

Determination 2008/29

Installation of new aluminium exterior joinery units to a house at 5 Houhere Place, Hamilton



1. The matters 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 applicant is the owner, the P R and C J Bullen Family Trust acting through its legal advisors (“the applicant”), and the other party is the Hamilton City Council (“the territorial authority”).
- 1.2 This determination arises from the decision of the territorial authority to refuse to issue a code compliance certificate for the replacement of existing windows and doors in a house with new aluminium joinery units because it was not satisfied that the installation of the replacement units complied with the Building Code² (Schedule 1, Building Regulations 1992).

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 matter for determination is whether the exterior joinery units as installed comply with Clauses B2 and E2 (see sections 177 and 188 of the Act). In addition, as the territorial authority in its submission has queried the compliance of the adjacent cladding, I have accepted that this is also a matter that may be considered in this determination.
- 1.4 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.
- 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 work

- 2.1 The consented building work consists of the installation of two new ranch sliders (“the sliders”) to replace existing windows and doors in a house (the consented building work). One of the slider openings is surrounded by a steel portal and the other has one 100mm x 100mm post and a 200mm x 100mm timber beam. The ends of the beam are fixed to either the post or the portal. An 840mm wide x 2400mm high braced panel faced with 9mm plywood is constructed adjacent to the southeast slider. The exteriors of the walls adjacent to the sliders have been re-clad with plywood.
- 2.2 The exterior walls adjacent to the sliders were apparently originally clad with “fibrolite” but the process of installation of the sliders caused the old cladding material to crack and break. The cladding was consequently replaced with plywood and battens. The owner considered this work was maintenance and not part of the consented work.
- 2.3 In addition to the re-cladding work, the applicant also installed a set of double-doors (“the double-doors”) adjacent to one of the sliders described in paragraph 2.1. I have been advised by the applicant that the set of aluminium double-doors were installed as the replacement for an existing set of aluminium double-doors and were not part of the original building consent.

3. Background

- 3.1 On 5 November 2001, the territorial authority issued a building consent (No 1807/2001) under the Building Act 1991 (“the former Act”). The application on the consent was to “replace Wndws (*sic*)/doors/walls with Ranch Slider”. The consent was subject to certain conditions, one of which noted “pre-lining inspection required”. This requirement was also noted in a letter from the territorial authority to the applicant that was dated 30 October 2001. I note that, while the consent does not describe the number of replacement sliders, the consented plan shows only two replacement sliders.
- 3.2 It appears that no inspections were called for when the work was constructed.
- 3.3 On 6 December 2004, the territorial authority wrote to the applicant noting that the required inspections of the project had not been called for and the territorial authority queried whether the work had been carried out.

- 3.4 On 29 September 2006, a firm of consulting engineers issued an “Observation Statement (Construction)”, which stated that it had observed the construction of the various elements of the project with regard to the “Steel beams and supports as shown on our drawing 01-168”. This statement was forwarded to the territorial authority on the same date.
- 3.5 On 5 December 2006, in a letter to the applicant’s legal advisors, the territorial authority confirmed that it had received the consulting engineers’ statement. However, as the territorial authority had not been requested to carry out a pre-line inspection, it had not inspected the work and was not in a position to issue a code compliance certificate.
- 3.6 On 17 July 2007, the territorial authority wrote to the applicant’s legal advisors stating that, acting on advice from its insurers, it had introduced a new policy in regard to consents issued under the former Act. This policy was described as

Code compliance certificates will not be issued for outstanding building consents where the building consent was issued prior to the Building Act 2004.

The territorial authority went on to say that an application for a code compliance certificate would be refused and set out options that the applicant could follow.

- 3.7 On 8 August 2007, the territorial authority wrote to the applicant’s legal advisors in answer to a previous query, stating that “there is no such Certificate as a Certificate of Compliance to complete an application”. The territorial authority believed that an application for a new building consent concerning the same work covered by a previous consent could not be made, as that would be a retrospective building consent.
- 3.8 The Department received the application for a determination on 16 November 2007.

4. The submissions

- 4.1 In a covering letter to the Department dated 13 November 2007, the applicant’s legal advisors provided a background to the dispute and noted that the applicant was seeking a determination requiring the territorial authority to issue a code compliance certificate on the basis that the engineering report confirmed the safety of the work.
- 4.2 The applicant forwarded copies of:
- the structural plan (no other consent documents were provided)
 - the building consent and some of the consent application information
 - the consulting engineer’s observation statement of 29 September 2006
 - the correspondence with the territorial authority.
- 4.3 On 6 December 2007, the territorial authority provided the Department with a submission, which stated that while the territorial authority agreed with the findings in the expert’s report, the report did not address the adjacent cladding issues. The territorial authority set out its concerns with the cladding and, because of these, it could not accept that the sliders installation was code-compliant.
- 4.4 Copies of the documents from the parties and other evidence were provided to the other parties. Neither party made any submissions in response to the information that was provided.

- 4.5 A draft determination was issued to the parties on 27 February 2008. The territorial authority accepted the draft. The applicants accepted the draft subject to non-contentious amendments. They noted the territorial authority had not copied them with the letter of 6 December 2007 and they had not received a copy of the expert's report which was mailed to them on 30 November 2007. Both have been subsequently sent.

5. The expert's report

- 5.1 As stated in paragraph 1.4, I engaged an expert, who is a member of the New Zealand Institute of Building Surveyors, to provide an assessment of the performance condition of the installed sliders, including their junctions with the cladding.
- 5.2 The expert inspected the property and furnished a report that was completed on 27 November 2007. It was noted that the door head and sill details appeared to be adequate. However the jambs of the sliders were not sealed on the front face.
- 5.3 The expert took two invasive moisture readings into the bottom plates at the ends of the doors and both indicated safe levels.
- 5.4 A copy of the expert's report was provided to each of the parties on 30 November 2007. As described in paragraph 4.3, the territorial authority generally agreed with the report but had concerns regarding its scope.

6. Discussion

The consented work

- 6.1 I am satisfied that the consultant engineers' observation statement, which is based on the consented structural plan, provides sufficient evidence for me to accept that the consented building work complies with Clause B1 of the Building Code.
- 6.2 I consider that the expert's report establishes there is no evidence of external moisture entering the building, and accordingly, that the installation of the sliders complies with Clause E2.
- 6.3 However, the building is also required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the building to remain weathertight. Because the inadequately sealed jambs of the sliders are likely to allow the ingress of moisture in the future, the house, in respect of the consented building work, does not comply with the durability requirements of Clause B2.
- 6.4 Because the identified fault is of a minor nature, I am able to conclude that satisfactory rectification of this item will result in the building remaining weathertight and in compliance with Clauses B2 and E2. Once the work is completed to the satisfaction of the territorial authority, then a code compliance certificate could be issued for the consented work.

The un-consented work

- 6.5 The consented work for which a code compliance certificate is sought relates to the sliders installation only and not to the additional double-doors installation or the re-cladding of the building adjacent to the consented work.
- 6.6 As noted in paragraph 1.3, based on the territorial authority's submission, I accept that the re-cladding can be considered in this determination. I am of the opinion that the replacement cladding and the double-doors installation have to be considered in light of Clause (a) of the Third Schedule of the former Act, which was in force at the time the work was done. This states that a building consent shall not be required in respect of the following work:
- Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building...
- 6.7 In Determination 2006/116, I reached the conclusion that the question of whether a building consent is required is not a matter that can be subject to a determination by the Department. However, I did provide some advice that I believed would assist the parties to that decision and I refer the applicant and the territorial authority to that advice.

Options for dealing with un-consented work

- 6.8 As regards the re-cladding and the installation of the double-doors (the substitution of a new set of doors for an existing set of doors), if it is decided by the parties that the work did not require a consent (refer paragraph 6.6) and the territorial authority is satisfied that it complies with the relevant requirements of the Building Code, then that is the end of the matter. However, if it is decided that a building consent was required, then the territorial authority may, on application, apply for a certificate of acceptance in terms of Sections 96 and 97 of the Act.

Section 436

- 6.9 In its letter to the applicant's legal advisors dated 17 July 2007, the territorial authority has stated that, as a matter of policy, it will not issue code compliance certificates for outstanding building consents issued under the Building Act 1991 (refer to paragraph 3.3). That does not accord with my reading of the Act. Section 436 of the Act applies to building work carried out under a building consent granted under section 34 of the former Act, and therefore applies in this case. Section 436 requires that applications for code compliance certificates must be "considered and determined as if this Act had not been passed." I note that in its submission for this determination the territorial authority has not referred to this policy.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I determine that the consented building work does not comply with Clause B2 of the Building Code, and 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. The territorial authority should now issue a notice to fix that requires the owner to provide adequate

sealing of the sliders' jambs, so as to bring the building up to compliance with the Building Code.

- 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 the notice to fix. The owner should then proceed to carry out the sealing work to the satisfaction of the territorial authority. 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 5 May 2008.

John Gardiner
Manager Determinations