

Determination 2025/015

Refusal to issue a code compliance certificate for a 27-year-old house due to concerns around compliance with clauses B2 and E2 of the Building Code

13 Orbell Road, Pukeuri, Oamaru

Summary

The authority has refused to issue a code compliance certificate for building work carried out pursuant to building consent because it is not satisfied that the cladding system that formed part of the building work complied with clauses B2 and E2 of the Building Code at the time it was constructed. The authority's formal refusal letter, when read together with an accompanying email referring to the reasons for refusal, had provided sufficient reasons for refusing to issue the code compliance certificate.



In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg, Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Andrew Eames, Principal Advisor, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. the owner of the house and property, J Greaney, who is the applicant in this determination (“the owner”)
 - 1.2.2. Waitaki District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a dwelling, due to concerns about the weathertightness of the external cladding, and the ongoing durability of both the cladding and the underlying structural timber of the external walls.
- 1.4. The matter to be determined, under sections 177(1)(b) and 177(2)(d) of the Building Act 2004, is the authority’s refusal to issue a code compliance certificate for the building work carried out pursuant to building consent 96006541.
- 1.5. The determination looks at the reasons stated in the authority’s refusal notice dated 15 May 2023 and associated email dated 1 May 2023, including the potential non-compliance of the building work with clauses B1, B2 and E2 of the Building Code.

2. The building work

- 2.1. The authority issued building consent 96006541 (also noted as 1996/0224) in May 1996 for the construction of a new dwelling on the owner’s property.
- 2.2. The building work to construct the dwelling began in 1996 and was substantially completed by early 1998.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

- 2.3. The building work consisted of constructing a new detached single-storey dwelling. The dwelling has a timber frame, with solid plaster cladding installed over a fibre cement sheet substrate.
- 2.4. The substrate is direct fixed, without a cavity, onto the timber frame. The dwelling has concrete pile foundations and concrete masonry perimeter walls, supporting a suspended timber floor, corrugated sheet metal roofing and single-glazed aluminium joinery.

3. Background

- 3.1. Between 1996 and 2000, the authority carried out various inspections of the building work.
- 3.2. On 13 January 2004, the authority contacted the owner to advise that no final inspection had yet been carried out and recommending this should be arranged.
- 3.3. On 6 November 2017, the authority conducted a final inspection (the “2017 inspection”). The inspection was indicated as ‘failed’, with the inspection report noting cracks in the external cladding and evidence of mould in some rooms. Photos taken at the inspection also showed ‘poor and high risk detailing’ at critical junctions in the cladding, including at the intersection between the roof and walls, and widespread cracking in the plaster.
- 3.4. The authority sent the owner a letter dated 13 November 2017 detailing the steps required to be completed before a code compliance certificate could be issued. These included a request to engage a registered building surveyor to report on ‘the integrity of the cladding and its ability to comply with the NZBC Clauses B2 and E2 ... [and] how this has affected the structure (B1) of the building ... [and the] remedial work required’.
- 3.5. The owner subsequently arranged for a registered building surveyor to inspect and report on the cladding and its compliance with the building code. The surveyor prepared a report dated 9 October 2019 (the “surveyor’s report”), the main findings of which are set out in paragraph 5 below.
- 3.6. The surveyor’s report concluded that the cladding had some ‘at risk’ areas of detailing, which coupled with the design of the cladding system, made the dwelling ‘at risk’ in terms of its weathertightness; that non-invasive moisture readings taken during the inspection showed elevated moisture level in the external walls in some locations; and that it was not possible to determine whether the building work complied with clauses B1 and E2 without ‘comprehensive external destructive testing’.
- 3.7. The owner sent a copy of the surveyor’s report to the authority on 13 November 2019, acknowledging some repairs were required to the cladding, including sealing

around the outside of the windows, and repairing cracks in and painting the plaster, and that this work was underway.

- 3.8. On 14 February 2020, the authority carried out a further final inspection, at which it noted the cladding had been repainted, with new plasterwork and sealant applied to some of the critical areas identified in the 2017 inspection.
- 3.9. Following this, the authority emailed the owner on 20 February 2020 advising that the application for a code compliance certificate had been declined, as the authority was unable to confirm that the building work complied with clauses B1, B2 and E2. The authority referred to the matters raised in the surveyor's report and suggested that 'more comprehensive invasive or destructive testing' may be required to establish compliance.
- 3.10. On 12 May 2022, the owner lodged a further application for a code compliance certificate, and on 20 May 2022, the authority carried out a further final inspection. The inspection failed with the site notice referring to the surveyor's report, stating it was up to the surveyor to determine the scope and to what extent of the 'invasive investigation' and remedial work are required to enable compliance to be established.
- 3.11. In 2023, the authority reviewed the property file at the owner's request. On 1 May 2023, it emailed the owner outlining the background of the matter to date. The email noted that the surveyors' report had recorded defects in the cladding system, which were listed, and that the dwelling was at "higher than normal risk of weathertightness issues". The surveyor had also not confirmed the compliance of the cladding system or underlying timber framing, and that obtaining a code compliance certificate for the building work would now be difficult. The authority stated:

This is because past construction defects with the cladding system will have likely allowed the passage of moisture into the underlying, and likely untreated framing over a number of years. Whilst maintenance on the exterior of the cladding system has now been completed to mitigate any further moisture entry this does not in any way address the likely condition of the underlying framing and the performance requirements of Clauses B1 and B2. ... a CCC could only be issued under the former Act if an authority was satisfied on reasonable grounds that the building work complied with the requirements of the building code in place when the building was constructed. Having viewed the photographs taken in 2017 and in particular the construction of critical junctions it is evident that the cladding system would likely not have complied with Clauses B2 and E2 when it was first constructed. A modification (backdating) of Clause B2 cannot therefore be considered because the cladding system did not comply with the requirements of the building code when it was first constructed.

- 3.12. The authority concluded that as it still did not have sufficient evidence that the cladding system as a whole complied with Clauses B2 and E2, or that it currently

complied, and therefore it could not issue a code compliance certificate for the building work, and suggested options for the owner to now consider.

3.13. The authority then sent a letter to the owner, on 15 May 2023, declining to issue the code compliance certificate. The letter stated that the reasons for refusal were as set out in the authority's email of 1 May 2023, and that in summary, the authority was not satisfied on reasonable grounds that:

3.13.1. '... the cladding system complied with clauses B2 and E2 Building Code 1992 at the time of construction'

3.13.2. '... the cladding system, has/will meet the ongoing performance requirements of the Building Code 1992 to the extent required by clause B2.3.1'

3.13.3. given this, '... the underlying untreated timber substrate has/will meet the performance requirements of clause B1 Building Code 1992'.

3.13.4. It laid out some further requirements for the owner to provide additional evidence.

4. Submissions

The owner

4.1. The owner submitted (in summary):

4.1.1. The owner has provided a building surveyor's report, and undertaken to do all the building work recommended by the surveyor in order to comply.

4.1.2. The 'house complies with what was required at the time of the build because all steps of the building process council inspections were 'done' and any concerns addressed at the time' as shown on the authority's inspection records.

4.1.3. A builder completed the work and had 'personally dropped the [code compliance certificate] final request' to the authority.

4.1.4. Both the owner and the builder were unaware the 'building consent was not finished' and the authority has 'failed to deliver due diligence on the last step'.

4.1.5. The owner also provided a letter in support from a builder dated 27 November 2023, which stated that:

- 'all materials that were specified were used on the job to the manufacturer's specifications'

- ‘all inspections were inspected at the required time throughout the construction and passed’
- ‘all dwelling work was passed but the only item that didn’t pass was two sets of steps at the end of the deck’; these were completed and the authority advised
- a code compliance certificate was sought at ‘the completion of the build’ and the builder believed this had been ‘duly carried out’. The authority did not send out any reminder notices ‘until 14 years later’ and it was ‘taken for granted’ that the code compliance certificate had been issued.

The authority

- 4.2. The authority made submissions in response to the application for a determination, the main points of which are as follows.
 - 4.2.1. The authority refused to issue the code compliance certificate because it was ‘not satisfied, on “reasonable grounds” that the cladding system complied with Clauses B2 and E2 at the time of construction. Consequently, because we are not satisfied that the cladding system was compliant at the time of construction we are not satisfied that the cladding system, has/will meet the requirements of the Building Code 1992 to the extent required by Clauses B2.3.1’.
 - 4.2.2. The photographs taken by the authority and the building surveyor illustrate “that moisture ingress was likely occurring, and/or was likely to occur in the future”.
 - 4.2.3. Because of the time between when the ‘cladding was completed, (in around 1998), and when sealing and painting of junctions and cracks occurred (in around 2020) raises concerns in relation the condition of the underlying untreated framing, and therefore its compliance with B1 and B2’.

5. Surveyor’s report

- 5.1. As stated in paragraph 3.5, the owner engaged a registered building surveyor to inspect and prepare a report. The inspection took place on 9 October 2019.
- 5.2. The main points of this report can be summarised as follows.
 - 5.2.1. The dwelling was in reasonable condition for its age, although there were ‘areas of deferred maintenance to the cladding system’. The plaster cladding system was also considered to be in reasonable condition, although a number of areas of hairline cracking were noted, particularly around the joinery junctions and on the dwelling’s corners. These areas create a risk of

moisture penetration and there was mould and staining apparent on the cladding in some areas.

5.2.2. The dwelling had some 'at risk' areas of detailing, which coupled with other aspects of its construction and the 'direct fixed monolithic cladding system' makes it at 'higher risk than normal' with respect to weathertightness issues. Particular details that made the dwelling more at risk (and where elevated moisture readings were recorded) included:

- inadequate clearance between external ground levels and the bottom of the cladding on the dwelling's southern elevation
- 'no obvious control joints' in the cladding
- aluminium window and door penetrations are 'face-fixed' to the cladding, and rely on the plaster to seal the junctions; plus have inadequate heading flashings and no sill flashings
- complex wall to roof junctions and spouting apron flashings, with poor plaster and sealant application
- downpipe brackets and service penetrations are fixed directly through the plaster with no 'formal flashings'.

5.2.3. The continued weathertightness of the cladding depended on the 'properties of the plaster and the integrity of its coating and suitable sealing and flashing details around openings'. No allowance had been made for 'drying or draining' any moisture that penetrates the cladding.

5.2.4. Isolated elevated moisture readings (taken using a capacitance moisture meter) were apparent in some areas, suggesting moisture may have penetrated in these places. Photos of these readings and their locations were provided in the report.

5.2.5. It was difficult to assess whether the building work complied with clauses B2 and D2 without 'comprehensive external destructive testing'.

5.2.6. At the time that the building work was completed, the cladding system, if completed in accordance with the consented documents would have complied with clauses B2 and E2 as no drained and vented cavity was required at that time.

5.2.7. Based on the date of construction, it is possible the external wall framing was not treated.

5.2.8. Ongoing maintenance was required to maintain the weathertightness of the cladding, including painting, repairing cracks and sealing junctions, but this

could be ‘considered to be normal maintenance for this type of cladding system’.

6. Discussion

- 6.1. The matter to be determined is the authority’s refusal to issue a code compliance certificate for the building work carried out pursuant to building consent 96006541. The authority has refused to issue the certificate because it is not satisfied that the cladding system that formed part of the building work complied with clauses B2 and E2 of the Building Code at the time it was constructed.

The legislation

- 6.2. Building consent 96006541 (formerly 1996/0224) was granted in May 1996, under the Building Act 1991 (“the former Act”).
- 6.3. Section 436 of the Act sets out the transitional provisions that apply to code compliance certificates for building work that has been carried out under a building consent granted under the former Act. It states:

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

(ii) section 43(4) were omitted.

- 6.4. Section 436 refers to section 43 of the former act as remaining (substantively) in force. The relevant provisions in the current case are subsections 43(3) and 43(5).

- 6.4.1. Section 43(3)(a) states that an authority shall issue a code compliance certificate if it is satisfied on reasonable grounds that “the building work to which the certificate relates complies with the building code” (section

43(3)(b) relates to situations where there have been waivers or modifications to the building consent and is not relevant here).

- 6.4.2. Section 43(5) applies where an authority decides to refuse to issue a code compliance certificate and requires the authority to notify the applicant in writing, specifying the reasons why the application has been refused. (This provision is substantively the same as that in section 95A of the current act).
- 6.5. The impact of these provisions in the current case is that the authority must consider the owner's application for a code compliance certificate as if the Building Act 2004 had not been passed, and may only issue the certificate if it is satisfied that the building work complies with the version of the building code in force at the time that building consent 96006541 was granted. In refusing to issue the code compliance certificate, the authority must do so in writing and the specify the reasons for its decisions.
- 6.6. Also of relevance are the clauses of the building code in respect of which the authority considers compliance has not been established: clauses B1—Structure, B2—Durability and E2—External moisture.
- 6.7. Clause E2 is concerned with ensuring that a building is and remains weathertight. The relevant provisions are:
- E2.3.2 – Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to *building elements*, or both.
- E2.3.3 – Walls, floors, and structural elements in contact with, or in close proximity to, the ground must not absorb or transmit moisture in quantities that could cause undue dampness, damage to *building elements*, or both.
- 6.8. Clause B2 requires that a building continues to satisfy all the other objectives of the building code throughout its effective life, and that includes the objectives relating to weathertightness (in clause E2) and structural stability (in clause B1).
- 6.9. In particular, clause B2.3.1 states that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the building code for certain periods (known as 'durability periods') from the time that the applicable code compliance certificate is issued. Durability periods range from the "the life of the building, being not less than 50 years" (for, among other things, elements that provide stability to the building; such as structural wall framing) to 15 years (for, among other things, elements that are moderately difficult to access or replace; such as the elements that make up a building's external envelope), to 5 years.
- 6.10. The authority has also raised concerns about compliance with clause B1—Structure. The objective of clause B1 is to, among other things, safeguard against the structural failure of buildings and building elements. The authority is concerned because, if, as it believes, compliance with clause E2 has not been achieved (for

example by the cladding not preventing external water from entering the building), then it cannot be satisfied that the compliance of the underlying timber structural wall framing has also not been compromised.

The authority's reasons for refusal

- 6.11. Previous determinations² have established the appropriate reasons that an authority must give when refusing a code compliance certificate. In essence, an authority must give an owner sufficiently explicit, specific, clear and valid reasons as to why compliance has not been achieved, so the owner can consider the work required to remedy the situation. A generalised refusal is not sufficient for an authority to meet its obligations under section 43 of the former Act (or section 95A of the current Act). It is also not sufficient that the reasons are referred to in an inspection record or some other documents. They must be in the communication notifying the refusal.
- 6.12. The authority's formal written refusal of the code compliance certificate dated 15 May 2023, referred to the reasons for refusal set out in its email dated 1 May 2023.
- 6.13. In addition, in an email also dated 15 May 2023 attaching its refusal letter, the authority repeated various options that were now available to the owner for addressing the non-compliance.
- 6.14. In my opinion, the authority has provided sufficient reasons for refusing to issue the code compliance certificate in its letter dated 15 May 2023, when read together with its email dated 1 May 2023.
- 6.15. Together this correspondence:
- informed the owner of the requirement to comply with clauses E2 and B2
 - drew the owner's attention to the surveyor's report which identified 'a number of areas of concern'
 - raised concerns of elevated moisture readings, reduced ground clearances, widespread cracking and poor construction detailing around the critical junctions
 - agreed with the owners' surveyor that suggested the owner organise invasive testing to confirm or demonstrate that the cladding system complied with clauses B2 and E2.

² See for example, Determination 2020/0052 Regarding the refusal to issue a code compliance certificate for a 22-year-old house at 63b Thirteenth Avenue, Tauranga, at paragraph 5.2.4; and Determination 2023/0182 An authority's refusal to issue a code compliance certificate for a 27-year-old house, at paragraphs 4.13 and 4.14.

- 6.16. Although this information did not all appear in one letter, in my opinion the letter and email were sufficiently proximate both in terms of their timeframes and the process of review that they both came out of to be taken as one for this particular case. The authority's email of 1 May 2023 -indicated that the code compliance certificate will be refused and this is then formally confirmed two weeks later in its email. The 1 May 2023 email is more detailed in its discussion of the reasons for refusal, and provides the owner with information about the issues of concern and their possible remedies. I suggest this proximity of the two communications will not always be considered appropriate and offer a comment that a written refusal should contain or have attached to it the explicit, specific, and clear reasons for the decision.
- 6.17. I do note the authority should not direct what actions must be taken to remedy the identified issues or require a report be obtained. The method of remediation is for the owner to propose and the authority to accept. The authority should outline where the information on building code compliance falls short allows the owner to provide information relevant to those areas or engage someone with additional expertise to assist them, but it is for the applicant to propose evidence and the authority to consider.

Grounds for refusal

- 6.18. The authority has refused to issue the code compliance certificate because it is not satisfied that the building work complied with the building code, either at the time it was completed or subsequently.
- 6.19. Looking first at the cladding, from the evidence provided in the surveyor's report it is evident that some areas of the cladding have failed to comply with clause E2. This may be due to shortfalls in the design of the cladding present at the time the cladding was constructed (such as inadequate ground clearances, and the absence of flashings around joinery, junctions and penetrations) or defects in the cladding that have subsequently developed (such as cracks in the plaster, and poor sealing around junctions and flashings).
- 6.20. Previous determinations³ have concluded that actual damage to the dwelling (such as decay in the structural framing or premature deterioration of the building wrap) need not have occurred in order to satisfy the test of whether there is undue dampness in clauses E2.3.2 or E2.3.3. A breach of clause E2.3.2 or E.2.3 will arise from either damage to the building element or evidence of undue dampness.

³ See for example Determination 2014/062 – Regarding the refusal to issue a CCC and the issue of a NTF for an 11-year old house with mixed cladding, at paragraph 8.3.1.

- 6.21. There is evidence of penetration, absorption and transmission of moisture which has caused undue dampness in the external cladding of the owner's dwelling. This evidence is in the form of the elevated moisture readings taken by the surveyor, and the mould and staining observed by him, when he inspected the dwelling in 2019. Therefore, the building work did not comply with Clause E2.3.2 and E2.3.3.
- 6.22. The building work was substantively completed in early 1998, and the evidence of undue dampness was reported by the surveyor in 2019. However, as we cannot ascertain accurately from the information in the surveyor's report when the ingress that caused the undue dampness or potential damage occurred, we are unable to conclude that the cladding complied with the 15-year durability period required for it by clause B2.3.1(b).
- 6.23. Turning now to the compliance of the structural timber wall framing, the surveyor's report stated that the building will require ongoing monitoring and maintenance if the timber framing is to achieve the 50-year life span, which is the durability period required for by clause B2.3.1(a). The surveyor is of the opinion that, given its age, the wall framing is likely to be untreated timber.
- 6.24. I note that at present there is not evidence to suggest that the timber framing is subject to decay. I note also that some limited investigations of the timber framing in the bathroom have been carried out (in conjunction with other repair work), and no decay was identified in those limited investigations. However, no other more invasive investigations have been undertaken to provide conclusive evidence of the moisture content or integrity of the framing in other areas where there was moisture ingress.
- 6.25. Building elements, such as structural members, must be protected from the effects of dampness if they are to continue to perform their functions and achieve their required durability. The form of protection for the timber framing can include a combination of the level of treatment of the timber, physical barriers such as the cladding, and allowances for drainage and ventilation.
- 6.26. For the owner's dwelling, there is evidence the external envelope allow the ingress of moisture to the extent that would cause undue dampness; there is a possibility given the age of the building that the timber framing is untreated; and the cladding is directly fixed to the framing, providing minimal allowance for ventilation or drainage, with is then being exacerbated in places by inadequate ground clearances at the bottom of the cladding. There is evidence of external moisture ingress that could have caused undue dampness.
- 6.27. Accordingly, in my view, I do not consider there is sufficient evidence the structural timber framing has been adequately protected from undue dampness, and in the absence of evidence to the contrary, there is insufficient evidence to conclude that

the timber wall framing complies with Clause B2 (and therefore Clause B1) and therefore grounds to refuse to issue a code compliance certificate.

- 6.28. If the owner wishes to pursue the option of obtaining a code compliance certificate for the building work, they will be required to provide evidence that the timber framing and external cladding currently comply with the relevant performance criteria in the Building Code. They may elect to carry out invasive investigation, identify other information on the building work not presented to the authority, or any other means to establish evidence of the building work meeting the requirements of the building code.

7. Decision

- 7.1. In accordance with section 188 of the Building Act 2004, I confirm the authority's refusal to issue a code compliance certificate for the building work carried out pursuant to building consent 96006541.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 March 2025.

Andrew Eames

Principal Advisor Determinations