

Determination 2007/94

Determination about the territorial authority's decision not to rely on a building certifier's inspections for additions and alterations for a house at 18 Yule Street, Kilbirnie, Wellington



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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the owners D Demiri and S Fairbrother (“the applicants”), and the other party is the Wellington City Council (“the territorial authority”).
- 1.2 The application arises from the territorial authority's refusal to issue a code compliance certificate for 5-year-old additions and alterations to a house (“the alterations”), as it did not:

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

- carry out any inspections of the work undertaken under the building consent
- receive building certificates or monthly inspection reports from Nationwide Building Certifiers Ltd (“the building certifier”) as required under the Building Act 1991 (“the 1991 Act”).

1.3 The matter for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for the alterations and additions is correct. The refusal arose because the building work had been erected under the supervision of the building certifier who did not issue a code compliance certificate for the house, and when asked to make a final inspection, the territorial authority refused to do so. The territorial authority considers that the appropriate certificate to be issued is a certificate of acceptance, as it cannot be satisfied that the building as a whole complies with the Building Code² (First Schedule, Building Regulations 1992).

1.4 In order to determine that matter, I must answer the following questions in sequence:

- a) Is there sufficient evidence to establish whether the building as a whole complies with the Building Code?
- b) Can a code compliance certificate be issued forthwith?
- c) If a code compliance certificate cannot be issued forthwith, are there sufficient grounds to conclude that, once any outstanding items are fixed and inspected, a code compliance certificate could be issued?
- d) If there are insufficient grounds to issue a code compliance certificate even after outstanding items are fixed and inspected, are there parts of the building work that can be confirmed, on reasonable grounds, as complying with the building code in order that a certificate of acceptance can be issued in respect of these parts?

I answer these questions in paragraph 6.11.

1.5 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter, including the building certifier’s inspections records.

1.6 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 an addition and alterations to a single-storey house, which is situated on a level site that is in a very high wind zone for the purposes of NZS 3604³. The addition, which is 4100mm x 3200mm in size, on plan, infills an external corner of the house, and is of conventional light timber frame constructed on

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

³ ³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

timber-framed floors. The new corrugated steel-clad pitched roof, which is integral with the roof of the existing building, has 300mm wide eaves projections. A timber-framed pergola is fixed over entrance doors of the addition.

- 2.2 I have not received any information as to the treatment, if any, of the external wall framing timber used in the addition. The external walls are clad with timber 250mm x 25mm rusticated weatherboards that match those on the existing walls of the rest of the house. The weatherboards have a painted finish and are fixed through the building wrap to the framing.
- 2.3 The alterations consist mainly of new sanitary fittings and associated plumbing to a bathroom and a kitchen, together with the additional structural and architectural elements, including those required to join the new addition to the existing building.

3 Sequence of events

- 3.1 The building certifier was approved as a building certifier under section 53 of the Building Act 1991 on 5 January 1999.
- 3.2 The territorial authority issued a building consent (74528) on 6 March 2001, based on a building certificate (C/2001-1861) issued by the building certifier and dated 5 March 2001. The building certificate did not contain any exclusions from the building certifier's scope of engagement, nor was the work inconsistent with the scope of its approval as a building certifier at that time.
- 3.3 The building certifier carried out various inspections during construction. I have received documentation issued by the building certifier that shows that inspections were undertaken and compliance established for the following:
- Piles: Inspected on 31 August 2001
 - Pre-clad: Inspected on 8 September 2001
 - Pre-line Inspected on 26 September 2001
 - Pre-line plumbing: Inspected on 27 October 2001
- 3.4 I have seen no records of any inspections following that of the 27 October 2001, but the applicants claim that the building certifier did carry out a final inspection.
- 3.5 The building certifier's scope of approval was amended on 1 January 2003 to, in general terms, exclude claddings outside E2/AS1, unit-titled dwellings and more than two dwelling under a single roof. These limitations would not have prevented the building certifier certifying the work to the addition after 1 January 2003.
- 3.6 It appears that the building certifier's Wellington office was closed in May 2004 and the building certifier's approval as a certifier expired on 30 December 2004.

- 3.7 According to the applicants, they requested that the building certifier provide a code compliance certificate. However, they eventually received information from the building certifier advising them that the building certifier's documentation for the project had been handed over to the territorial authority, which would finalise the project.
- 3.8 The applicants stated that they have been informed by the territorial authority that only the consent documentation was on the territorial authority's file. The applicants were also told by the territorial authority that, in order for their case to be considered, the applicants needed to get the alteration plans re-drawn so as to provide additional information. The applicants consider this request to be unreasonable.
- 3.9 The Department received the application for a determination on 20 April 2007.

4 The submissions

- 4.1 In a covering note, the applicants described the background to the matters in dispute and stated that they would like the territorial authority to carry out a final inspection and then issue a code compliance certificate.
- 4.2 The applicants forwarded copies of:
- the consent drawings
 - details of the trusses used in the construction
 - some building consent documentation
 - the available inspection records detailed by the building certifier
 - the electrical certificate of compliance
 - the plumbing quotation.
- 4.3 The territorial authority wrote to the Department on 10 May 2007, setting out the background to the dispute and describing the documentation that it had received from the building certifier. The territorial authority stated that it had not carried out any inspections of the building work. The building certifier had not supplied a building certificate under section 56 of the 1991 Act nor had it supplied monthly inspection reports as required under section 57 of the 1991 Act. The handwritten inspection notes are not monthly inspection reports and even if they were, such reports are not documents that establish code-compliance. In addition, the territorial authority considered that the issuing of a certificate of acceptance under section 437 of the Act was the appropriate method to deal with the matter.
- 4.4 The territorial authority forwarded copies of:
- some building consent documentation

- the project information memorandum
 - a site report noting a telephone conversation with one of the applicants.
- 4.5 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.
- 4.6 The draft determination was sent to the parties for comment on 18 July 2007. The applicant accepted the draft noting some typographical errors.
- 4.7 The territorial authority responded to the Department in a letter dated 15 August 2007. The territorial authority also noted some typographical errors and made submissions with respect to the conflict of interest discussed in paragraphs 6.2 to 6.4. The territorial authority also submitted that the determination should require the consent documents to be an accurate record of the work as built.

5 The expert's report

- 5.1 Before deciding whether or not to rely on the reports and other evidence, I consider it important to look for evidence that corroborates them. In this particular case the corroboration comes from the expert's report, that a visual inspection of the accessible components demonstrates code compliance of those components. Taken together, this information provides grounds on which to form a view that the building work will comply with the building code once the defects noted herein have been fixed to the satisfaction of the territorial authority.
- 5.2 As noted in paragraph 1.5, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to inspect the dwelling and report on the compliance of the building work with the relevant requirements of the building code. The expert inspected the alteration and furnished a report that was completed on 3 July 2007. The expert noted that, while the quality of finish appeared to be of a reasonable standard, there were some cases of "poor finishing standards".
- 5.3 The expert took non-invasive moisture readings around the interior of the external walls of the addition and no unusual readings were recorded. The expert also removed one power point and a small section of internal lining to check on lintel sizes and insulation. I am prepared to accept that the details observed at these locations are typical of similar situations elsewhere in the alteration.
- 5.4 The expert observed a number of variations from the consent drawings, noting that:
- the size of two windows has been amended
 - an additional window has been installed
 - a pergola is constructed on the west elevation
 - various changes had been made to the interior layout, including the ensuite not being built, and repositioning of the bath and the bathroom toilet and hand basin.

5.5 The expert made the following specific comments on the building work:

5.5.1 The exterior

- The weatherboard cladding as installed complied with the requirements of Acceptable Solution E2/AS1 and NZS 3604:1999.
- The new windows lack sill flashings, and no sealant has been installed at the junctions of the head flashings and the window facings.
- There is no air gap where the pergola adjoins the weatherboards and no flashing has been installed at this location.
- The increased size of the new west window may have detrimentally affected the bracing requirements for the alteration.

5.5.2 The interior

The code-compliant elements:

- The pile heights and window lintel checked by the expert comply with NZS 3604:1999.
- The safety glass in the door over the new bath complies with clause F4.
- The ventilation and natural light requirements of the alteration comply with of G7.
- Insulation has been correctly applied to the under-floor and wall areas.

The non-compliant elements:

- The requirements for anchor piles have not been met.
- The central joist sub-floor bearer is not adequately supported.
- The foundation cover boards are not gapped, restricting sub-floor ventilation.
- The insulation in the roof space does not comply with clause H1.

6 Discussion

6.1 In previous determinations⁴ (for example, Determination 2006/115) relating to building certifiers' inspections, in the absence of any evidence to the contrary, the Department has taken the view that it is entitled to rely on the inspections reported by the building certifier with regard to inaccessible building components.

⁴ Copies of all determinations issued by the Department can be obtained from the Department's website.

6.2 In this instance, and as referred to by the territorial authority, the employee of the building certifier who carried out the inspections on behalf of the building certifier during construction also drew the plans for the alterations that formed part of the building consent. In this respect, I note that the name of the person carrying out the subsequent on-site inspections of the alteration also appears on at least 4 of the consented plans.

6.3 Sections 56 (6) and (7) of the 1991 Act state:

- (6) No building certifier shall issue a building certificate or a code compliance certificate in respect of a building in which the building certifier has a professional or financial interest.
- (7) A person shall be regarded as having a professional or financial interest in the building if that person—
 - (a) Is or has been responsible for the design or construction of any part of the building in any capacity...

6.4 Taking into consideration the evidence provided to me, and relevant sections of the 1991 Act, I am of the opinion that as the employee of the building certifier was acting as an agent of the building certifier at the time the plans were prepared, that the building certifier was a person with a “professional or financial interest” in the alteration.

6.5 While the matter raised in paragraph 6.4 might appear to qualify the objectivity of the subsequent on-site inspections carried out on behalf of the building certifier, it does not necessarily mean that these inspections were not carried out in a competent manner. Consequently, I am of the opinion that, in this instance, I can rely on the expert’s report as a means of verification of the inspection work that was reported as being carried out, together with elements not included in the inspections. A condition for this reliance is that a visual inspection of the accessible components demonstrates code compliance of those components, so providing grounds to form a view that the building work as a whole complies with the building code. The addition contained in the alteration is a small uncomplicated structure that the expert has been able to inspect in detail, and the alterations within the existing structure are of a minor nature. Accordingly, the building certifier’s inspections, while adding to the information provided to me, are not so relevant in these circumstances

6.6 In addition, the applicant has provided an electrical certificate of compliance and I note that the plumbing work was carried out by a member of the New Zealand Society of Master Plumbers and Gasfitters.

6.7 Taking account of the expert’s opinion, I accept that work is necessary to fix the following:

- The lack of sill flashings to the new windows and the lack of sealant at the junctions of the head flashings and the window facings.
- The lack of an air gap and flashing where the pergola adjoins the weatherboards.

- The non-complying anchor piles.
- The inadequately supported central joist sub-floor bearer.
- The lack of gaps at the foundation cover boards.
- The non-complying insulation in the roof space.

- 6.8 I believe that I have sufficient grounds to form a view that once the defects and outstanding items identified in paragraph 6.7 have been fixed to the satisfaction of the territorial authority, the alteration will comply with the building code. In doing so, I am of the opinion that the territorial authority could well have carried out under its own initiative the same inspections as undertaken by the expert to establish the compliance of the alteration.
- 6.9 The territorial authority should also check whether the increased size of the new west window has affected the bracing requirements for the alteration.
- 6.10 In his report the expert noted a number of as-built variations from the consent drawings (refer paragraph 5.4). I consider this matter also needs to be resolved to the satisfaction of the territorial authority.
- 6.11 In paragraph 1.4 I posed a number of questions that I needed to answer. My answers to those questions are as follows:
- a) Is there sufficient evidence to establish whether the house as a whole complies with the Building Code? No, to the contrary, and as concluded in paragraph 6.7 and 6.9, there is evidence that the building work as a whole does not comply with the Building Code.
 - b) Can a code compliance certificate be issued forthwith? No, because the building work does not comply with the Building Code.
 - c) If a code compliance certificate cannot be issued forthwith, are there sufficient grounds to conclude that, once any outstanding items are fixed and inspected, a code compliance certificate could be issued? Yes, see paragraph 6.8.
 - d) If there are insufficient grounds to issue a code compliance certificate even after outstanding items are fixed and inspected, are there parts of the building work that can be confirmed, on reasonable grounds, as complying with the building code in order that a certificate of acceptance can be issued in respect of these parts? This question is not relevant in the light of the answer to (c).

7 The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the building work for the alteration does not comply with the Building Code. I accordingly confirm the territorial authority's decision to refuse to issue a code compliance certificate.
- 7.2 I note that the territorial authority has not issued a notice to fix. A notice to fix should be issued that requires the applicant to bring the building work into compliance with the Building Code, identifying the defects listed in paragraph 6.7

together with any bracing issues, but not specifying how those defects are to be fixed. That is a matter for the applicant 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.

- 7.3 I would suggest that the parties adopt the following process to meet the requirements of paragraph 7.2. Initially, the territorial authority should issue a notice to fix. The owner should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified items. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 24 August 2007.

John Gardiner
Manager Determinations