

Determination 2005/155

Code compliance certificate in respect of building work inspected but not certified by a building certifier at Whananaki North Road, Hikurangi

1 THE MATTER TO BE DETERMINED

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of the Department.
- 1.2 The applicant is D Carse (“the owner”) who was also the builder. The only other party was the Whangarei District Council (“the territorial authority”). Also entitled to be a party was the building certifier concerned, N Boler (“the building certifier”), trading as Approved Building Certifiers Ltd (“ABC”) (a company that subsequently became a corporate building certifier in its own right). However, the building certifier has gone out of business as a building certifier and accordingly I did not require him to participate in this determination.
- 1.3 The application arises from a dispute about the refusal of the territorial authority to issue a code compliance certificate for certain building work as described in 2.1 below. The owner identifies the matter of doubt or dispute submitted for determination as “The Council refuses to give Code of Compliance” and refers to an attachment, which outlines the sequence of events (see 2.2 and 2.3 below).
- 1.4 I take the view that the matters I am asked to determine are:
- (a) Whether or to what extent certain items of building work (see 2.1 below) comply with the Building Code (the First Schedule to the Building Regulations 1992), and
 - (b) Whether I should confirm, reverse, or modify the territorial authority’s decision to refuse to grant a code compliance certificate in respect of each such item.
- 1.5 Although not specifically asked to do so, in the course of the determination I also considered whether I should confirm, reverse, or modify the territorial authority’s decision to grant the building consent.

2 THE BUILDING WORK AND THE SEQUENCE OF EVENTS

2.1 The building work

2.1.1 The building work concerned is associated with the construction of a new house and garage. The single-storey house is on a sloping section. It is of conventional timber frame construction with corrugated steel roof cladding and fibre-cement weatherboard wall cladding supported by timber piles on concrete footings. The garage is of similar construction except that it has a concrete slab-on-ground floor.

2.1.2 The items of building work concerned are:

- (a) The house (excluding the on-site effluent disposal system and the retaining wall in the basement area) and the garage (excluding the rumpus room), which were covered by the building consent.
- (b) The on-site effluent disposal system (“the disposal system”), which was covered by the building consent but, but for the reasons set out in 4.2.2 below, should not have been.
- (c) The retaining wall in the basement area of the house (“the retaining wall”) described in 2.1.3 below, which was constructed to facilitate car parking but was not covered by the building consent.
- (d) The rumpus room in the garage (“the rumpus room”), which is described in 2.1.4 below and was not covered by the building consent.
- (e) A proprietary self-supporting swimming pool and associated safety barrier, which were not covered by the building consent.

2.1.3 The retaining wall was formed to retain cuts in the soil under the house that were made to create a parking area. The wall retains 750 mm depth of soil along the inner end of that area and has wings that step down to match the height of the retained soil (750 – 0 mm) along each side of the area. The wall consists of 150 x 50 mm timber walings behind 100 x 100 mm timber piles set into the ground to at least the depth of the soil retained. The concrete pads for adjacent house piles behind the wall are approximately 200 mm horizontally from the wall and, at worst, approximately 400 mm maximum above the base of the wall. An unreinforced concrete slab has been laid on the ground in front of the retaining wall. That means that the wall piles, propped by the slab, must act as vertical cantilevers to resist the horizontal loads imposed by the retained soil and by the pile footings behind the wall.

2.1.4 The building work involved in the construction of the rumpus room consisted of:

- (a) Installing an internal partition and door between the garage and the room.
- (b) Replacing the garage door at the end of the room with an external wall.
- (c) Installing a window, a door, and additional bracing in the external walls.
- (d) Installing a storage cupboard.

2.2 The building certificate and the building consent

2.2.1 The plans and specifications for the house and garage were the subject of a building certificate dated 16 June 1997 issued by the building certifier under section 56(2)(a) of the Building Act 1991 (“the previous Act”). A copy of that certificate is on the files of the previous Building Industry Authority (“the Authority”), see 2.2.3 below, but was not given to me by the parties. The certified plans and specifications were endorsed:

“Construction review of effluent disposal system by a suitably qualified engineer to be forwarded to Approved Building Certifiers prior to occupation of dwelling.”

2.2.2 On 25 June 1997 the territorial authority issued a building consent on the basis of that certificate.

2.2.3 However, in response to a complaint against building certifier under section 54 of the previous Act, the Authority held an inquiry and was satisfied (Decision 97/2 dated 21 November 1997) that the certificate was incorrect in that:

“(a) The on-site effluent disposal system was outside the building certifier’s scope of approval as a building certifier.

“(b) The plumbing and drainage details were not adequately specified.

“(c) The subfloor bracing shown on the plans did not comply with the Building Code.

“(d) The deck safety barrier was not shown on the plans nor mentioned in the specifications.

“(e) The blocking to floor joists shown on the plans did not comply with the Building Code.”

2.2.4 The decision said:

“The Authority was given no reason to doubt that [the building certifier] would have ensured that the builder eventually corrected those errors so that the final building work would comply with the Building Code. Nevertheless, the Authority is satisfied that the building certificate was incorrect in that it certified plans and specifications which:

“(a) Included items which were outside the building certifier’s scope of approval;

“(b) Included items which did not comply with the Building Code; and

“(c) Did not include sufficient details of some items to establish whether or not they complied with the Building Code.”

2.2.5 The Authority was satisfied that the building certifier had been negligent as a building certifier and reprimanded him, ordered him to make a payment towards the Authority’s costs, and, required that he give an undertaking to follow guidelines in respect of the documentation required before a building certifier could issue a

building certificate or a territorial authority could issue a building consent. Those guidelines were subsequently published in BIA News No. 76, December 1997.

2.2.6 The Authority stated that:

“The evidence at the inquiry did not indicate that building certifier was technically incompetent.”

I therefore accept that building certifier’s negligence related to matters of administration and not to matters of building technology.

2.2.7 The owner did not apply for, and the territorial authority did not make, any amendments to the building consent to correct the errors identified by the Authority.

2.3 Construction and inspection

2.3.1 The owner undertook the building work under the building consent subject to inspection by the building certifier. I have not been told at what stage of construction the owner departed from the building consent by constructing the retaining wall in the basement of the house and the rumpus room in the garage.

2.3.2 In his evidence to the inquiry, the building certifier said that he had inspected the work on 15, 19, and 25 September 1997. By that time, both the garage and the house had been completed to the stage of “pre-line” and “gib nail” inspections. I have not been given any documentation in respect of those inspections, which should have been covered in monthly reports from the building certifier to the territorial authority under section 57(3)(a) of the previous Act. In respect of work completed and covered up before those inspections, the building certifier relied on producer statements from the owner as provided for by section 56(3A) of the previous Act.

2.3.3 On 13 November 1997, the territorial authority wrote to the building certifier saying “to resolve the outstanding septic tank issue, simply send in an amendment to the existing building consent”. No such amendment was ever processed.

2.3.4 On 12 December 1997, the building certifier wrote to the owner, in response to his request for a final inspection, listing the following “items to be completed”:

- “1. . . . design for the septic tank approved and inspected by an Engineer qualified to do so. . .
- “2. . . . As Built Plumbing and Drainage Plan . . .
- “3. . . . sub-floor bracing details on Amended Plan . . .
- “4. Attend to extra blocking to joists . . .
- “5. . . . amended details for deck safety barrier.
- “6. . . .your own Producer Statement for the foundations of the house and garage . . .
- “7. . . . Producer Statement for the fireplace . . .”

2.3.5 The only other documentation as to inspection that I have seen is an ABC “field advice notice” dated 24 June 2004 that sets out the following outstanding matters:

“Seismic restraints to be installed [to hot water cylinder].

“Seal along vanity Top.

“Close in basement . . . repair foil and line.

“Provide [solid fuel] Heater specifications.

“As built drainage plan.

“Smoke Detector to be installed.

“Swimming Pool Plan.”

(That is the earliest mention of the swimming pool that I have seen.)

2.3.6 On 9 September 2004, the building certifier became unable to continue as a building certifier and the building work came under the control of the territorial authority under section 57(3)(b)(i) of the previous Act. Section 57(4) of the previous Act required the territorial authority to then “make such inspections . . . as it considers necessary”, but in fact the territorial authority did not make any inspections in respect of the outstanding matters mentioned in the field advice notice or of any other matters.

2.3.7 On 11 October 2004 the territorial authority refused to issue a code compliance certificate, giving its reasons for refusal as:

“1. Inspections all show to be carried out on the same date up to preline stage.

“2. Building Certificate supplied is a copy.

“3. There is no record of septic tank and effluent design or approval.

“4. There is no record of swimming pool approval, only an as-built plan.

“5. There is no record of rumpus room in garage, only as-built plan.

“Whangarei District Council are unable to carry out further work on this building consent as it does not seem to comply with the NZ Building Act 1991. Please contact the B.I.A. in regards to completing this consent.”

2.3.8 In March 2005, the owner obtained a report from Richardson Stevens Consultants (1996) Ltd recommending an “upgrade” of the disposal system, and two reports from Wayne Sapwell of Best Construction Practices (Whangarei) Ltd (“the consultant”)

2.3.9 On 30 March 2005 the owner applied for this determination.

3 THE SUBMISSIONS

3.1 Written submissions

- 3.1.1 The owner submitted the various documents mentioned above (other than documents related to the complaint against the building certifier).
- 3.1.2 The consultant's reports covered site investigations and concluded that:
- (a) The house and garage foundations not inspected by the building certifier had the required depths and reinforcing steel had been detected.
 - (b) "The braces that were identified as missing in [the Authority's decision] have been installed as have the solid blocking to the floor joist."
 - (c) The required insulation was present above the ceiling and in the external walls of the rumpus room in the garage.
 - (d) "A small [800 mm high] retaining wall measuring 2.8 m across the back face and 2.0 m along each side has been constructed in the basement of the dwelling to provide a garage space. . . There is no deflection to the wall and the design has been the subject of an engineering report."
 - (e) The deck safety barrier "has been well constructed".
 - (f) All outstanding matters listed in the field advice notice mentioned in 2.3.5 above "have been rectified except item 5 an as-built drainage plan".
 - (g) The proprietary swimming pool "appears to be well constructed and all sides are plumb under the load of the water".
 - (h) "The pool fencing and gate operation complies with the Fencing of Swimming Pools Act 1987".
- 3.1.3 The territorial authority submitted that it:
- " . . . [had] only completed the in-house vetting of viewing over [the territorial authority's] building file against ABC file supplied to Council . . .
- "We have not carried out an onsite inspection and do not wish to proceed with the completion of this building consent, as it is our opinion that we can not be assured on reasonable grounds that the building work carried out with out on-site inspections from the certifier will meet the Building Code. . . . our records show no evidence of inspection up to the preline of dwelling."
- 3.1.4 I entered into extensive correspondence with the owner and the territorial authority in an attempt to obtain additional information, but with only limited success. Accordingly, I prepared a draft determination on such information as I had and sent it to them for their comments, advising that if either of them did not accept the draft then I would hold a hearing at which they could speak and call evidence.
- 3.1.5 The owner did not accept the draft, and accordingly I held a hearing.

3.2 The hearing

- 3.2.1 The hearing was held before me on 3 November 2005, and included a visit to the site. The owner was present, as were two officers of the territorial authority. In attendance were Mr J Hill, a Referee acting for and on behalf of the Chief Executive by delegated authority under section 187(2) of the Building Act 2004, and officers of the Department.
- 3.2.2 In the course of the hearing, I was informed that the owner intended to apply for a building consent to upgrade the disposal system, see 2.3.8, and that the territorial authority would issue such a consent on receipt of the owner's application and all necessary documentation to establish compliance with the Building Code. I was also informed that the owner intended to apply for a certificate of acceptance in respect of the swimming pool.
- 3.2.3 The owner's evidence included assurances that he had now properly completed all of the building work concerned. In particular, the owner said that:
- (a) He had properly completed the items mentioned as uncompleted in 2.3.4 and 2.3.5 above.
 - (b) He had set the retaining wall piles to at least the depth of soil retained below the base of the concrete slab.
 - (c) He had constructed the rumpus room in accordance with generally accepted good practice.
- 3.2.4 The territorial authority officer did not oppose the owner's evidence but indicated that the territorial authority was not willing to rely on it in respect of items of building work that it could not fully inspect, particularly the retaining wall.
- 3.2.5 I asked the representatives of the territorial authority what additional information, such as an independent engineer's inspection that established the depth to which piles were set, would satisfy them that the retaining wall complied with the Building Code. They said that, as a matter of territorial authority policy for insurance reasons, they did not have the authority to accept the retaining wall on the basis of any such report. In my view a building consent authority should decide, on a case-by-case basis, whether it has reasonable grounds on which it can be satisfied that the building work concerned complies with the Building Code.

4 DISCUSSION

4.1 General

4.1.1 Legal points

- 4.1.1.1 Under section 40 of the Act (corresponding to section 80(1)(a) of the previous Act) it is an offence to do building work otherwise than in accordance with a building consent. It is a matter for the territorial authority to decide in each case whether or not to mount a prosecution for such an offence. I take the view that even if the owner

committed an offence by doing the work, that is irrelevant to whether the work complies with the Building Code.

- 4.1.1.2 Section 436 of the Act provides that an application for a code compliance certificate in respect of building work carried out under a building consent granted under the previous Act must be considered and determined as if the Act had not been passed. Section 43(1) of the previous Act provides for the owner to advise the territorial authority when “the building work has been completed to the extent required by the building consent”. Section 43(3)(a) of the previous Act provides that the territorial 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. I take that to mean that in certain circumstances a code compliance certificate may be issued under the previous Act in respect of building work that does not comply with the building consent provided that it complies with the Building Code, but only if that work is within the general scope of the building consent and is comparatively minor in the context of the totality of the work specified in the building consent. (The situation is now different, see section 94(1)(a) of the Act.)
- 4.1.1.3 Section 437 of the Act provides that a territorial authority may issue a certificate of acceptance in respect of building work done without a building consent before 31 March 2005. I take the view that in this case, if the building work concerned complies with the Building Code, it is open to the territorial authority, on application by the owner, to issue a certificate of acceptance for the retaining wall and the rumpus room.

4.1.2 *Credibility*

- 4.1.2.1 I appreciate the territorial authority officers’ reluctance to accept the owner’s unsupported statements as reasonable grounds on which to be satisfied as to compliance with the Building Code.
- 4.1.2.2 However, each case must be considered on its merits, and in this case, having heard the owner and seen the building work concerned, I concluded:
- (a) All of the building work that I saw appeared to be well done with a good standard of workmanship.
 - (b) The owner appeared to have a sound grasp of building practice (although not of administrative procedures under the Act and the previous Act).
 - (c) The owner appeared to give an honest and detailed account of what he actually did.
- 4.1.2.3 Accordingly, in this case I accept the owner’s evidence as amounting to reasonable grounds on which I can be satisfied as to compliance with the Building Code. I emphasise that this is not to be taken as a precedent for my attitude to similar evidence in future determinations.

4.2 Does the building work concerned comply with the Building Code?

4.2.1 *The house (excluding the disposal system and the retaining wall) and the garage (excluding the rumpus room)*

4.2.1.1 The house (excluding the disposal system and the retaining wall) and the garage (excluding the rumpus room) were covered by the building consent. Prior to the hearing, the relevant evidence as to whether they comply with the Building Code consisted of:

- (a) The inspections made by or on behalf of the building certifier, and the owner's producer statements accepted by the building certifier.
- (b) The consultant's reports.

4.2.1.2 Section 57(3)(a) of the previous Act and regulation 8(1) of the Building Regulations 1992 provided that a building certifier must make monthly inspection reports to the territorial authority and must make a final report if the building certifier has ceased to act as a building certifier. In fact, I have not seen any such reports other than the field advice note mentioned in 2.3.5 above, and those provisions are no longer in effect. Nevertheless I take the view that those provisions indicate that, in the absence of evidence to the contrary, the territorial authority was entitled to rely on the building certifier to ensure that building work done subject to the certifier's inspections had in fact been done correctly, at least up to the time of the certifier's latest report.

4.2.1.3 Although I deplore the lack of documentation, I accept that the building certifier was in fact satisfied that the building work concerned complied with the Building Code as at 24 June 2004 except as noted on the field advice notice mentioned in 2.3.5 above. I accept the Authority's opinion (see 2.2.4 above) that the building certifier could be relied on to ensure that the final building work done under his supervision would comply with the Building Code. That is confirmed by the consultant's report, which noted that certain errors in the plans and specifications identified by the Authority had been corrected in the final construction.

4.2.1.4 I recognise the territorial authority's point that it has no record of any inspections having been made up to the pre-line stage. However, the building certifier was authorised to accept producer statements under section 56(3A) of the previous Act. I have not seen those statements, and indeed as I read the previous Act there was no requirement that they should be in writing. There is no evidence to indicate that the building certifier acted unreasonably in accepting the owner's producer statements. That approach is supported by the consultant's report on the foundations.

4.2.1.5 I consider that the building certifier was satisfied that the house and garage complied with the Building Code except for:

- (a) The disposal system.
- (b) The other uncompleted items mentioned in 2.3.4 and 2.3.5 above.
- (c) The retaining wall.

(d) The rumpus room.

4.2.1.6 To the extent that the items listed as uncompleted were visible at the hearing, I was satisfied that they now complied with the Building Code.

4.2.1.7 I accept the owner's statement that he properly completed the rest of those items in accordance with generally accepted good practice.

4.2.1.8 I therefore conclude that I have reasonable grounds on which to be satisfied that the house and garage, including the items mentioned in 2.3.4 and 2.3.5 above but excluding the other items listed in 4.2.1.5 above, comply with the Building Code, and that a code compliance certificate should be issued accordingly.

4.2.2 *The disposal system*

4.2.2.1 The disposal system covered by the building consent was outside the building certifier's scope of approval. That is because Clause G14.3.2(d) of the Building Code requires that the system shall "avoid the likelihood of contamination . . . except as permitted under the Resource Management Act 1991". Building certifiers had no powers of approval in respect of compliance with that Act. Accordingly, the building certifier's certificate was outside the scope of his approval and therefore the territorial authority had no grounds on which it could be satisfied that the system complied with the Building Code.

4.2.2.2 The fact that the building certifier required a construction review of the system by "a suitably qualified engineer" did not bring the system within his scope of approval. However, it did result in the report by Richardson Stevens Consultants (1996) Ltd, which recommended certain "upgrading" work to bring the system to compliance with the Building Code.

4.2.2.3 As mentioned above, the owner intends to apply for a new building consent to undertake that "upgrading" work. I therefore do not need to consider the system in this determination, although any future disputes about the system may be submitted to me for a future determination.

4.2.3 *The retaining wall*

4.2.3.1 The previous Act provided that a code compliance certificate must be issued if all of the building work under a building consent had been completed and complied with the Building Code. The retaining wall does not comply with the building consent. However, I take the view that it is within the scope of the building consent and is comparatively minor in the context of the totality of the work specified in the building consent (which does not detract from the importance of ensuring that the wall complies with the Building Code). I conclude that the retaining wall may properly be covered by the code compliance certificate if it complies with the Building Code.

4.2.3.2 I accept the advice of Mr Hill and the officers of the Department to the effect that if the retaining wall piles were embedded to the depth of the soil retained then the retaining wall would comply with the Building Code.

4.2.3.3 I accept the owner's statement that the piles were embedded to at least that depth.

4.2.3.4 I conclude that the retaining wall complies with the Building Code and should be included in the code compliance certificate to be issued in respect of the house and the garage.

4.2.4 *The rumpus room*

4.2.4.1 The rumpus room does not comply with the building consent. However, again I take the view that it is within the scope of the building consent and is comparatively minor in the context of the totality of the work specified in the building consent (which does not detract from the importance of ensuring that the room complies with the Building Code). I conclude that the rumpus room may properly be covered by the code compliance certificate if it complies with the Building Code.

4.2.4.2 The consultant's report is incomplete as regards the rumpus room, and in particular does not consider compliance with Clause E2 External moisture of the Building Code. The plans for the garage do not show details of weatherproofing of doors and windows or whether there is a damp-proof membrane or the like to the concrete slab floor as would usually be required for compliance with Clauses E2.3.2 and 3. Those clauses do not apply to the garage as such because moisture entering the garage through the roof, walls, and floor is not likely to be more harmful than moisture brought in to it on vehicles or through open garage doors. However, that is not the case for the rumpus room.

4.2.4.3 However, to the extent that building work concerned was visible, I was satisfied that what I could see of the building work concerned complied with the Building Code.

4.2.4.4 I accept the owner's statement that he properly completed the rest of the building work involved in the construction of the rumpus room in accordance with generally accepted good practice.

4.2.4.5 I conclude that the rumpus room complies with the Building Code and should be included in the code compliance certificate to be issued in respect of the house and the garage.

4.2.5 *The swimming pool*

4.2.5.1 The swimming pool is outside the scope of the building consent. The consultant's report indicates that the swimming pool complies with the Building Code and that the associated safety barrier complies with the Fencing of Swimming Pools Act (and therefore with the Building Code).

4.2.5.2 As mentioned above, the owner intends to apply for a certificate of acceptance for the swimming pool and its associated safety barrier. I therefore do not need to consider the pool in this determination, although any future disputes about it may be submitted for a future determination.

4.3 The building consent

- 4.3.1 As mentioned above, the building consent was issued in 1997 and most of the work under the consent was completed that year. That means that it is inappropriate to issue a code compliance certificate in 2005 on the basis of that building consent because I am not satisfied as to compliance with Clause B2 Durability of the Building Code.
- 4.3.2 I consider that it is appropriate to amend the building consent by incorporating a waiver of Clause B2 to the effect that the durability periods specified in Clause B2.3.1 are to apply from 12 December 1997 (the date of the building certifier's letter mentioned in 2.3.4 above) instead of from the time of issue of the code compliance certificate.
- 4.3.3 For the reasons set out in 4.2.2 above, the building consent should not have included the disposal system. I consider it is appropriate to further amend the building consent by omitting that system.

4.4 The code compliance certificate

- 4.4.1 Section 43(3)(b) of the previous Act provides for a code compliance certificate to be granted in respect of work covered by a building consent if that work complies with the Building Code "to the extent authorised in any previously approved waiver or modification of the Building Code contained in the building consent which relates to that work".
- 4.4.2 Accordingly, once the building consent has been amended as indicated in 4.3 above, I consider that, for the reasons set out 4.2 above, a code compliance certificate should be issued in respect of the house (including the retaining wall but not the disposal system) and the garage (including the rumpus room).

4.5 A certificate of acceptance

- 4.5.1 For the reasons outlined in 4.1.1 above, I take the view that an alternative approach would have been for me to conclude that a code compliance certificate should be issued for the building work that complied with the building consent, leaving it open to the owner to apply for a certificate of acceptance in respect of the retaining wall and the rumpus room (as he intends to do for the disposal system and the swimming pool). However, I decided not to do so because:
- (a) The garage was never constructed in compliance with the building consent.
 - (b) From the territorial authority officers' replies to questions at the hearing (see 3.2.5 above) I formed the impression that certainly the retaining wall and possibly also the rumpus room would be refused a certificate of acceptance and I would have to make a further determination in respect of that refusal.
- 4.5.2 However, I emphasise that this determination is not to be taken as a binding precedent for one approach rather than the other should a comparable situation arise in the future.

5 DECISION

5.1 In accordance with section 188 of the Act, I hereby:

- (a) Modify the territorial authority's decision to grant the building consent by amending that consent to:
 - (i) incorporate a waiver of Clause B2 of the Building Code to the effect that the durability periods specified in Clause B2.3.1 are to apply from 12 December 1997 (the date of the building certifier's letter mentioned in 2.3.4 above) instead of from the time of issue of the code compliance certificate, and
 - (ii) omit the disposal system.
- (b) Reverse the territorial authority's decision to refuse to grant a code compliance certificate to the effect that a code compliance certificate is to be issued in respect of the house (including the retaining wall but not the disposal system) and the garage (including the rumpus room).
- (c) Make no determination in respect of:
 - (i) The disposal system.
 - (ii) The swimming pool and associated safety barrier.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 December 2005.

John Gardiner
Determinations Manager