

Determination 2010/007

Refusal to issue a code compliance certificate for a 12-year-old house at 120 Haukore Street, Tauranga



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 applicants are the owners of the house, D and K Edgecombe (“the applicants”), acting through their legal advisers, and the other party is the Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority. I consider that the former owners of the house are persons with an interest in this determination.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 12-year-old house because it was not satisfied that it complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992).

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.

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.

1.3 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate. In making this decision, I must consider:

1.3.1 Matter 1: The external envelope

Whether the external claddings to the house (“the claddings”) comply with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The claddings include the components of the systems (such as the timber weatherboards, the brick veneer, the windows, the roof cladding and the flashings), as well as the way the components have been installed and work together. (I consider this matter in paragraph 6.)

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 7.)

1.4 I note that in the case of this house a building certifier inspected the building work during construction on the authority’s behalf. The company ceased operating as a building certifier in 2005 but continued operating under a different name to provide inspection services for the authority, acting as the authority’s agent. In this determination, the building certifier and subsequent inspection company are therefore referred to as “the authority’s contractor”.

1.5 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. I have evaluated this information using a framework that I describe more fully in paragraph 6.1.

2. The building work

2.1 The building work consists of a detached house, which is three-storeys high in part and is situated on an excavated gently sloping site in a medium wind zone for the purposes of NZS 3604⁴. Construction is generally conventional light timber frame and has a concrete slab and foundations to the eastern two thirds and a concrete block retaining wall separating the timber-framed ground floor to the west. The house has brick veneer and timber weatherboard claddings, aluminium windows and concrete tile roofing, with a free-draining timber deck to the north.

2.2 The house has a complex roof form, with a three-storey high central section, a two-storey section to the east and a single-storey wing to the west. The 40° pitch multi-level roof has hips and gables, with dormer windows to the upper level and lean-to roofs over lower walls. The highest roof section has no eaves or verges, with eaves over lower walls generally varying from about 450mm to 600mm. The house is assessed as having variable (low to high) weathertightness risk (refer paragraph 6.2).

2.3 The cladding to the basement walls is brick veneer, installed over a 40mm drained and ventilated cavity. The walls of the western section and the upper levels are clad in horizontal rusticated cedar weatherboards finished with a clear protective coating.

³ Under section 177(b)(i) of the Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 2.4 The expert noted that there was no evidence as to timber treatment of the wall framing and I have not been provided with any evidence from the parties in this regard. Given the date of construction in 1997 and the lack of other evidence, I consider that the wall framing is not treated.

3. Background

- 3.1 The authority issued a building consent (No. 96/2746) on 14 October 1996 under the Building Act 1991, and construction commenced in November 1996.

- 3.2 The authority's contractor carried out inspections during construction on behalf of the authority, including a pre-line building inspection on 4 April 1997. Although construction was apparently completed during 1997, final inspections were not requested or carried out until 2003.

- 3.3 The authority's contractor carried out final plumbing and building inspections on 28 July and 1 September 2003. I have seen no records of those inspections. In a letter to the (then) owner dated 5 September 2003, the authority's contractor confirmed that an assessor had visited the site and stated:

As a result of his inspection, and on the assumption that all the required earlier inspections had been carried out, he is satisfied that the building was properly completed in accordance with the building code requirements that existed at the time of construction.

I suggest that you provide the council with a copy of this report for their records.

- 3.4 The above letter was included as part of the LIM report for the property, which also includes a note dated 14 October 1996 stating that a 'code compliance certificate will not be issued for this Consent'. This note implies that the authority refused to issue a code compliance certificate, although I have seen no records of correspondence with the owner regarding the matter indicating the grounds on which the authority declined to issue the code compliance certificate.

- 3.5 I do not believe that this is acceptable. It is important that should an owner be declined a code compliance certificate, they be given clear reasons why, either through a letter or the issuing of a notice to fix. This requirement is set out in section 95(a) of the Act. The owners can then choose to act on those reasons or to apply for a determination if they dispute them.

3.6 The inspection company's report

- 3.6.1 The former owners commissioned a property inspection company to assess the building. The inspection company visited the site on 30 October 2009, noting that all of the required 'progress inspections' had been carried out during construction and, except for several internal layout changes, the house appeared to be constructed 'in accordance with the overall intent of the council approved construction plans and specifications'.

- 3.6.2 Based on observations, the inspection company was satisfied that the house was 'safe and sanitary in terms of section 121 and 123 of the New Zealand Building Act 2004', but did not otherwise report on compliance with the Building Code.

3.7 The Department received an application for a determination from the former owners on 9 November 2009 and sought further information from the authority regarding the reasons for its apparent refusal to issue a code compliance certificate. In an email dated 10 November 2009, the authority stated that:

...the Council is refusing to issue the CCC as the dwelling is 13 years old and may not comply with either Clause E2 or B2.

3.8 The applicants finalised their purchase of the property on 27 November 2009 and elected to continue with the application for this determination.

4. The submissions

4.1 The applicants forwarded copies of:

- the drawings
- the building consent
- the inspection summary
- the inspection company's report dated 2 November 2009
- some other information from the authority's property files.

4.2 The authority acknowledged the applicant's submission, but made no submission in response.

4.3 A draft determination was issued to the parties on 15 January 2010. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.

4.4 The parties accepted the draft without comment and agreed that compliance with Clause B2 was achieved in April 1997. I have therefore taken the Clause B2 compliance date to be 1 April 1997.

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. I note that the expert's company had previously been engaged by the applicants carry out the inspection described paragraph 3.6. The parties raised no objection to my using the expert to assist me, and I am satisfied that the use of the expert in this instance does not constitute a conflict of interest.

5.2 The expert inspected the house on 23 December 2009 and provided a report that was completed on 11 January 2010, noting that the house generally appeared to accord with the consent drawings and specifications except for some layout changes to the laundry and bathroom.

5.3 The expert noted that the overall standard of workmanship appeared to be generally good except for the items outlined in paragraph 5.6, with the weatherboards 'well fixed and aligned', the brick veneer satisfactory and the roof flashings 'tidy and

effective'. However the expert also noted that the weatherboards were 'overdue for recoating'.

- 5.4 The expert noted that the windows within the weatherboard cladding are face fixed, with satisfactory metal head flashings, rustic plugs installed under the jamb flanges and no sill flashings.
- 5.5 The expert inspected the interior of the house, taking numerous non-invasive moisture readings, and noted no evidence of moisture. The expert also took invasive moisture readings through internal linings at areas considered at risk, such as below windows and roof junctions and beside doors. No evidence of elevated moisture levels was noted.
- 5.6 Commenting specifically on the claddings, the expert noted that:
- there are no kickouts to the ends of the head flashing at the curved top of the window in the south stairwell
 - the bottom of the apron flashing above the dining room is not weathertight as heavy sealant use is evident, indicating repairs of likely past leak(s)
 - the weatherboards require recoating.
- 5.7 A copy of the expert's report was provided to the parties on 11 January 2010.

Matter 1: The external envelope

6. Weathertightness

- 6.1 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to examine 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.

6.2 Weathertightness risk

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

Increasing risk

- the house is three storeys high in part
- the house has a complex roof form, with various levels and dormer windows
- some of the upper walls have no eaves or verges to shelter the cladding
- most of the walls have weatherboard cladding fixed directly to the framing
- the external wall framing is not treated to a level that provides resistance to decay if it absorbs and retains moisture

Decreasing risk

- the house is in a medium wind zone
- the only deck is a free-draining timber deck at ground floor level
- some walls have brick veneer cladding over a drained and vented cavity
- there are eaves and verge projections to shelter most lower walls.

6.2.2 When evaluated using the E2/AS1 risk matrix, these features show that one elevation of the house demonstrates a low weathertightness risk rating, one a moderate risk rating and two a high risk rating. I note that, if the details shown in the current E2/AS1 were adopted to show code compliance, the weatherboard cladding to three elevations of this building would require a drained cavity. However, I also note that a drained cavity was not a requirement of E2/AS1 at the time of construction.

6.3 Weathertightness performance

6.3.1 Generally the claddings appear to have been installed in accordance with good trade practice. However, taking account of the expert's comments in paragraph 5.6, I conclude that remedial work is necessary in respect of the following:

- the lack of kickouts to the ends of the head flashing to the curved top window
- the lack of weathertightness to the roof to wall junction above the dining room
- the deteriorating coating to the weatherboards.

6.3.2 Notwithstanding the fact that the weatherboards are fixed directly to the timber framing, thus inhibiting drainage and ventilation behind the cladding, I have noted certain compensating factors that assist the performance of the cladding in this particular case:

- The weatherboards are generally installed according to good trade practice and to the manufacturer's instructions.
- There is no evidence of current moisture penetration.
- Apart from possible repairs to an isolated roof to wall junction, there is no evidence of past moisture penetration over the past 12 years.

6.3.3 These factors can assist the building to comply with the weathertightness and durability provisions of the Building Code.

6.4 Weathertightness conclusion

6.4.1 I consider the expert's report establishes that the current performance of the building envelope is adequate because it is preventing water penetration through the claddings at present. Consequently, I am satisfied that 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. Because the cladding faults on

the house are likely to allow the ingress of moisture in the future, the building work does not comply with the durability requirements of Clause B2.

- 6.4.3 Because the faults identified with the claddings occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3.1 will result in the house being brought into compliance with Clauses B2 and E2
- 6.4.4 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 2: The durability considerations

7. Discussion

- 7.1 The authority has concerns regarding the durability, and hence the compliance with the building code, of certain elements of the house taking into consideration the age of the building work completed in 1997.
- 7.2 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).
- 7.3 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.
- 7.4 In this case the 12-year delay since the completion of the building work in 1997 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 1997.
- 7.5 It is not disputed, and I am therefore satisfied that all the building elements installed in the alterations and additions complied with Clause B2 on 1 April 1997. This date has been agreed between the parties, refer paragraph 4.4.

7.6 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.

7.7 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 1997.

7.8 I strongly recommend 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.

8. What is to be done now?

8.1 A notice to fix should be issued that requires the owners to bring the house into compliance with the Building Code, identifying the defects listed in paragraph 6.3.1 and referring to any further defects that might be discovered in the course of investigation and rectification, but not specifying how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owners to propose and for the authority to accept or reject.

8.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 8.1. Initially, the authority should issue the notice to fix. The applicant 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 matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

8.3 Once the matters set out in in paragraph 6.3.1 have been rectified to its satisfaction, the authority may issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 7.

9. The decision

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

- the external envelope currently complies with Clause E2 of the Building Code
- the external envelope does not comply with Clause B2 of the Building Code, insofar as it relates to Clause E2

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

9.2 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 2010/007, complied with Clause B2 on 1 April 1997.
- (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 April 1997 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 paragraph 6.3.1 of Determination 2010/007.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 February 2010.

John Gardiner
Manager Determinations