommended that maintenance be completed ‘before final sign [off]’.
 - It sought more information on the wastewater system as it had carried out no inspections and held no information to confirm size, system type, and accurate location.

- The terminal vent is cracked ‘and has the potential to allow odour to escape’. If the wastewater system became blocked ‘there is also the potential for foul water to overflow’.

4.6 The following is noted in response to the authority’s submission:

- The performance of the wastewater system is based on its apparent performance for the 21 years since its installation.
- The top of the gully dish (and/or the gully surround) should be a minimum of 150 mm below the overflow level of the lowest sanitary fixture in the house and be installed so that any surcharge from the gully trap cannot enter into or under the building.

5. The expert’s report

5.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me by assessing the building work. The expert is a member of the New Zealand Institute of Architects. The expert conducted a site visit of the applicant’s property on 1 May 2015, and inspected the authority’s property files relating to the property and building work. He provided a report in 25 May 2015, which was forwarded to the parties on 27 May 2015.

5.2 In his report, the expert considered the 49 items of concern identified by the authority in its letter of 30 March 2015. The expert also prepared an updated floor and site plan of the applicant’s property.

5.3 The expert’s findings with respect to the code compliance of the building generally, and the authority’s identified items of concern are listed in Table 1 at paragraph 6.2.2.

5.4 From his assessment of the building work the expert concluded that:

... the building has performed reasonably well over the more than twenty years since its completion. I believe that apart from some outstanding maintenance items being completed it does meet the compliance requirements of the code with exception of only the three following items:-

- i) The gulley trap at the rear of the building needs to be raised up and modified such that it prevents surface water from entering the drainage system.
- ii) The hot water cylinder, (which has been more recently installed), needs to have the compliant tempering valves etc. fitted and an Electrical Certificate of Compliance related to the electrical work involved.
- iii) The ceiling insulation needs to be completed and installed to insure the performance requirements of clause H1 of the NZ Building Code are met.

6. Matter 1: The code compliance of the building work

6.1 General

6.1.1 I note that the building consent was issued under the former Act, and accordingly the transitional provisions of the 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 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’.

6.1.2 I also note that an application can be made to the authority for a modification of durability requirements to allow durability periods to commence from the date of substantial completion in about 1994. I have taken that anticipated modification into account when considering the performance of the house.

6.1.3 In order to determine whether the authority correctly exercised its powers in refusing to issue a code compliance certificate, I must consider whether the building work complied with the Building Code that was in force at the time the consent was issued in 1994.

6.2 Performance of the building work

6.2.1 Taking account of the expert's report, I accept that the house generally appears to have been constructed in accordance with the consented plans and with good trade practice at the time of construction.

6.2.2 I also accept the expert's assessment that the majority of the items identified by the authority as of concern are in fact compliant. Table 1 sets out the 49 items listed in the authority's letter of 30 March 2015, along with the expert's findings and my comments.

Table 1: Compliance of the items identified by the authority

Item #	Building element	Expert's observations	My comment
1	As-built drawings required	New plans drawn as a result of the site visit.	These have now been provided to the authority.
42	Provide electrical certificate of compliance	-	Refer paragraph 6.2.3
Clause B1 - Structure			
35	Ceiling battens	Was unable to confirm the thickness of the ceiling panels, but observed no bowing or distortion of the panels in any of the rooms.	Complies
48	Wall bracing	'Although the consent drawings are quite basic they do show the bracing and where it is required in the exterior walls. There is no reason [to] assume this work was not done...'	Complies. There is no evidence to show the building has not satisfied Clause B1 during the period since it was built.
49	Slab reinforcement	The authority's request regarding reinforcing steel would require 'considerable invasive work'. 'No unevenness [or] deformation of the floor ... was noticed during my inspection.'	Complies. As above
Clause E2 – External moisture			
12	Cladding to fit around pipe penetration and install flashing	There is a galvanised flashing, which 'appears to be working satisfactorily, with no evidence of leaking into the wall framing.'	Complies. Authority is requiring compliance with the Acceptable Solution
13	Cladding to be replaced where cracked or deteriorated	There was no evidence of deterioration in the cladding. '...the material has already outlasted the 15 year performance requirement of the NZ Building Code B2, Durability.'	Complies. Beyond 15-year durability period required by Clause B2.3.1(b).
36	Cladding underlay	There was no evidence of deterioration in the cladding. '...the material has already outlasted the 15 year performance	Complies. Beyond 15-year durability period from time of

Item #	Building element	Expert's observations	My comment
		requirement of the NZ Building Code B2, Durability.'	completion.
14	Rubber seals to windows loose/short	Generally the windows are in good condition. Some windows and doors have deteriorated seals, flashings missing, water damaged sills, and are sticking. Moisture meter readings show no indication of 'significant moisture' in surrounding walls. 'These are maintenance items only.' There is no evidence of moisture ingress in the interior of the house. 'Generally non-invasive moisture meter readings were within the acceptable range...'	Complies Maintenance issue – has not lead to non-compliance
15	Head flashings required		
21	Meter box	'Although there is no flashing the box is well sealed to the weatherboards and shows no sign of deterioration or leaking...'	Complies
22	Cavities to foundation at power entry	'...building has been in service for some considerable time without these items being of any concern. ... prudent however to carry out ... work under maintenance.'	Complies Maintenance issue – has not lead to non-compliance
24	Clearance to patio	'Because of its construction it does not hold water therefore there is no problem with clearance to the floor level in this case.'	Complies
26	Pergola fixing	There was no evidence of any leaking as a result of the pergola fixing.	Complies
31	Seal vent pipe to bathroom wall	'...building has been in service for some considerable time without these items being of any concern. ... prudent however to carry out ... work under maintenance.'	Maintenance issue – has not lead to non-compliance
37	Roof	'There was no evidence of any signs of leaking...'	Complies
44	Ranch slider – track	Door is slightly difficult to open and shut. 'These are maintenance issues only.'	Maintenance issue – has not lead to non-compliance
45	Ranch slider – frame	Door is slightly difficult to open and shut. 'These are maintenance issues only.'	Maintenance issue – has not lead to non-compliance
36	Cladding underlay	There was no evidence of deterioration in the cladding. '...the material has already outlasted the 15 year performance requirement of the NZ Building Code B2, Durability.'	Complies
Clause E3 - Internal moisture			
29	Shower tray	Has been repaired.	Now complies
41	Kitchen sink	No evidence of leaking, is maintenance issue only.	Maintenance issue – has not lead to non-compliance
Clause F2 - Hazardous building materials			
30	Bathroom window glass	'...the window does meet the performance criteria of Clause F2...as it is protected from impact.'	Complies
43	Sliding glass door	The glass should be safety glass. This needs to be confirmed.	Compliance not established: confirm presence of safety glass

Item #	Building element	Expert's observations	My comment
Clause G12 - Water supplies			
17	Water tank – overflow	The over-flow from the concrete water storage tank discharges directly onto the ground. Although this is 'not ideal', there is plenty of plant growth to mitigate erosion.	Complies: is not adversely effecting this or neighbouring property
33	Water tank – pipework	The authority is requesting compliance with the Acceptable Solution. 'The system as is has seemed to have worked successfully for the last twenty odd years.'	Complies
38	Hot water cylinder (seismic restraint)	There is no seismic restraint to the hot water cylinder.	Does not comply
39	Hot water cylinder (tempering valve)	No tempering valve was evident.	Compliance not established: confirm presence of tempering valve
40	Hot water cylinder (cold water expansion valve)	No cold water expansion valve was evident.	Does not comply
Code clause G13 – Foul water			
2	Septic tank location unknown, size and venting to be provided, filter to be installed	'There is no venting mushroom evident, however the system, as is, has been operating over the years satisfactorily and been maintained... Because the on-site disposal of foul water has been adequate over the years it therefore meets the performance requirement set out in clause G13 3.4 where no sewerage system is available.'	Complies.
3	Effluent field needs to be checked against Regional Council rules		As above, system appears to be operating satisfactorily.
4	Gully trap surround	The trap is set well down below the level of the concrete mowing strip and is subject to inflows of surface water.	Does not comply.
5	Gully trap lid	Gully trap 'has a plastic lid modified to fit around all the pipes as is generally the case'.	Complies
9	Waste pipe	Waste pipes will need to be lifted and clipped to wall once gully trap has been raised.	Does not comply.
6	Plumbing penetration	'...building has been in service for some considerable time without these items being of any concern. It may well be prudent however to carry out this suggested work under maintenance.'	Maintenance issue; has not lead to non-compliance
7	Terminal vent – cracked PVC	The vent pipe has dropped causing one of the bend junctions to crack which needs repair.	Does not comply. Maintenance issue has led to non-compliance
8	Terminal vent – flashing	The movement of the vent pipe has adversely affected the roof flashing which needs replacing. The vent pipe needs all brackets	
10	Terminal vents – brackets required	require re-fixing.	
11	Waste pipes to discharge into gully trap	Waste pipes discharging into the trap are compliant.	Complies
Clause H1 Energy efficiency			
34	Ceiling insulation	'Considerable areas of the ceiling space were not covered with any insulation material.'	Does not comply.

Item #	Building element	Expert's observations	My comment
47	Wall insulation	'No insulation material was visible although I was only able to expose a small area of the wall cavity...'	Compliance not established: confirm presence of insulation
Other			
16	Fascia	'All the other items covered in the [authority's] letter pertain to maintenance rather than non-compliance.'	Items that require maintenance, but have not resulted in non-compliance.
18	Spouting		
19	Roof cladding		
20	Bargeboards		
23	Downpipes		
25	Corner soakers		
27	Soffit boxes		
28	Fascia – decay		
32	Window jambs		
46	Scribers		

6.2.3 While section 94(3) of the Act says that failure to provide an energy works certificate is 'sufficient reason' to refuse to issue a code compliance certificate, the absence of a certificate does not prevent a code compliance certificate from being issued. I have addressed this issue in previous determinations⁴, and I remain of the view that this provision allows the authority to apply this requirement as it considers appropriate. As the building work is in the order of 21 years old, the provision of an electrical energy works certificate at this time would appear to be of limited value.

6.2.4 In addition I note that the drain pipe from the TPR⁵ valve on the hot water cylinder has been installed in polybutylene instead of copper. Polybutylene pipework is not suitable for this use as the temperature the drain is likely to experience in normal use is in excess of the temperature for which the pipe is designed.

6.2.5 I note here that some of the authority's concerns relate to non-compliance with an Acceptable Solution. What must be demonstrated is compliance with the performance requirements in the relevant clauses of the Building Code and not the Acceptable Solutions that relate to them. In the current case, although particular elements may not have been built or installed in accordance with an Acceptable Solution, they have none-the-less demonstrated their compliance by performing as required over an extended period of time.

6.3 Conclusion

6.3.1 In summary, taking account of the expert's report, I conclude that remedial work, investigation and/or maintenance is necessary in respect of the following areas (with associated code clauses provided in brackets):

- the low level of the gully trap and associated waste pipes (E1 and G13)
- the terminal vent pipe, brackets and flashing (E2, G13)

⁴ For example Determination 2013/035 Regarding the refusal to issue a code compliance certificate for a 14-year-old house and a 15-year-old quarantine building

⁵ Temperature and pressure relief valve

- the lack of earthquake restraint to the hot water cylinder (B1)
- the apparent lack of tempering and expansion valves to the cylinder, and the drain to the TPR valve (G12)
- the lack of ceiling and wall insulation (H1)
- the glass to the sliding door (F2).

6.3.2 I conclude that the authority's decision not to issue the code compliance certificate for the building work is correct, until such time as the outstanding matters (above) are addressed.

6.4 Maintenance

6.4.1 Modifying the durability provisions will allow the durability periods stated in B2.3.1 to commence from the date that the building work was substantially completed. Assuming that this was sometime in or close to 1994, this means that many of the building elements will have already met their 5-year and 15-year minimum durability period required by the Building Code.

6.4.2 However, it is important to note that the expected life of the building itself is a minimum of 50 years. Careful attention needs to be paid to the ongoing performance of the individual building elements, in particular such elements as flashings, cladding and seals that maintain the building's weathertightness, to ensure the underlying structure is protected and achieves its required life.

6.4.3 One of the primary ways that this can be achieved is through regular maintenance. I concur with the expert's opinion that many of the items of concern identified by the authority are maintenance, rather than compliance issues. However, while most of the deferred maintenance has not yet lead to non-compliance, there are some areas where I consider that is not the case and I have identified these as required repairs.

6.4.4 Maintenance is the responsibility of the building owner. Once a code compliance certificate has been issued the authority has no regulatory role in respect of maintenance issues unless the building becomes dangerous or insanitary. However, in the current case, a copy of this determination will be placed on the property file, and this will ensure that the identified maintenance items will be apparent to any prospective buyer, who can check if they have been addressed.

7. Matter 2: The durability of the building work

7.1.1 Clause B2.3.1 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 that a code compliance certificate is issued.

7.1.2 In the current case, the 21-year delay since the completion of the house in 1994 creates an issue, in that many elements of the building are now well through or beyond their required durability periods. As a result, they would in all likelihood no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.

- 7.1.3 I have considered this issue in many previous determinations. In those determinations I have formed the view, which applies equally in the current case, that:
- 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
 - 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 in 1994.
- 7.1.4 I will leave the matter of amending the building consent to modify Clause B2.3.1 to the parties once the outstanding matters identified in paragraph 6.3.1 are resolved.

8. What is to be done

- 8.1 I suggest the parties adopt the following process. The applicant should bring the items identified in paragraphs 6.3.1 into compliance with the Building Code. The parties should also agree on a date when the house was substantially completed. The applicant can then apply to the authority for an amendment of the building consent for all of the building elements, so that Clause B2.3.1 is modified to apply from that date, rather than from the date of issue of the code compliance certificate. The authority can then issue a code compliance certificate once it is satisfied that the identified items have been made compliant.

9. The decision

- 9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority's decision to refuse to issue a code compliance certificate for the building work was correct, on the basis that there were items that did not comply with the Building Code that was in force at the time the consent was issued.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 28 August 2015.

John Gardiner
Manager Determinations and Assurance