



Determination 2016/013

Regarding the refusal to issue a code compliance certificate for an 11-year-old house at 6/24 Ferry Road, Wade Heads, Whangaparaoa



Summary

This determination considers the authority's decision to refuse to issue a code compliance certificate: the grounds for the refusal concerned the weathertightness and durability of the exterior envelope, the adequacy of barriers to a deck and stairs, surface water disposal, and a change of use. The determination reviewed the reasons given for the refusal and considered whether the items identified in the refusal comply with the Building Code.

1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ ("the current Act") made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
 - the owner of the property, H Hoare ("the applicant")
 - Auckland Council ("the authority")², 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 an 11-year-old house because it was not satisfied that the building work complies with certain clauses³ of the Building Code (First Schedule, Building Regulations 1992).

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 The building consent was issued by the Rodney District Council before it was transitioned to Auckland Council; this determination refers to both entities as "the authority".

³ In this determination, unless otherwise specified, references to clauses are to clauses of the Building Code that was in force at the time the Building Consents were issued and references to the Act are to the Building Act 2004.

- 1.4 The matter to be determined⁴ is therefore whether the authority was correct in its decision to refuse to issue a code compliance certificate for the house. In deciding this, I must consider whether the items identified in the authority's letter of refusal comply with the relevant clauses of the Building Code that was current at the time the consent was issued. This includes whether the external building envelope complies with Clause B2 Durability and Clause E2 External Moisture; the building envelope includes all the components of the external moisture management system (such as the wall claddings, windows, joinery, roof claddings and flashings) as well as the way these components have been installed and work together.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Ministry ("the expert"), and other evidence in the matter.

2. The building work

- 2.1 The house is moderately complex in plan and is constructed over three levels on a sloping site in a high wind zone and within a sea spray zone⁵. The expert described the front of the house as oriented toward the northwest, and I have followed that convention in this determination.
- 2.2 The house is on concrete foundation, with concrete blockwork retaining walls to the ground floor and timber framing to the remaining walls. The remaining framing is timber with some steel beams to the floors.
- 2.3 The wall claddings are plastered brick veneer and direct-fixed bevel-back timber weatherboards to the ground floor; with direct-fixed weatherboards, and painted 9mm fibre-cement sheet with expressed joints installed over a drained cavity to the upper two floors. The roofing is long run trapezoidal roofing with butyl rubber membrane lined internal gutters.
- 2.4 The approved plans included a three-car garage, office/bedroom, bathroom and toilet on the ground floor, with internal access stairs to the upper level. The garage has at some time been converted into a separately-tenanted dwelling, containing a kitchen with built-in sink and mobile gas cooking appliance, and two bedrooms. The single garage door is permanently closed and forms the external wall of one of the bedrooms. The double garage door is permanently open with plastic sheeting in a timber frame installed to form an "exterior wall".
- 2.5 The ground floor dwelling also has exclusive access to and use of a second floor room, which is currently fitted out with hairdressing fittings and fixtures. The room has been closed off from the other areas on the upper level by what was described by the expert as a "make shift wall"; this wall also separates the kitchen of the upper level dwelling from the stairwell.
- 2.6 The first floor otherwise contains an open plan living and dining area, three bedrooms, two bathrooms, laundry and storage. There is access to a small membrane deck to the northwest from two bedrooms, and a larger wrap-around open timber slat deck adjoins the living areas at three sides.

⁴ Under sections 177(1)(b) and 177(2)(d) of the current Act

⁵ The wind zone and sea spray zone are taken from the consent documentation

3. Background

- 3.1 The authority issued building consent no. ABA 40568 on 20 April 2004 under the Building Act 1991 (“the former Act”). Inspection records indicate construction progressed until December 2004.
- 3.2 Three further inspections were carried out: in 2006, 2007 and on 19 June 2009 a final inspection was undertaken which failed. I am not aware of whether any application was made, but no code compliance certificate was issued following completion of the building work.
- 3.3 The applicant purchased the property in 2005. At some time in 2015 the applicant sought to obtain a code compliance certificate and a final inspection was carried out on 15 September 2015.
- 3.4 On 20 September 2015 and as a result of the final inspection, the authority issued a notice under section 95A refusing to issue the code compliance certificate. The authority listed 23 items that it considered either did not comply or it was unable to establish compliance, and 13 items of documentation that it required. The 23 matters related to:
- the cladding and the roof (15 items)
 - ‘elevated internal moisture readings’ (1 item)
 - barriers to deck and stairs (3 items)
 - surface water (1 item)
 - changes to the internal layout, the ground floor kitchen (2 items)
 - maintenance (1 item).
- 3.5 The authority noted that the list was not exhaustive and recommended the applicant engage a suitably qualified person to carry out a weathertightness assessment on the building.
- 3.6 The Ministry received an application for a determination on 22 September 2015.

4. The submissions

- 4.1 The applicant made no submission in support of the application for determination, but provided a copy of the letter from the authority refusing to issue the code compliance certificate (section 95A notice) and plans.
- 4.2 On 11 November 2015 I sought clarification from the applicant as to whether the matters for determination were in regards to specific items in the section 95A notice that were disputed, or whether it was the authority’s decision to refuse to issue a code compliance certificate that was disputed. The applicant responded on the same day confirming that all matters were disputed.
- 4.3 The authority acknowledged the application but made no submission in response. The authority provided a copy of the property file on CD ROM which included documents pertinent to this determination.
- 4.4 A draft determination was issued to the parties for comment on 28 January 2016.
- 4.5 The authority responded to the draft determination by email on 19 February 2016, noting that it had been ‘purposely vague’ in the s95A letter setting out the reasons for the refusal because its experience has been that rather than obtaining a

comprehensive report, consultants engaged by owners focus only on the items listed. The authority noted that indicative non-invasive moisture readings were recorded between 16-37% at various locations on the day of inspection. The authority also confirmed it was aware of the issue regarding a change of use as was evident by referring to the kitchen located in the garage; and although no hairdressing facilities were operating at the time of its inspection the authority will follow this matter up (refer paragraph 7).

- 4.6 On 3 March 2016 the applicant advised by email that a response to the draft determination would be forthcoming the following week. However, despite a reminder on 23 March, no further submission or comment was received from the applicant.

5. The expert's report

- 5.1 As mentioned in paragraph 1.5, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert visited the site on 30 November and 2 December 2015 to carry out an assessment with regard to compliance with Building Code clauses B2 Durability and E2 External Moisture, and in particular the items listed in the notice of refusal (refer paragraph 3.4). The expert provided a report dated 11 December 2015, which was sent to the parties on 15 December 2015.

- 5.2 The report described the house, noting a number of significant differences from the consented building work, including that the ground floor has been altered to form a separate tenanted dwelling. In regards to the ground floor dwelling the expert observed that there are no operable windows in the kitchen/living area, and there is no provision for the removal of gas and cooking fumes from the kitchen area through mechanical ventilation.

5.3 Weathertightness, moisture testing and destructive investigation

- 5.3.1 The expert set out the risk factors present for weathertightness, noting that the level of timber treatment is unknown but that the date of construction indicates some treatment is very likely to be present.

- 5.3.2 The expert observed evidence of water leaking in the main kitchen ceiling near the skylight. The expert carried out a series of invasive moisture tests at various locations considered at high risk, with readings varying between 14-29%. I note that readings over 18% generally indicate that moisture is entering the framing and further investigation is needed.

- 5.3.3 To investigate timber treatment and condition, the expert also undertook eight destructive tests, removing sections of cladding or smaller elements to assess the construction detail and confirm the condition of the material and/or underlying timber framing.

- 5.3.4 As a result of the assessment, the expert made the following conclusions:

- Moisture ingress has occurred to the direct-fixed timber weatherboard cladding at windows and some ground locations.
- Ground clearance issues in isolated areas showed high to very-high moisture readings in the adjacent framing.
- Mould growth and damage to particleboard flooring is evident in one location behind the weatherboard cladding, which will require remedial work.

- Damage has occurred to the weatherboards where they had been inadequately coated or where the existing coating has delaminated.
- The fibre-cement sheet cladding is installed incorrectly in areas, with incorrect fixings and insufficient coating. This has caused localised damage to the cladding material and it is deteriorating where the paint finish is missing or compromised. Some elevated moisture readings indicate moisture has reached the framing in some areas.
- Inadequate parapet capping and flashing has allowed water ingress and damage to fibre-cement sheeting and cavity battens in a localised area at the enclosed deck on the front of the building.
- A roof leak near the skylight over the kitchen has caused water ingress and damage to interior wall framing and associated elements.
- Although there are defects to the installation of the fibre-cement cladding, the cavity installation has generally protected the underlying timber framing from damage caused by water ingress.

5.4 Other compliance matters

5.4.1 The expert reviewed the list of items noted in the authority's letter of refusal and made the following additional observations:

E3 Internal moisture

- The location of elevated moisture readings by the authority could not be determined.
- 18% moisture reading taken in the bottom plate near the door of the door jamb of the top floor 'home theatre' (now in use as hair salon).

F4 Safety from falling

- At several locations around the building the barriers, stairs and handrails appear to be inadequately fixed. Parts of the exterior balustrades and the stair leading to the deck have been installed using nail fixings only. The guardrail to the stair between the deck levels at the north side lacks adequate rigidity and strength, and moves from side to side.

E1 Surface water

- A severely corroded rainwater head was discharging water onto the adjacent wall areas.

5.4.2 Other matters observed by the expert:

G4 Ventilation

- There was a lack of ventilation to the ground floor kitchen / living area.

6. Discussion

6.1 Compliance with the Building Code

- 6.1.1 The building consent was issued under the former Act, accordingly the transitional provisions of the Act apply when considering the issue of code compliance certificates for building work completed under this consent. Section 436(3)(b)(i) of the transitional provisions require the authority to issue a code compliance certificate if it 'is satisfied on reasonable grounds that the building work complies with the building code that applied at the time the building consent was granted'.
- 6.1.2 In order to determine whether the authority correctly exercised its power in refusing to issue the code compliance certificate because of its concerns about weathertightness, durability, and safety from falling; I must consider whether the building work complies with the Building Code that was in force at the time the consent was issued.

6.2 Clause E1

- 6.2.1 The severely corroded rainwater head does not satisfy Clause E1.

6.3 Clause E2 – External Moisture, Clause B2 – Durability

- 6.3.1 The expert identified a number of defects in the construction of the building envelope, and it is clear from the expert's report that the building envelope is unsatisfactory in terms of its weathertightness performance, which has resulted in moisture penetration and damage to parts of the cladding and underlying timber framing (refer paragraph 5.3.4). Consequently, I am satisfied that the claddings currently do not comply with Clause E2 of the Building Code and will not meet the 15-year minimum period required by Clause B2.
- 6.3.2 In addition, the required minimum durability period for the underlying timber structure is for the life of the building being not less than 50 years. The cladding faults will require attention to address the faults to ensure the ongoing compliance of the building's structure with Clause B1.
- 6.3.3 Careful maintenance is also needed to ensure that claddings continue to protect the underlying framing 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 2007/60⁶).
- 6.3.4 While the expert did not give an opinion in relation to the plastic-covered infill frame fitted to the double garage door opening, it is unclear how the wall infill is satisfying, at a minimum, Clauses B2, E2 in relation to the garage's current use as a kitchen / living space (refer also paragraph 7). It is noted that while the infill wall (along with other internal partitions) is likely to be exempt from the need for a building consent under Schedule 1 of the Act, it is none-the-less required to comply with the relevant performance requirements of the Building Code.

⁶ Determination 2007/060 Determination regarding a code compliance certificate for a house with monolithic and weatherboard wall cladding systems

6.4 Clause E3 Internal moisture

6.4.1 I note that the expert was unable to find the area referred to in the authority's refusal letter (item #20) that indicated internal moisture. I leave this matter to the parties to resolve in due course.

6.5 Clause F4 Safety from falling

6.5.1 The expert identified a number of defects in the construction of the barriers, stairs, and handrails at several locations around the building. I accept the expert's findings and I conclude that the building work does not comply with Clause F4 of the Building Code that was in force at the time the consent was issued.

6.6 Clause G4 Ventilation

6.6.1 The ventilation to the ground floor kitchen / living space does not satisfy Clause G4.

6.7 The durability considerations

6.7.1 In this case the delay with issuing the code compliance certificate raises concerns that many elements of the buildings are well through or have completed their durability periods and would consequently no longer comply with the requirements of Clause B2 if a code compliance certificate were to be issued.

6.7.2 I have considered this in many previous determinations and I maintain the view that the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by the owner. I therefore leave the matter of amending the building consent to modify Clause B2.3.1 to the parties to address once the building work has been brought into compliance with the Building Code.

7. The change of use

7.1 The use of the building was not raised by the applicant as a matter of dispute between the parties. I therefore make the following comments as general observations to assist the parties.

7.2 Under section 114 of the Act an owner is required to give notice to the authority of an intended "change of use". The "use" of building, for the purposes of sections 114 and 115 of the Act, is set out in Schedule 2 of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005* ("the Regulations").

7.3 The relevant use categories in this case include the following:

Uses relating to sleeping activities		
Use	Spaces or dwellings	Examples
SR (Sleeping Residential)	attached and multi-unit residential dwellings, including household units attached to spaces or dwellings with the same or other uses, such as caretakers' flats, and residential accommodation above a shop	multi-unit dwellings, flats, or apartments
SH (Sleeping Single Home)	detached dwellings where people live as a single household or family, including attached self-contained spaces such as granny flats when occupied by a member of the same family, and garages (whether detached or part of the same building) if primarily for storage of the occupants' vehicles, tools, and garden implements	dwellings or houses separated from each other by distance

Uses relating to working, business, or storage activities		
Use	Spaces or dwellings	Examples
WL (Working Low)	spaces used for working, business, or storage—low fire load	..., hairdressing shops, beauty parlours, ...

- 7.4 It is my understanding that the original consent was for a single detached dwelling. Accordingly the use at the time of construction would have fallen within the use category SH – Sleeping single home. From the observations of the expert it appears that the building has undergone a change of use since its original construction from SH to SR. This is evident in the alterations to the ground floor converting the garage to a self-contained unit, and the internal access stairs and an upper floor room that have been separated from the rest of the first floor level.
- 7.5 Section 115(a) provides that the owner must not change the use of the building in a case where the change involves the incorporation in the building of one or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the Building Code in all respects.
- 7.6 From the expert’s observations of the separate tenancy of the ground floor, it appears that the building now contains two separate household units. In addition the expert observed fixtures and fittings that indicate a hairdressing salon is operating from one of units. I note that the room used as a hairdressing salon would fall within the use category WL – working low as a space used for business.
- 7.7 In respect of the hairdressing facilities on the upper floor, I note also that if the service is offered to members of the public there are obligations to comply with the Act and Building Code in respect of access and facilities for persons with disabilities to and within the building.
- 7.8 I leave the matter of the use of the building for the authority to pursue.

8. What happens next?

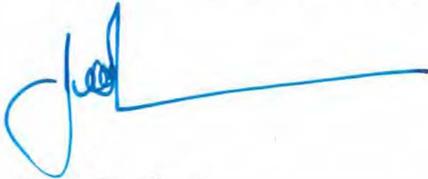
- 8.1 In respect of the compliance of the building work in its original use; it is now for the applicant to undertake the necessary investigation and building work required in order to obtain the code compliance certificate. I strongly suggest that the applicant engage a competent person with suitable experience in weathertightness remediation to undertake the investigation.
- 8.2 Prior to carrying out remedial work the applicant should submit to the authority a detailed proposal that refers to the items identified by the authority and in the expert’s report, as well as any defects that might be discovered in the course of further investigation. It is not for the authority to specify how the defects are to be remedied, this is a matter for the applicant to propose and for the authority to either accept or reject.
- 8.3 Subject to the authority being satisfied as to the building’s use under the Regulations; once the building work has been rectified to the satisfaction of the authority, and the building consent modified in respect of Clause B2.3.1 and amended to reflect the as-built work, the code compliance certificate can be issued.

9. The decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the building work does not comply with the following clauses of the Building Code that was current at the time the consent was issued:
 - E2.3.2 and E2.3.5
 - B2.3.1 in respect of clauses E2 and B1
 - F4.3.4 (c)(d)
 - G4.3.1 and G4.3.3 (a)
- accordingly, the authority was correct in its decisions to refuse to issue the code compliance certificate for consent No. ABA 40568, and I confirm the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 April 2016.



John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act

Change of use, extension of life, and subdivision of buildings

114 Owner must give notice of change of use, extension of life, or subdivision of buildings

(1) In this section and section 115, *change the use*, in relation to a building, means to change the use of the building in a manner described in the regulations.

(2) An owner of a building must give written notice to the territorial authority if the owner proposes—

(a) to change the use of a building; or

(b) to extend the life of a building that has a specified intended life; or

(c) to subdivide land in a manner that affects a building.

(3) A person commits an offence if the person fails to comply with subsection (2).

(4) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$5,000.

115 Code compliance requirements: change of use

An owner of a building must not change the use of the building,—

(a) in a case where the change involves the incorporation in the building of 1 or more household units where household units did not exist before, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use, will comply, as nearly as is reasonably practicable, with the building code in all respects; and

(b) in any other case, unless the territorial authority gives the owner written notice that the territorial authority is satisfied, on reasonable grounds, that the building, in its new use,—

(i) will comply, as nearly as is reasonably practicable, with every provision of the building code that relates to the following:

(A) means of escape from fire, protection of other property, sanitary facilities, structural performance, and fire-rating performance:

(B) access and facilities for people with disabilities (if this is a requirement under section 118); and

(ii) will,—

(A) if it complied with the other provisions of the building code immediately before the change of use, continue to comply with those provisions; or

(B) if it did not comply with the other provisions of the building code immediately before the change of use, continue to comply at least to the same extent as it did then comply.

Other transitional provisions

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

(1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.

(2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.

(3) For the purposes of subsection (2), section 43 of the former Act—

(a) remains in force as if this Act had not been passed; but

(b) must be read as if—

(i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and ...

A.2 The relevant clauses of the Building Code include:

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.

E2 – External Moisture

E2.3.2 Roofs and exterior 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*.

F4 – Safety from falling

F4.3.4 Barriers shall:

...

(c) be constructed with adequate rigidity,

(d) be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,

...

G4 – Ventilation

G4.3.1 Spaces within buildings shall have means of ventilation with outdoor air that will provide an adequate number of air changes to maintain air purity

G4.3.3 Buildings shall have a means of collecting or otherwise removing the following products from the spaces in which they are generated:

(a) cooking fumes and odours

...

