

Determination 2006/85

Refusal of a code compliance certificate for a building with a plywood cladding system at 15A Notley Street, Westmere, Auckland



1. The dispute 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, for and on behalf of the Chief Executive of that Department. The applicant is Jill Smith, the previous owner (“the applicant”), and the other party is the Auckland City Council (“the territorial authority”). I also consider that the new owner is a person with an interest in this Determination.
- 1.2 The dispute for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for 7-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 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.

- 1.3 The question to be determined is whether a code compliance certificate is to be issued despite the fact that it is not now (October 2006) possible to be satisfied that certain building elements, which have 5 and 15-year durability requirements, comply with clause B2 of the Building Code considering the time that has elapsed since those elements were constructed.
- 1.4 In making my decision, I have considered the submissions of the parties, the legal opinion that I have obtained, and the other evidence in this matter. I have not considered any other aspects of the Act or the Building Code.
- 1.5 In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The building

- 2.1 The building work consists of a single-storey split-level house situated on an excavated sloping site, which is in a low wind zone for the purposes of NZS 3604³. The house is of a relatively simple shape on plan and the low-pitched roofs, which are at two main levels, have wall to roof junctions. Apart from the west elevation, the roofs lack eaves and verge projections. A breeze block feature wall is constructed over a block foundation wall to the ends of bedroom 1 and the studio. The remainder of the external wall construction is of conventional light timber frame built on timber-framed piled floors. A timber-framed open deck is located outside two elevations of the living room and this has a plywood-clad balustrade with timber cappings. Two narrow interior decks are located inside the main structure between the bedroom 1 and studio joinery units and the exterior block wall.
- 2.2 The external cladding system is textured plywood with vertical and horizontal battens over the joints and finished with a paint system.

3. Sequence of events

- 3.1 The territorial authority issued a building consent in May 1999 under the former Building Act 1991 (“the former Act”).
- 3.2 The territorial authority carried out various inspections during the construction of the building work, which was completed in late 1999, and carried out a site inspection of the property on 15 February 2006. In a letter to the applicants dated 20 February 2006, the territorial authority refused to issue a code compliance certificate because it was not satisfied that the house complied with the Building Code in a number of respects.
- 3.3 The territorial authority attached a notice to fix, also dated 20 February 2006, to this letter. The “particulars of contravention or non-compliance” attached to the notice listed requirements under the following headings:
1. Issues relating to cladding.
 2. Changes to the building consent.
 3. Other building related issues.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

4. Durability issues.

The notice also set out the actions that the applicant was to undertake to remedy the contravention or items of non-compliance.

- 3.4 The applicant commissioned a consulting firm (“the consultants”) to inspect the property and provide a report in relation to the notice to fix. The report and a set of appendices were published in April 2006 and was subsequently forwarded to the territorial authority.
- 3.5 In a letter to the applicant dated 24 April 2006, the territorial authority responded to the consultants’ report, saying in effect that the territorial authority was satisfied that the work necessary to remedy the non-compliance had been properly completed. I have not been informed as to why there was an interval of approximately five years between the substantial completion of the building and the February 2006 inspection.
- 3.6 The Department received the applicant’s application for a determination on 12 May 2006.

4. The submissions

- 4.1 In a covering letter to the Department dated 9 May 2006, the applicant noted that the territorial authority had agreed with the “scope of works” described by the consultants and these works were now underway. However, the territorial authority was not satisfied with the consultant’s assessment that the house will continue to meet the requirements of clause B2.

- 4.2 The applicants forwarded copies of:

- the plans and specifications
- some of the consent documentation
- the notice to fix
- the consultants’ April 2006 report and appendices
- the correspondence from the territorial authority.

- 4.3 In a letter to the Department dated 19 May 2006, the territorial authority described the Particulars of Contravention.

- 4.4 In a further letter to the Department dated 24 May 2006, the territorial authority stated:

Regarding the letter we submitted dated 19th of May 2006 Council were satisfied the building work complied with all clauses of the Building Code except B2 durability.

Therefore the only outstanding area of contravention as listed on the NTF at the 23rd of May 2006 was B2 Durability...

Those building elements are itemised in paragraph 5 of the notice to fix, and are referred to below as “the listed elements”).

- 4.5 The territorial authority also forwarded copies of:

- the plans

- some of the territorial authority's consent documentation
- the notice to fix
- the correspondence with the applicants.

4.6 Copies of the submissions and other evidence were provided to each of the parties and a copy of a draft determination ("the first draft") was forwarded to the parties on 16 August 2006. The territorial authority responded in a letter dated 28 August 2006, the content of which was taken into consideration in another draft ("the second draft"), which was in the form of a final determination and was also sent to the parties. The second draft was to the effect that:

- (a) The Chief Executive could not be satisfied as to compliance of the listed elements with clause B2, but
- (b) The applicant should apply to the territorial authority for a waiver or modification of clause B2 to the effect that the durability periods specified in clause B2.3.1 for the listed elements were to run from the date of substantial completion of the building instead of from the date of the code compliance certificate, and
- (c) Such an application should be considered by the territorial authority in terms of section 436.

4.7 The territorial authority requested a hearing, which was held on 29 September 2006 with both parties represent.

4.8 At the hearing the territorial authority explained its reservations about the procedures by which it could grant a waiver or modification of clause B2 and then issue a code compliance certificate in respect of the building work subject to that waiver or modification.

4.9 In response to my request, the territorial authority and the applicant agreed that as at 20 December 1999 the listed elements had been properly completed in accordance with both the building consent and the Building Code.

5. Discussion

5.1 It is not disputed that the building has now been completed in accordance with the building consent. I do not know whether the building consent was formally amended to cover the work done in response to the notice to fix. Be that as it may, because of the time taken to do that work, and possibly for other reasons, by the time the territorial authority could consider issuing a code compliance certificate in respect of the completed building, the listed elements had been in place for several years. It was therefore no longer possible to be satisfied that they would still achieve the required durability periods measured from the date when a code compliance certificate was finally issued.

5.2 Before addressing these issues I sought and received some clarification of general legal advice about waivers and modifications. I have now received that clarification, which has enabled me to make this determination.

- 5.3 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).
- 5.4 Those 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; and
 - 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.
- 5.5 It is not disputed, and I am therefore satisfied that the listed elements complied with clause B2 on 20 December 1999.
- 5.6 Section 433 provides that a building consent granted under the former Act must be treated as if it were a building consent granted under section 49 except that section 93 (time in which a building consent authority must decide whether to issue a code compliance certificate) does not apply.
- 5.7 Section 67 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 the Building Code for access and facilities for use by people with disabilities.)
- 5.8 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”.
- 5.9 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.
- 5.10 In response to the territorial authority’s 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 5.15 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 determination should be identified on the Land Information Memorandum, with a copy of the determination on the property file for the building.

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

5.12 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.

5.13 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.

5.15 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).

5.16 I continue to hold that view, and therefore conclude that

- (a) The territorial authority had the power to grant an appropriate modification of clause B2 in respect of the listed elements if the applicant had in fact applied for such a modification.
- (b) It would have been reasonable to grant such a modification, with appropriate notification as outlined in 5.10(b) above, because in practical terms the building is no different than it would have been if a code compliance certificate had been issued in December 1999 with the building subsequently being altered under a separate building consent for the work mentioned in 3.5 above. To put it another way, if those alterations had been completed with reasonable celerity, as I understand they were, and the territorial authority had inspected them upon completion, then a code compliance certificate would no doubt have been issued in late 1999 or early 2000 without the need for any waiver or modification of clause B2. It is regrettable that that sequence of events did not in fact occur.

6 The decision

6.1 In accordance with section 186, I hereby:

- (a) Determine that the listed elements complied with clause B2 on 20 December 1999.
- (b) Modify the territorial authority's decision to issue the building consent to the effect that the building consent is amended as follows:

This amendment is subject to an amendment to the Building Code to the effect that, in respect of the building elements listed in paragraph 5 of the notice to fix dated 20 February 2006, performance B2.3.1 applies from 20 December 1999 and not from the time of issue of the code compliance certificate.
- (c) Reverse the territorial authority's decision not to issue a code compliance certificate to the effect that a code compliance certificate is issued 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 4 October 2006.

John Gardiner
Determinations Manager