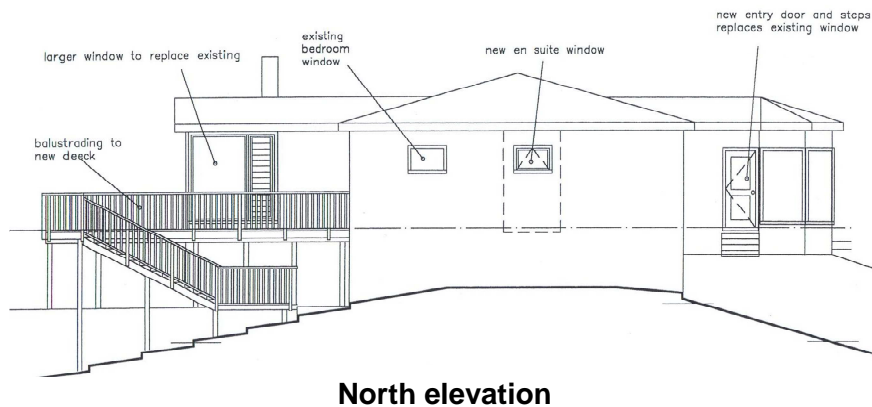




Determination 2010/84

Refusal to issue a code compliance certificate for alterations to a house at 114 Nevay Road, Wellington



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 the Department.

1.2 The parties are:

- Mr M Barrett, the owner of the house, (“the applicant”)
- Wellington City Council carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for alterations to a house, because it was not satisfied that the

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.

alterations complied with Clauses B1 Structure, B2 Durability, E2 External Moisture, and E3 Internal Moisture².

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

1.4.1 Matter 1: The external envelope

Whether the external envelope of the alteration complies with Building Code Clauses B2 Durability and E2 External Moisture. The external envelope includes the cladding, its configuration and components, junctions with other building elements, formed openings and penetrations.

1.4.2 Matter 2: The remaining code requirements

Whether the internal envelope of the house complies with Building Code Clauses B1 Structure and E3 Internal Moisture.

1.4.3 Matter 3: 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 building work.

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

2. The building

2.1 The building is a single level house of traditional weatherboard construction. The house is set on a hill overlooking the sea and is in a very high wind zone for the purposes of NZS 3604⁴. (Note: the wind zone was calculated by the consulting engineer as part of the PS1, refer paragraph 4.3.)

2.2 The construction has a concrete ring foundation with concrete piles, weatherboard cladding and a painted corrugated iron roof. The joinery is wooden with some alloy louvers. Ceramic tiles form the internal ‘wet area’ linings.

2.3 There is a large freestanding deck at the rear of the house and a smaller freestanding entry deck at the front.

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 Under section 177(b)(i) of the Building Act 2004.

⁴ New Zealand Standard NZS 3604: 1999 Timber Framed Buildings.

3. Background

- 3.1 The authority issued a building consent (No. 120912) under the Building Act 1991 on 2 November 2004. The consent was for alterations to the existing house, described on the Project Information Memorandum (No. 120912) as: new deck with steps, new larger window to lounge, new window/door to bedroom, new french doors to dining, new bathroom and alterations to the common area.
- 3.2 Inspections were carried out by the authority on 5 and 24 November 2004 (I have not seen records of any other inspections). The inspection on 24 November noted that in both bathrooms the waterproof membrane under the tiling was well applied. Approval to tile and approval of portal beam connections were also noted. The building work was substantially completed by the end of 2004, however no final inspection was carried out.
- 3.3 The applicant sold the house in April 2010 and during the sale process it was identified that a code compliance certificate had not been issued. The applicant subsequently approached the authority to apply for a code compliance certificate.
- 3.4 The authority refused to issue a code compliance certificate due to the time that had elapsed since the building work was undertaken. In their letter to the applicant of 30 April 2010, the authority noted that when considering if the work complies with the Building Code it 'must give specific consideration to the durability of material used in construction (Clause B2 Durability)'. A code compliance certificate issued in 2010 would imply that the authority was satisfied the respective elements would remain durable until 2025, whereas the elements only have a 15 year durability requirement.
- 3.5 The authority offered two options with regard to obtaining a code compliance certificate:
- i) to apply for a waiver / modification of the original consent under section 67 in relation to the requirements of Clause B2 (Durability)
 - ii) to apply to the Department for a determination regarding the authority's decision not to issue a code compliance certificate.
- 3.6 The applicant chose to apply for a determination and an application was received by the Department on 7 May 2010.

4. The submissions

- 4.1 In a letter to the Department dated 6 May 2010, the applicant outlined the situation by which they discovered that the final inspection had not been completed and, as a consequence, a code compliance certificate would not be issued, due to the age of the building work.
- 4.2 The applicant stated that they considered the code compliance certificate should be backdated to 2004 to satisfy durability considerations.
- 4.3 The applicants also provided copies of:

- plans and specifications of the building work
 - the building consent, consent drawings and Project Information Memorandum
 - Producer statements PS1 and PS4 provided by the consulting engineer, along with the engineers inspection records
 - compliance certificates regarding electrical and gasfitting work
 - correspondence with the builder and consulting engineer requesting building information
 - correspondence and some inspection records from the authority.
- 4.4 The draft determination was sent to the parties on 14 July 2010. The draft was issued to the parties for comment and to agree a date when the building work complied with Clause B2 Durability.
- 4.5 The applicant responded to the draft determination in a submission received on 21 July 2010. The applicant noted that the ensuite bathroom was included in the approved building consent and was not additional work as had been indicated in the draft.
- 4.6 The authority wrote to the Department in a letter dated 28 July 2010 about matters unrelated to the draft. The letter acknowledged receipt of the application for determination and advised of the authority's procedure for reviewing building consents over 5 years old, the first step of which was a 'desktop review' used to recommend 'whether or not there is sufficient evidence that Council officers would be able to assess compliance if they were to visit'.
- 4.7 The authority responded to the draft in a submission from its legal advisers dated 11 August 2010. The submission said that the authority 'accepts the conclusions expressed in the draft determination in relation to code compliance' but that this was on the basis of information 'not all available to the Council at the time it made its decision'. In particular, the submission said the authority did not have the PS4 referred to in paragraph 4.3.
- 4.8 The submission contended that the authority did 'not have the power to unilaterally amend building consents to incorporate waivers or modifications of the building code' as this meaning was taken from the draft determination and previous determinations issued by the Department.
- 4.9 The submission questioned the Departments ability to comment on 'the way it presents statutory options to building owners' in order to satisfy the Act. The submission contended that the Department's jurisdiction was limited to section 118(1) of the Act. The submission said that the authority 'does not consider that it is legally obliged to carry out a physical inspection for every [code compliance certificate] application that it receives'.
- 4.10 The submission stated that missing inspections referred to in the authority's letter of 30 April 2010 'simply reflected the requirements of the original building consent' and that the draft determination 'does not examine the practical consequences of the missed inspections for the [authority's] task of determining code compliance.

- 4.11 The parties agreed that compliance with Building Code Clause B2 was achieved on 1 January 2005.
- 4.12 I have amended the determination as appropriate. I have also taken account of other matters and errors noted by the parties.

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 Registered Building Surveyor. The expert inspected the house on 10 June 2010 and filed his report on 14 June 2010.

5.2 The expert noted the following observations in relation to the building code clauses identified as being of concern to the authority:

Clause B2 (Durability)

- All construction detailing is of a traditional and well proven system.
- No faults could be detected that would give cause for concern.

Clause E2 (External moisture)

- The work has been done to a high standard and level of finish.

Clause E3 (Internal moisture)

- All other wet areas are well presented with no defects observed.

5.3 With regard to the quality of finish of various building elements, the expert observed that internal and external claddings were excellent. Flashings were described as tidy and effective.

5.4 The expert noted that the decking balustrade currently does not comply with Clause F4 Safety from falling. The tension to the stainless steel wires forming the barrier had 'relaxed' so the wires can be stretched apart. It was suggested that this was the likely result of drying and shrinkage of the balustrade timbers since installation. As a result the wires do not provide a sufficient barrier to prevent children under the age of six falling through

5.5 A copy of the expert's report was sent to the parties for comment on 17 June 2010.

6. Matter 1: The external envelope

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

Increasing risk

- it is in a very high wind zone
- it is in a coastal zone and subject to high wind salt spray

Decreasing risk

- it enjoys protection of other homes, structure and trees as shelter from the prevailing winds
- the traditional weatherboard construction is typical of good construction practice
- original house and alterations have been well tested and proven in stormy conditions of the area.

6.2.2 When evaluated using the E2/AS1 risk matrix, these features show that the house demonstrates a low weathertightness risk rating. If the details shown in the current E2/AS1 were adopted to show code compliance, the weatherboard cladding would not require a drained cavity.

6.3 Weathertightness performance

6.3.1 Taking account of the expert's report, the claddings appear to have been installed in accordance with good trade practice.

6.4 Weathertightness conclusion

6.4.1 I consider the expert's report establishes that the current performance of the external envelope is adequate because it is preventing water penetration through the cladding. Consequently I am satisfied that the house complies with Clause E2 of the Building Code.

6.4.2 In addition, the house is 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. I consider the expert's report establishes that the house will not be likely to allow the ingress of moisture in the future. Consequently I am satisfied that the house complies with Clause B2 of the Building Code.

7. Matter 2: The remaining code requirements

7.1 I consider the expert's report, the authority's inspection, the consulting engineer's inspections and the PS4 establishes that the alterations comply with Building Code Clause B1 Structure.

- 7.2 I consider the expert's report and the authority's inspection establishes that the alterations comply with Building Code Clause E3 Internal moisture.
- 7.3 However, I note that the expert has raised the matter of the decking balustrade not currently complying with Clause F4 (Safety from falling). I am of the view that this matter should be rectified prior to the issuing of a code compliance certificate. Remedial work is necessary in respect of the stainless steel wires on the balustrade to restrict the passage of children under six.

8. Matter 3: The durability considerations

- 8.1 Clause B2.3.1 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. 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.
- 8.2 The alterations to the house are now six years old. This means some elements of the house are now partly through, or at the end of, their required durability periods, and would consequently no longer comply with Clause B2, if a code compliance certificate was issued effective from today's date.
- 8.3 It is not disputed, and I am therefore satisfied that all the building elements installed in the alteration complied with Clause B2 on 1 January 2005. This date has been agreed between the parties, refer paragraph 4.11.
- 8.4 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.
- 8.5 I continue to hold that view, and therefore conclude that:
- (a) In the general case an authority has the power to grant an appropriate modification, or waiver, of the building code if this is requested by an owner.
 - (b) In this instance the authority has the power to grant an appropriate modification of Clause B2 in respect of the building elements if this is requested by the applicant.

- (c) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if a code compliance certificate for the house had been issued when the building work was substantially completed in 2004.

8.6 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.

9. The authority's actions

9.1 In my opinion the authority's letter to the applicants, dated 30 April 2010, is not clear as to the reasons why the authority would not issue the code compliance certificate. The letter makes statements about the work needing to comply with the durability requirements of the Building Code. The letter advised that the authority was:

... unfortunately not able to provide you with an assurance of building code compliance at this time. This is not an indication that your building is failing or deficient, but simply that too long a period has elapsed since it was built.

9.2 The letter requires the applicant to:

employ a suitably qualified member of the New Zealand Institute of Building Surveyors Inc to undertake a full survey of the building works ... [The report] must identify all matters of concern, but with specific regard to;

- B1 (Structure),
- B2 (Durability),
- E2 (External moisture) and
- E3 (Internal moisture).

[it] may still be necessary for [the authority] to carry out a final inspection after a formal decision has been made and any such final inspection will only take place after the confirmation of the formal decision

9.3 The letter lists specific inspections that the authority considered were required but had not been completed. In my view the list is inaccurate, as it includes items that are either not relevant to the work undertaken, or that had been inspected, as follows:

- 'Before placing any concrete or timber foundations'. The timber foundations to the deck were inspected by the consulting engineer who issued a PS4.
- 'Plumbing in/under under floor slabs'. All new work was installed under the existing suspended timber floor.
- 'Testing any drainage work prior to backfilling'. The new drains are all above ground.
- 'Before covering any field drains'. There are no field drains.
- 'Plumbing systems before fitting any linings'. A plumbing and drainage pre-line inspection was carried out on 5 November 2004 with a pressure test. The inspection records the work as 'compliant'.

- 'Final inspection on completion of work'. The authority had elected not to undertake this inspection.
- 9.4 The authority's legal advisers have submitted that the list is simply the requirements of the original building consent. That may well be the case, but the list should at the least be an accurate reflection of what is now required of the applicant.
- 9.5 The authority's legal advisers have referred to the practical consequences of the missed inspections. In this instance the majority of the 'missed' inspections have been completed or were not necessary. With respect to the remaining items the owner has not been given the opportunity to verify compliance to the satisfaction of the authority other than by the appointment of an expert.
- 9.6 I note that the PS4 has been issued by the engineer in respect of Clause B1. An inspection record dated 25 November 2004 records satisfactory completion of the waterproof membrane under the tiling to 'both bathrooms'. The same inspection also records 'sighted portal beam inspection connections and approved'.
- 9.7 I accept that the PS4 may not have been seen by the authority prior to the receipt of the application for determination. However, the application information was received by the authority in May 2010, and the authority could have modified its view of the outstanding matters accordingly.
- 9.8 The building work is a simple weatherboard-clad single-storey addition to an existing house. I consider that the requirement for the applicant to undertake a 'full survey of the building works' by suitable third party was unnecessary as:
- the 5-year-old alterations were inspected by the authority during construction and no defects were noted
 - it was reasonable for the authority to have re-inspected the house. In doing so it would have obtained a more accurate view of the nature of the work and the risks associated therewith, before determining the need for any additional specialist inspection and reporting
 - irrespective of the other statements made in its letter, authority advised that 'a final inspection may still be necessary'.
- 9.9 The authority has advised that the desk top process it applied in this instance is used on all consents over 5-years old.
- 9.10 I consider that options offered by the authority to the owner as outlined in paragraph 3.5 were not helpful. While the authority has made a decision by refusing to issue the code compliance certificate its reasons for doing so are not clearly articulated.
- 9.11 In conclusion, I do not consider the authority has reasonably explained the reasons for declining to issue the code compliance certificate, as it is required to do under section 95A of the Act.

10. What is to be done now?

- 10.1 The applicant should address the matter of the non-complying balustrade to ensure compliance with Clause F4 Safety from Falling.

11. The decision

- 11.1 In accordance with section 188 of the Building Act 2004, I determine that the building work complies with Building Code Clauses B1, B2, E2 and E3 and I reverse the authority's decision to refuse to issue a code compliance certificate.

- 11.2 I also determine that:

- a) all the building elements installed in the house complied with Clause B2 on 1 January 2005
- 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 January 2005 instead of from the time of issue of the code compliance certificate for all the building elements, except for the items to be fixed as set out in Determination 2010/84.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 6 September 2010.

John Gardiner
Manager Determinations