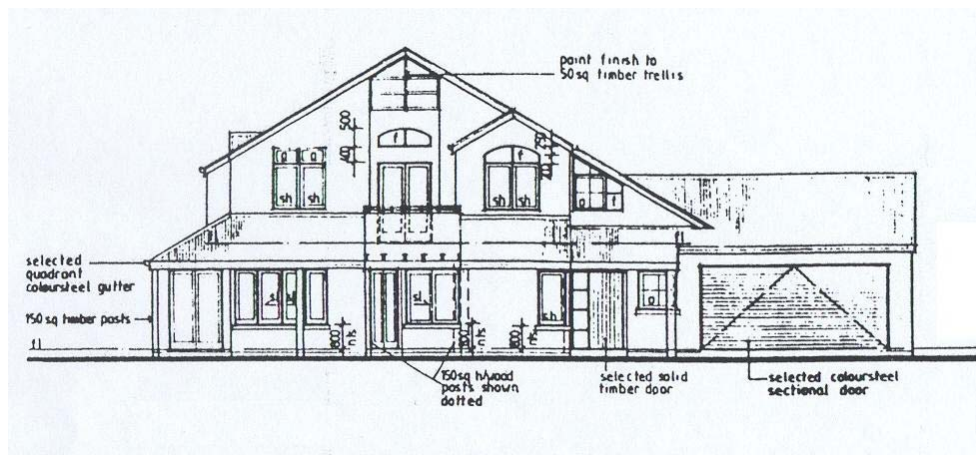


Determination 2006/110

Refusal of a code compliance certificate for a building with monolithic cladding at 12 Dover Road, Hamilton



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, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are Mr and Mrs Walker, acting through an agent (“the applicants”), and the other party is the Hamilton City Council (“the territorial authority”). The dispute for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for a 10-year-old house because it was not satisfied that the building work complied with clause B2 “Durability” of the Building Code² (First Schedule, Building Regulations 1992) is correct.
- 1.2 The matter to be determined is whether all the building elements installed in the house, apart from those items that may need to be fixed as set out in paragraph 5.4, comply with clause B2 of the Building Code considering the time that has elapsed since the elements were constructed.
- 1.3 The territorial authority has also submitted that the cladding used on the house had been “banned” and this was an additional reason why it declined to issue the code

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

compliance certificate. I have not treated this as a matter for dispute but have discussed the issue in paragraph 5.

- 1.4 In making my decision, I have considered the submissions of the parties, a legal opinion, and the other evidence in this matter. I have not considered any other aspects of the Act or the Building Code.

2. The building

- 2.1 The building work consists of a detached two-storey house situated on a level site, which is in a low wind zone for the purposes of NZS 3604³. The house is of a relatively simple shape on plan but with some complex features. The steeply pitched roofs are at varying levels and have hip, valley, and wall to roof junctions. While the roofs generally lack effective eaves and verge projections, they are extended over the lower level verandas. The extended roof areas are supported on timber posts and beams. The external wall construction is of conventional light timber frame built on either concrete or timber-framed floors.
- 2.2 A timber-framed balcony is constructed outside the upper-floor gallery and two of the bedrooms and this is constructed over a living space. The balcony has a monolithic-clad timber-framed balustrade. A pergola constructed with timber posts, plates and beams is secured through the cladding adjacent to the ground floor living room. Brick planter boxes are situated at various garden locations.
- 2.3 I have not received any evidence that establishes whether the external wall framing is treated to a level that is effective in helping resist decay if it absorbs and retains moisture.
- 2.4 The external cladding system is a monolithic cladding system described as stucco plaster applied over a metal “Riblath” backing fixed through the building wrap directly to the framing timbers. The plaster is finished with a paint system.

3. Sequence of events

- 3.1 The territorial authority issued a building consent in 1996.
- 3.2 The territorial authority wrote to the applicants on 8 May 2000, noting that there were 4 items yet to be completed on the house, and when the project was satisfactorily completed, the territorial authority would issue a code compliance certificate.
- 3.3 The Building Industry Authority (the “Authority”), the antecedent to the Department, made an interim change to the Acceptable Solution⁴ for E2 External Moisture E2/AS1 which came into effect on 9 February 2004. The change required the use of drained ventilated cavities behind stucco cladding for both rigid and non-rigid backing. The change remained in place until the revised E2/AS1 came into effect in 1 February 2005. The revised E2/AS1 also contained this requirement.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁴ An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way, but not the only way, of complying with the Building Code. The Acceptable Solutions are available from The Department’s Website at www.dbh.govt.nz.

- 3.4 A firm of building consultants engaged by the applicants (“the consultants”) inspected the building work on 8 December 2005 and produced a report of the same date.
- 3.5 On 4 March 2006 the applicants wrote to the territorial authority advising that they had inadvertently not actioned the letter from the territorial authority that listed four items to be completed before a code compliance certificate could be issued. The applicants noted that they arranged for an inspection to take place and an officer of the territorial authority had carried out this inspection on 7 December 2005. The officer produced a new and extended list of requirements and the applicants were working through them. The applicants also queried some of the issues raised by the territorial authority.
- 3.6 The territorial authority wrote again to the applicants on 15 March 2006, noting that there had been recent developments regarding certain claddings that would impact on the house in question. The territorial authority listed the issues affecting the building, including a statement that the Department had banned face-fixed stucco cladding and any such claddings must be fixed in conjunction with a ventilated and drained cavity. As the building was close to 10 years old, the territorial authority also had to take this into account when considering the issue of a code compliance certificate. The territorial authority suggested that a joint inspection be held on site in conjunction with the applicants and the consultants.
- 3.7 The consultants re-inspected the work in the presence of an officer from the territorial authority and one of the applicants. In a letter to the applicants dated 27 March 2006, the consultants made certain comments concerning the cladding that can be summarised as follows:
- No major or minor movement was identified, cracks had been sealed and painted, and all penetrations were well sealed.
 - There were some issues relating to ground clearances.
 - There were positive drip-lines with purpose formed eyebrows over the windows and at the inter-floor junctions.
 - The stucco plaster within the brick planter boxes had been waterproofed and it would be unwise to remove the cappings at these locations.
 - The apron flashings now direct water away from the cladding.
 - As long as the pergola ribbon plate junction with the cladding was sealed and maintained, this detail would meet the requirements of the Building Code.
 - The interior of the building showed no signs of moisture, dampness, settling or movement.
- The consultants were of the opinion that, if the territorial authority was fully satisfied that the building was constructed in accordance with the Regulations current at the time of construction, then it could issue a certificate of acceptance.
- 3.8 In a letter to the applicants dated 3 August 2006, the consultants stated that, in attendance with the applicants and an officer from the territorial authority, destructive tests and moisture readings had been undertaken at various building locations. No higher readings had been recorded. The pergola ribbon plate/cladding

junction was inspected and no signs of dampness or corrosion had been found. The letter noted that the applicants had agreed to remove the pergola and reinstate allowing for packers to space the plate off the wall. The gardens around the foundation lines had been removed and the lower part of the footings waterproofed to prevent the wicking of moisture onto the cladding. The opinion of the consultants was that:

the tests completed verify that the building envelope still meets the durability requirements of the building code.

- 3.9 In a letter to the consultants dated 24 August 2006, the territorial authority described the building and its cladding, saying:

It is important to note that the BIA banned the use of solid plaster fixed in the manner on this building some years ago now and all plaster systems must now be installed over a cavity.

In this instance although we have concerns with plaster systems of this type the workmanship and attention to detail on this building suggests a high level of workmanship . . .

“Belling” of the plaster to form drip edges over openings is evident and there was only some very minor hairline cracking in one or two places. The building is in a very tidy condition and has obviously been well maintained by the owners . . .

In conjunction with [the consultant], the writer visited the site and observed a number of tests . . . in potentially high-risk areas; under windows, around bottom plates and in areas where if a building were leaking one would expect to find evidence of problems.

. . .moisture readings were taken [that]. . . returned very low figures in all areas tested. In essence there were no high readings to suggest that the building ever has or is allowing moisture to penetrate the stucco cladding.

- 3.10 The territorial authority said the two main issues were:

The building is now 10 years old and [the territorial authority] . . . does not wish to take on a further 10 years of liability for a building that is already 10 years old . . . [the Department] should take into account other determinations they have made . . . in similar circumstances.

The former BIA has banned the cladding and [the territorial authority] is concerned of the implications in terms of a further 10 years of liability where we have a banned system or product.

- 3.11 The territorial authority did not issue a notice to fix in terms of section 164 of the Act.

- 3.12 The Department received the application for a determination on 1 September 2006.

4. The submissions

- 4.1 In a covering letter to the Department dated 16 August 2006, the applicants noted that the territorial authority would not issue a code compliance certificate for the house, as the dwelling was nearly 10 years old.

- 4.2 The applicants forwarded copies of:

- the plans
- some of the consent documentation

- the correspondence with the territorial authority
 - the correspondence from the consultants, including the report of 27 March 2006.
- 4.3 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submission in response to the submission of the other.
- 4.4 The draft determination was sent to the parties on 13 October 2006. The draft determination was issued for comment and for the parties to agree a date when all the building elements installed in the house, apart from items that have to be rectified as described in paragraph 5.4, complied with the Building Code Clause B2 Durability. Both parties accepted the draft citing 20 October 1996 as the time when compliance with B2 was achieved.

5 Discussion: The stucco cladding

- 5.1 The territorial authority submitted that the Authority “banned” the use of stucco unless it was installed over a drained and ventilated cavity.
- 5.2 I note that Building Code clause E2 “External Moisture” was not changed over the period of time since the house was constructed. The Building Code is a performance-based document and while an Acceptable Solution provides one means of complying with the performance requirements, compliance can also be achieved by alternative means. The requirements of any Acceptable Solution are non-mandatory.
- 5.3 The Authority had no powers under the Building Act 1991 to ban any building method or product. The Building Act 2004 does give powers to the Chief Executive of the Department to ban a building method or product under section 26 of the Act, but no such ban has been imposed on the use of stucco.
- 5.4 I note, however, that there appear to be the possibly of outstanding issues related to the compliance of the cladding as noted in paragraph 3.7 these being:
- the adequacy of the ground clearance
 - the pergola ribbon plate junction with the cladding.
- Work to correct these items may expose additional associated defects that are not yet apparent.
- It is not clear from the correspondence whether these matters have now been rectified.
- 5.5 If there are matters that are still to be rectified the territorial authority should issue a notice to fix requiring the owners to bring the house into compliance with the Building Code. The notice to fix may list the items to be rectified but it should not specify how compliance is to be achieved as this is for the owner to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.
- 5.6 The applicant should then produce a response to the notice to fix in the form of a technically robust proposal, produced in conjunction with an expert, as to the

rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding Determination.

6. Discussion: The durability considerations

- 6.1 As set out in paragraph 1.2, the territorial authority has concerns about the durability, and hence the compliance with the building code, of certain elements of the building, taking into consideration the completion date of the building in about 1996.
- 6.2 Before addressing these issues I sought clarification of general legal advice about waivers and modifications. I have now received that clarification, which has enabled me to make this draft determination for consideration by the parties.
- 6.3 It appears the building was substantially completed in about 1996. The territorial authority wrote to the applicants on 8 May 2000, noting that there were 4 items yet to be completed on the house, and when these were satisfactorily completed a compliance certificate could be issued. No further inspections were carried out by the territorial authority.
- 6.4 The relevant provision of clause B2 of the Building Code recognises 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 of issue of the applicable code compliance certificate” (clause B2.3.1).
- 6.5 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 6.6 It is not disputed, and I am therefore satisfied that all the building elements installed in the house, apart from items that may need to be fixed as described in paragraph 5.4, complied with clause B2 in October 1996. This date has now been confirmed by both the applicant and the territorial authority since the publication of the draft determination.
- 6.7 Section 433 provides that a building consent granted under the Building Act 1991 must be treated as if it were a building consent granted under section 49 except that section 93 (which stipulates the time in which a building consent authority must decide to issue a code compliance certificate) does not apply.
- 6.8 Section 67 of the Act provides that a territorial authority “may grant an application for a building consent subject to a waiver or modification of the building code” subject to “any conditions that the territorial authority considers appropriate”. I take

the view that a territorial authority may grant such a waiver or modification only when it is reasonable to do so in the circumstances. (Section 69 effectively excludes the provision of waivers or modifications to the Building Code for access and facilities for use by people with disabilities).

- 6.9 Section 45(5) provides that an application for an amendment to a building consent granted under section 49 must be made as if it were an application for a building consent and section 45 “applies with any necessary modifications”.
- 6.10 I take the view that those sections are to be read as enabling a territorial authority to amend a building consent (whether granted under the Act or the former Act) by incorporating a waiver or modification of the Building Code.
- 6.11 Once any outstanding matters described in paragraph 5.4 are addressed to the territorial authority’s satisfaction, the territorial authority may then issue a code compliance certificate against the amended consent.

7. Procedure

- 7.1 Should the territorial authority have concerns about procedure, I take the view that:
- (a) Sections 92(1) and 94(1)(a) establish that a code compliance certificate must relate to all of the building work covered by the building consent to which that certificate relates. I take that to mean the building consent as amended (if at all) prior to the granting of the code compliance certificate. (See paragraph 7.5 below for a discussion of section 436).
 - (b) Section 92(1) also establishes that it is no longer possible to issue an interim code compliance certificate (as it was under section 43(4) of the former Act).
 - (c) An amendment to building consent under section 45(5) does not create a new building consent in the sense that it is possible to issue separate code compliance certificates for the original building consent and for the amendment. After all, if an amendment deletes particular work as specified in the original consent and substitutes different work as specified in the amendment, then the work covered by the original consent will never be completed and accordingly it will be impossible to grant a code compliance certificate in respect of that work as distinct from the work specified in the amended consent.
 - (d) Amendments to building consents are not confined to changing the building work covered by the building consent concerned but may also change the other matters covered by the building consent such as procedures for inspection and so on, including any waivers or modifications of the Building Code.
 - (e) Any waiver or modification the Building Code should be documented in the territorial authority’s records of the property to ensure that potential purchasers and subsequent owners are aware of the waiver or modification. If the waiver or modification was made by way of a determination then that determination should be identified on the Land Information Memorandum, with a copy of the determination on the property file for the building.

7.2 In coming to this view, I have had to consider section 436 of the Act, which sets out the transitional provision for issuing code compliance certificates for building work consented under the former Act.

7.3 Under section 43(3) of the former Act, a territorial authority was required to issue a code compliance certificate if it was satisfied that the building work complied with the Building Code subject to any previously approved waiver or modification.

7.4 The relevant parts of section 436 state:

- (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—
 - remains in force as if this Act had not been passed; but
 - 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.

7.5 In Determination 2006/87, issued on 11 September 2006, I said

“4.2.12 There are two possible interpretations of section 436:

- a code compliance certificate may be issued only if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted; or
- a code compliance certificate may be issued if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted, but allowing for any waivers and modifications to the Building Code incorporated in the building consent.

“4.2.13 The first interpretation is premised on section 436(3)(b)(i) replacing section 43(3) of the 1991 Act. It relies on the use of the word “only” in section 436(3)(b)(i) as excluding the possibility of the territorial authority considering anything other than compliance against the Building Code in force at the time the building consent was granted, meaning that a territorial authority would not be able to consider any waivers or modifications to the Building Code that were incorporated in the building consent.

“4.2.14 In comparison, the second interpretation is that section 436(3)(b)(i) does not replace section 43 of the 1991 Act, but that it must be read alongside section 43(3) as much as possible. Under this interpretation, section 436(3)(b)(i) should be read as modifying section 43(3) only in respect of the new element it adds to the code compliance certificate test; it merely changes the version of the Building Code that compliance should be measured against,

from the version in force at the time the application for a code compliance certificate was made, to the version in force at the time the building consent was granted.

“4.2.15 The effect of the first interpretation would be that owners who have been granted waivers or modifications to the Building Code (whether under the 1991 Act or through an amendment to a consent under the 2004 Act) would never be able to obtain a code compliance certificate. Essentially, these owners, who may have relied in good faith on waivers or modifications legitimately granted to them, would be left in perpetual limbo.

“4.2.16 This would be most undesirable. It would be the reverse of the usual situation under both the 1991 and 2004 Acts and, in my view, does not fit with the purpose and scheme of the Building Act 2004. As far as possible, an owner should obtain a code compliance certificate for all work requiring a building consent and for which a consent was granted. A grant of a waiver or modification should not stop this.

“4.2.17 Furthermore, there is nothing in the transitional provisions of the 2004 Act that supports such a result; for cases where waivers or modifications have been granted, the Act does not provide for any outcome other than to obtain a code compliance certificate. In comparison, section 437(1)(b) provides for an owner to obtain a certificate of acceptance if they are unable to obtain a code compliance certificate because the building certifier no longer exists.

“4.2.18 For the reasons set out above, I prefer the second interpretation relating to section 436(3)(b)(i)”.

7.6 I continue to hold that view, and therefore conclude that:

- (a) The territorial authority has the power to grant an appropriate modification of clause B2 in respect of all the building elements installed in the house, apart from items that may need to be fixed as described in this determination if the applicant applies for such a modification.
- (b) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if a code compliance certificate had been issued in 1996.

7.7 I strongly recommend that the territorial authority record this determination, and any waiver resulting therefrom, on the property file and any LIM for the property.

8. The decision

8.1 In accordance with section 186, I hereby determine:

- (a) that all the building elements installed in the house, apart from any items that are to be fixed as described in this determination, complied with clause B2 at 20 October 1996.
- (b) that, should the applicant so request, the territorial authority must modify the territorial authority’s decision to issue the building consent to the effect that the building consent is amended as follows:

This building consent is subject to a modification of the Building Code to the effect that clause B2.3.1 applies from 20 October 1996 instead of from the time of issue of the code compliance certificate for all building elements except those elements to be clarified and if necessary fixed as set out in paragraph 5.4 of Determination 2006/110.

- (c) that, once any defects set out in paragraph 5.4 of this determination have been fixed to its satisfaction the territorial authority is to issue a code compliance certificate in respect of the building consent as amended

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 November 2006.

John Gardiner
Determinations Manager