Department of Building and Housing
Te Tari Kaupapa Whare

Determination 2009/102

Refusal to issue a code compliance certificate for a 5-year-old house completed under the supervision of a building certifier at 105A Whakamarama Road, RD6, Tauranga

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("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 O O'Brien and K Paulger ("the applicants"), and the other party is the Western Bay of Plenty District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.2 This determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to fix for a 5-year-old house because the building work had been undertaken under the supervision of Bay Building Certifiers ("the building certifier"), which was duly registered as a building certifier under the former Building Act 1991, but which ceased operating as a certifier before it had issued a code compliance certificate for the building work.

[1] The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

1.3 Based on the applicant's submission, and in the absence of any submission from the authority, I consider that the matter for determination, in terms of sections 177(b)(i) of the Act[2], is whether the authority was correct in declining to issue a code compliance certificate. In making that decision I have considered the following matters:

1.3.1 Matter 1: Compliance with the Building Code

Whether the building complies with the clauses relevant to this house. (I consider this matter in paragraph 7.)

1.3.2 Matter 2: The durability considerations

Whether the elements that make up the building work comply with Building Code Clause B2 Durability, taking into account the age of the house. (I consider this matter in paragraph 9.)

1.4 Based on the information and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion as to whether this building will comply with the Building Code once completion of remedial work is confirmed. This determination therefore considers whether it is reasonable to issue a code compliance certificate. In order to determine that, I have addressed the following questions:

(a) Is there sufficient evidence to establish that the building work as a whole complies with the Building Code? I address this question in paragraph 5.

(b) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, the building work will comply with the Building Code? I address this question in paragraph 8.

1.5 In making my decision, I have considered the submissions of the applicants, the authority's inspection of the house ("the authority's assessment") and the other evidence in this matter. I have evaluated this information using a framework that I describe more fully in paragraph 5.

2. The building work

2.1 The building work consists of a single-storey split-level house situated on the spur of a sloping site, which is in a high wind zone for the purposes of NZS 3604[3]. Construction is conventional light timber frame, with concrete slabs, concrete block foundations and retaining walls, brick veneer and weatherboard wall claddings, profiled metal roof cladding and aluminium windows. The house is a conventional simple rectangular form.

2.2 The roof is a 25^{o} pitch profiled metal tile gable roof with eaves of 600mm and verges of 300mm. The roof includes hips, gables and dutch gables, together with an 8^{o} pitch veranda attached to the eaves at the northeast corner. The veranda is 1.8m deep and extends over part of a free-draining timber deck.

[2] 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.
[3] New Zealand Standard NZS 3604:1999 Timber Framed Buildings

2.3 The wall claddings

2.3.1 The cladding to the dutch gable end walls and to the east and north wall areas beneath the veranda is timber bevel backed weatherboards fixed through the building paper to the framing.

2.3.2 The remaining exterior cladding is 70mm brick veneer, installed over a 40mm drained and ventilated cavity.

2.4 The drawings describe the framing as 'kiln dried frame'. Given the date of construction in 2003 and the lack of other evidence, I consider that the wall framing is not treated.

2.5 The house is assessed as having a low weathertightness risk (refer paragraph 6.3).

3. Background

3.1 The authority issued a building consent (No. 69448) on 11 August 2003 under the Building Act 1991, with construction generally taking place during 2003 and 2004.

3.2 The building certifier carried out the following inspections:

- Foundations on 1 October 2003 (which passed).
- Concrete block retaining/foundation walls on 10 October 2003 (which passed).
- Pre-pour slab inspection on 22 October 2003 (which passed).
- Drainage inspection on 15 December 2003 (which passed, noting '19/12/2003 received drainage as built plan. Sent to [the authority]').
- Pre-line plumbing and building inspections on 6 January 2004 (which passed, noting 'Insulation in walls and ceiling. Timber moisture OK, bracing OK.').

3.3 The building certifier carried out final plumbing and building inspections on 18 May 2005, and the inspection summary notes:

> Shower is leaking in ensuite.
> Handrail required on internal stairs.
> Producer Statement required for tiles.

3.4 According to the applicants, the above items were completed 'without any problems'. In the meantime the building certifier ceased to operate as a building certifier on 30 June 2005 without having issued a code compliance certificate for the building.

3.5 The authority's pro-forma letter

3.5.1 In a pro-forma letter to the applicants dated 20 June 2006, the authority explained that when the building certifier ceased operating, an agreement had been made with a contractor to complete outstanding inspections on the building certifier's projects and make recommendations regarding the issuing of code compliance certificates. The authority went on to explain that the liability for building work imposed by the Act meant that:

> ...before Council accepts such liability by issuing Code Compliance Certificates it must be satisfied inspections carried out by Bay Building Certifiers and Bay Inspections were satisfactory to confirm projects have been completed to the standards required by the Building Acts 1991 and 2004. Unfortunately our experience to date is that these inspections, supporting documentation and evidence are not satisfactory to support Council issuing Code Compliance Certificates. Regrettably, this lack of satisfactory inspection detail puts Council in the position where it is unable at this time to accept liability for these deficient projects or issue Code Compliance Certificates.

3.5.2 The authority explained that further inspections were therefore required in order to determine:

- If a Code Compliance Certificate could be issued or whether more building work and inspections are necessary, or
- If a Certificate of Acceptance could be issued or whether more building work and inspections are required, or
- If a Certificate of Acceptance is not appropriate or a Code Compliance Certificate cannot be issued to advice owners of their right to seek a Determination from [the Department].

3.5.3 The authority also offered assistance with an application for determination, noting that it could make the application on the owner's behalf, and attached a 'Transfer Form' to be filled in as required to initiate an assessment of the property. The authority concluded:

> Please understand that this extra process is regrettable, but has been forced upon Council because it cannot accept any ongoing liability for private certifier projects (not Council projects) without being confident that the inspection documentation and inspections themselves were adequate in the first instance.

3.6 The authority's assessment

3.6.1 On 3 January 2007, the applicants completed the transfer form, which requested the authority to 'undertake an assessment of the project' as explained in the above letter. The authority inspected the house on 7 December 2007.

3.6.2 Following the inspection, the authority wrote to the applicants on 11 December 2007, listing the following 'non complying items' that were identified during its inspection:

1. Ground levels too high at north side of garage and paving above brick rebate between garage doors.
2. Riser on gully trap on north side is not sealed into base.
3. End of head flashings not sealed above joinery under veranda.
4. No vent slots under brick veneer sills.
5. Electricity meter box not sealed into brick veneer at bottom.
6. Brick beside exhaust fan outlet south wall has cracked joint and hole needs filling.
7. Brick above veranda flashing north side by front door loose.

3.6.3 The authority noted that the applicants 'may wish' to have the completed work inspected, but a code compliance certificate would not be issued, and:

> That being the case, Section 91 of the Building Act 2004 requires that you apply for a Certificate of Acceptance...

> If Council then decides it is able to issue a Certificate of Acceptance it will only cover those elements of the building that can be readily inspected and compliance with the Building Code determined.

3.7 According to the applicants, the outstanding items were subsequently completed and they formally applied to the authority for a code compliance certificate on 9 June 2009. In a letter to the applicants dated 6 August 2009, the authority declined to issue a code compliance certificate because:

> This building project was carried out under the control of [the building certifier] and [the authority] carried out no inspections, nor undertook any other tasks associated with it, other than to issue the building consent on the instructions of the building certifier.

3.8 The Department received an application for a determination on 9 September 2009.

4. The submissions

4.1 In their submission dated 22 June 2009, the applicants outlined the background to the current situation, noting that their house 'is not the type of construction that has historically caused problems' and explaining that all items raised by the building certifier and the authority had been attended to. The applicants concluded:

> The only reason [the authority] has given for refusing to issue a Code Compliance Certificate is that the inspections were not carried out by them. [The building certifiers] were the inspectors appointed by [the authority] and were acting as agents for them.

4.2 The applicants forwarded copies of:

- the drawings and specification
- the consent documentation
- the building certifiers inspection summary dated 29 June 2006
- the correspondence from the authority
- various other invoices, statements and information.

4.3 The draft determination was issued to the parties on 12 October 2009. The draft was issued for comment and for the parties to agree a date when the house, with the exception of the items that are to rectified, complied with Building Code Clause B2 Durability.

4.4 The parties accepted the draft without comment. The parties also agreed that compliance with Clause B2 Durability was achieved on July 2004. I have taken the agreed date as 1 July 2004.

5. The establishment of code compliance

5.1 In order for me to form a view as to the code compliance of the building work, I established what evidence was available and what could be obtained considering that the building work is completed and some of the elements were not able to be cost-effectively inspected.

5.2 The available evidence

5.2.1 In this case the evidence supplied by the applicant includes:

- the building certifier's inspection summary (refer paragraph 3.2)
- the outcome of authority's assessment of the house (refer paragraph 3.6.2)
- the drawings, photographs, other information and documentation
- the proven performance of the building elements over five years
- The low weathertightness risk levels associated with the building (refer paragraph 6.3.3).

5.2.2 The authority believes that any decision it makes with respect to compliance of the house is limited by what items it is able to inspect. I therefore needed to decide if I could rely on the inspections that were undertaken by the building certifier, particularly in regard to inaccessible building components.

5.2.3 The building certifier was deemed to be competent and was approved by the Building Industry Authority to carry out inspection work at the time of construction. Accordingly, and in the absence of any evidence to the contrary, I take the view that I am entitled to rely on the inspection records. However, I also consider that the level of that reliance is influenced by the information available to me and also by my evaluation of the house as outlined below.

5.3 Evaluation for code compliance

5.4 I have evaluated the code compliance of this building by considering the following two broad categories of the building work:

- The level of risk associated the regard to the weathertightness (Clause E2) and durability (Clause B2 insofar as it relates to Clause E2) of this relatively simple external building envelope.
- The remaining relevant code requirements.

In the case of this house, weathertightness considerations are addressed first.

6. Weathertightness

6.1 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to apply the principles of weathertightness. This involves the examination of the design of the building, the surrounding environment, the design features that are intended to prevent the penetration of water, the cladding system, its installation, and the moisture tolerance of the external framing. Weathertightness risk factors have also been described in previous determinations (for example, Determination 2004/1) relating to cladding and these factors are also used in the evaluation process.

6.2 The consequences of a building demonstrating a high weathertightness risk is that building solutions that comply with the Building Code will need to be more robust. Conversely, where there is a low weathertightness risk, the solutions may be less

robust. In any event, there is a need for both the design of the cladding system and its installation to be carefully carried out.

6.3 Weathertightness risk

6.3.1 This house has been evaluated using the E2/AS1 risk matrix. The risk matrix allows the summing of a range of design and location factors applying to a specific building design. The resulting level of risk can range from "low" to "very high". The risk level is applied to determine what cladding systems can be used on a building in order to comply with E2/AS1. Higher levels of risk will require more rigorous weatherproof detailing; for example, a high risk level is likely to require a particular type of cladding to be installed over a drained cavity.

6.3.2 This house has the following environmental and design features which influence its weathertightness risk profile:

Increasing risk

- the house is in a high wind zone
- the external wall framing is not treated to a level that provides resistance to decay if it absorbs and retains moisture
- some walls have weatherboard cladding fixed directly to the framing

Decreasing risk

- the house is one-storey high
- the house is fairly simple in plan and form
- most walls have brick veneer cladding over a drained and vented cavity
- there are eaves and verge projections to shelter the walls, and a 1.8metre wide veranda above most of the weatherboard claddings.

6.3.3 When evaluated using the E2/AS1 risk matrix, these features show that all elevations of the house demonstrate a low weathertightness risk rating. I note that a drained cavity is not required by E2/AS1 for weatherboard cladding at low risk levels.

6.4 Weathertightness conclusion

6.4.1 Taking into account the low weathertightness risk of the external envelope and the lack of concerns raised by the authority's assessment of the house, I am of the view that there are reasonable grounds to consider the house complies with Clause E2 of the Building Code.

6.4.2 However, the building work 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 house to remain weathertight. The authority identified several minor faults, five of which relate to the cladding, which may not have been satisfactorily rectified on this house. If so, they are likely to allow the ingress of moisture in the future and the building work will not comply with the durability requirements of Clause B2.

6.4.3 However because these faults occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 7.4 will establish reasonable grounds to consider the house will be brought into compliance with Clauses B2.

6.5 Effective maintenance of claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

Matter 1: Compliance with the Building Code clauses

7. Discussion

7.1 In considering the compliance of this house with other relevant Building Code clauses, I have taken into account the consent drawings, the building certifier's inspection records, the authority's assessment of the house, and the other evidence.

7.2 The Certifier carried out a final inspection on 18 May 2005 and noted three items for attention:

- A handrail was required on the internal stairs.
- A producer statement was required from the tiler.
- The shower in the ensuite was leaking.

The applicants advise the above have been attended to and the authority has not referred to them in its inspection. However, I consider these items should also be verified by the authority.

7.3 The authority assessed the house on 7 December 2007, and identified various items that required attention. The applicants also maintain that these items were subsequently rectified, but the authority has not yet verified that the work was satisfactorily completed.

7.4 I therefore conclude that verification of satisfactory completion is required for the following areas:

- the lack of clearances from the bottom of the brickwork around the garage (B2)
- the riser on the gulley trap on the north side is not sealed at the base (G13)
- the unsealed ends of the window head flashings under the veranda (B2)
- the lack of vent slots under the brick veneer window sills (B2)
- a brick beside the exhaust fan outlet in the south wall has cracked and the hole needs filling (B2)
- the unsealed bottom of the meter box (B2)
- the loose brick adjacent to the front door (B2).

7.5 With respect to the remaining code clauses relevant to this house, I consider that the following items which require rectification or verification of satisfactory completion (the applicable clause is shown in brackets):

- Verification that safety glass is installed where required to shower screens and glazed doors (Clause F2).
- Verification of satisfactory completion of the stair handrail (Clause F4).
- Verification of satisfactory rectification of the ensuite shower (Clause E3).
- Verification of satisfactory rectification of the north gully trap (Clause G13).

7.6 I consider that satisfactory rectification and verification of the above items will result in the building work being brought into compliance with Clauses E3, F2, F4, and G13.

7.7 The authority's assessment of visible components of the building together with the building certifier's inspection records and the other documentation allow me to conclude that the building work complies with the remaining relevant clauses of the Building Code.

8. The appropriate certificate to be issued

8.1 Having found that the building can be brought into compliance with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.

8.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a building consent authority may, on application [my emphasis] issue a certificate of acceptance. In the case of this house, the owner is seeking a code compliance certificate and has not applied for a certificate of acceptance.

8.3 In this situation, where I have reasonable grounds to conclude that the consented building work can be brought into compliance with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.

Matter 2: The durability considerations

9. Discussion

9.1 There are concerns regarding the durability, and hence the compliance with the building code, of certain elements of the building taking into consideration the age of the building work completed in 2004.

9.2 The relevant provision of Clause B2 of the Building Code requires 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).

9.3 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.

9.4 In this case the delay between the completion of the building work in 2004 and the applicants' request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at a date in 2004.

9.5 It is not disputed, and I am therefore satisfied that all the building elements installed in the house, with the exception of the items that are to rectified, complied with Clause B2 Durability on 1 July 2004. This date has been agreed between the parties (refer paragraph 4.4).

9.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.

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

(a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements.

(b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued in 2004.

9.8 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

10. What is to be done now?

10.1 The authority should initially re-inspect the house to verify that the items listed in paragraphs 7.4 and 7.5 have been satisfactorily remedied or completed.

10.2 If any of the identified items are not satisfactory, or if any further defects are discovered, then a notice to fix should be issued that requires the owners to bring the house into compliance with the Building Code, identifying those items. 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 issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

10.3 Once the matters set out in paragraphs 7.4 and 7.5 have been rectified or resolved to its satisfaction, the authority may issue a code compliance certificate in respect of the building consent as amended.

11. The decision

11.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the external envelope does not comply with Clause B2 of the Building Code insofar as it relates to Clause E2
- verification is required that the house complies with Clauses E3, F2, F4, and G13

and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate was correct.

11.2 I also determine that:

(a) all the building elements installed in the house, apart from the items that are to be rectified as described in Determination 2009/102, complied with Clause B2 on 1 July 2004.

(b) the building consent is hereby modified as follows:

> The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 1 July 2004 instead of from the time of issue of the code compliance certificate for all the building elements, except the items to be rectified as set out in paragraphs 7.4 and 7.5 in Determination 2009/102.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 November 2009.

John Gardiner
Manager Determinations