



Determination 2011/031

Refusal to issue code compliance certificate for a 7-year-old house completed under the supervision of a building certifier at 107 Gravatt Road, Papamoa.



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 parties to the determination are:

- the owners, D & E Skewes (“the applicants”), and
- the Tauranga Council (“the authority”), carrying out its duties and functions as a territorial authority or building consent authority.

1.2 This determination arises from the authority’s decision to refuse to issue a code compliance certificate for a 7-year-old house because it was not satisfied that the house complied with the Building Code (First Schedule, Building Regulations 1992). The refusal arose because at the time of construction no pre-plaster or cladding inspections were undertaken and the building work been undertaken under the supervision of Bay Building Certifiers Ltd (“the building certifier”), which was duly

¹ The Building Act 2004, the Building Code the Compliance Documents, past determinations, and guidance documents issued by the Department are available from the Department’s website at www.dbh.govt.nz or by contacting the Department on 0888 242 243.

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 work.

1.3 The matter for determination² is whether the authority was correct in its decision to refuse to issue a code compliance certificate. In deciding this I must consider:

1.3.1 Matter 1: The external envelope

Whether the external envelope of the dwelling (“the external envelope”) complies with Clause B2 Durability and Clause E2 External Moisture of the Building Code³. The external envelope includes the components of the systems (such as the plaster and fibre-cement claddings, the windows, the roof tiles and the flashings), as well as the way the components have been installed and work together.

1.3.2 Matter 2: Other relevant code requirements

Whether the building work complies with the other relevant clauses of the Building Code.

1.3.3 Matter 3: The durability considerations

Whether the elements that make up the building work comply with Clause B2 Durability of the Building Code, taking into account the age of the house.

1.4 The available evidence

1.4.1 Based on the information available and records supplied, I consider there is sufficient evidence available to allow me to reach a conclusion on the code compliance of the building work. This determination therefore considers whether it is reasonable to issue a code compliance certificate for the building work. In order to determine that, I have addressed the following questions:

- (a) Is there sufficient evidence to establish that the building work complies with the Building Code? I consider this 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 and a code compliance certificate is the appropriate certificate to be issued? I address this question in paragraph 9.

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 other evidence in this matter.

2. The building work

2.1 The house is sited on a relatively sheltered residential section in a medium wind zone in terms of NZS3604⁴.

2.2 The building is a single storey timber framed house, founded on a perimeter masonry foundation and concrete floor. The cladding is a textured and painted 60mm EIFS⁵ system with aluminium joinery.

² In terms of sections 177(1)(b) and 177(2)(d) of the Act.

³ 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.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ Exterior insulation finishing system

- 2.3 The roof is a combination of an 18° pitch truss construction covered with concrete tiles and a 3° rafter construction clad in long run 5 rib steel. Bulkhead perimeter parapet walls extend past the roof to form internal gutters. The truss roof areas have an externally fitted fascia/gutter system. The dwelling is well protected by 400, 600 and 1000mm soffit overhangs.
- 2.4 The expert noted that he was unable to establish whether or not the timber framing in the walls, roof and flooring of the dwelling had been treated but understood that the framing timber was Douglas Fir.

3. The background

- 3.1 On 6 September 2002 the authority issued a building consent for the dwelling, under the Building Act 1991, based on a building certificate issued by a building certifier. I have not seen the certificate issued by the building certifier.
- 3.2 The building work commenced and the building certifier undertook the following inspections:
- Footing – 4 September 2002, passed (presite inspection)
 - Underfloor – 9 September 2002, passed
 - Slab – 9 September 2002, passed
 - Drainage – 13 September 2002, passed (drainage as built received)
 - Preline/Building – 29 October 2002, passed
 - Preline/Plumbing – 29 October 2002, passed (AAV to kitchen, 6/3/2003 received producer statement from [tiling company] confirming waterproofing to showers. 7/3/2003 received producer statement from [texture systems company], have applied 60mm [EIFS])
 - Final/Plumbing – 7 March 2003, failed fire rating requirement (fire rates system to rear of gas hobbs in owners care 7/3/2003 Interim CCC issued)
 - Final/Building – 7 March 2003, passed
- The interim code compliance certificate was subject to the condition that the fire rated system to rear of gas hobbs required completion.
- 3.3 The building certifier ceased to operate as a building certifier on 30 June 2005 and became ‘processing and inspections consultants’ operating on the authority’s behalf (“the contractor”).
- 3.4 In May 2010 the applicants contacted the authority requesting that a code compliance certificate be issued.
- 3.5 On 3 May 2010 the contractor wrote to the applicants explaining that whilst comfortable with what could be inspected, no pre-plaster or cladding inspections had been carried out at the time of construction. As a result the contractor could not recommend that the authority issue a code compliance certificate until the cladding system had been further investigated. The contractor noted that at the very least this would require a report for a registered building surveyor that, through invasive testing, was able to demonstrate compliance with Clause E2 External moisture.

- 3.6 On 26 August 2010 the contractor wrote to the applicants noting that the splashback behind the gas hobbs had been addressed.
- 3.7 An application for a determination was received by the Department on 6 December 2010.

4. The submissions

- 4.1 The applicant forwarded copies of:
- a covering letter providing some background to the dispute
 - correspondence from the contractor dated 3 May 2010 and 26 August 2010
 - a copy of the interim code compliance certificate and conditions of code compliance for building consent number 8952, both dated 7 March 2003, and
 - building consent plans.
- 4.2 The authority acknowledged the application but did not provide a submission.
- 4.3 A draft determination was issued to the parties on 14 March 2011. 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 Both parties accepted the draft without comment and agreed that the date of compliance with Clause B2 was 7 March 2003, being the date that the final inspection was undertaken and passed.

5. Grounds for 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 have established what evidence was available and what could be obtained, considering that the building work is completed and some of the elements are not able to be cost-effectively inspected.
- 5.2 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the building certifier's inspection records, but I consider it important to look for evidence that corroborates or contradicts these records. I consider that the level of that reliance is influenced by the information available to me and also by my evaluation of the building work.
- 5.3 In summary, I find that the following evidence will allow me to form a view as to the code compliance of the building work:
- the record of inspections carried out by the building certifier, which indicates satisfactory inspections of parts of the building work (refer paragraph 3.2)
 - the drawings and specifications in the consent documentation
 - the expert's report (refer to paragraph 6).

6. The expert's report

- 6.1 As mentioned in paragraph 1.5, I contracted an independent expert to assist me and assess the Building Code compliance of the house.
- 6.2 The expert is a member of the New Zealand Institute of Building Surveyors. He visited the building on 21 January 2011 and furnished a report dated 4 February

2011. The expert made a second site visit and provided an addendum to the report on 8 February. A copy of the report and the addendum was provided to the parties on 8 February 2011.

6.3 General

- 6.3.1 The expert noted that the dwelling had been constructed in accordance with the consented plans and specifications.
- 6.3.2 The expert observed that the quality of the materials and workmanship associated with the construction of the dwelling was of a very high standard. He found that the cladding system had been well fixed and aligned. Roof flashings were tidy and effective and penetrations were all well sealed.
- 6.3.3 He also noted that the dwelling had been repainted about 12 months ago with a proprietary paint system and that the cladding was in excellent condition.

6.4 Weathertightness

- 6.4.1 The expert undertook an external and internal inspection as well as internal invasive and non-invasive moisture readings. The expert took non-invasive moisture content readings in a number of locations through the interior of the dwelling and found no evidence of moisture ingress.
- 6.4.2 The expert took invasive moisture content readings in locations considered high risk. These sites included apron flashing/wall junctions on the south, west and east elevations. No evidence was found of water ingress and so therefore the expert did not consider it necessary to drill through the cladding for further invasive testing.

The expert assessed the building work for compliance with the relevant clauses of the Building Code, and commented on them as follows.

E2 External moisture

- All floor to ground clearances adequate.
- All joinery is recessed into the cladding and head flashings and sill flashings were seen fitted to all windows. The sill flashings extended past the bottom of the doors and appeared to be well sealed.
- No evidence of cracking or premature deterioration and the walls did not exceed a length which required control joints.
- Roof penetrations and parapet wall/roof junctions were well flashed.
- Parapet cap flashings mitre and straight joints had sufficient overlap and were well sealed and finished. In addition to the cap flashings, the expert noted a second line of defence against water ingress had been created by extending the butynol of the gutter over the parapet wall.
- Internal gutters appeared to have sufficient fall to water outlets and overflows were provided as required.
- The butynol apron flashing/wall junctions were well formed and guided water into the gutter.

Based on the visual inspection, the expert concluded that the manufacturer's installation recommendations had been followed.

6.5 Other Building Code clauses

6.5.1 The expert assessed the house for compliance with the other relevant clauses of the Building Code and noted:

B1 Structure

- there is no evidence of structural stress or excessive movement

C Fire safety

- smoke alarms are installed within 3 metres of the bedroom entrance doors

E1 Surface water

- the dwelling is sufficiently elevated to allow natural run-off of surface water and the roof water is collected in gutters and via down pipes and is then disposed into the site's soak hole drainage system

E3 Internal moisture

- moisture content readings taken adjacent to the tiled showers in the bathroom and ensuite demonstrate that the waterproof membranes are performing
- large opening doors and windows provide ample ventilation; the bathroom and ensuite are also adequately ventilated to prevent accumulation of internal moisture
- the wall surfaces and spaces with sanitary fixtures and appliances are impervious and easily cleaned.

The expert was uncertain the extent to which the bathroom and ensuite floors had been waterproofed but noted that the showers were in enclosed cubicles which would limit the amount of splashing and was unlikely to threaten the durability of the underlying timber floor.

F2 Hazardous Building Materials

- Visible markings on the glass doors to the showers indicate compliance with NZS 42236.

G1 personal hygiene

- Facilities are in convenient locations, water pressure is good and all facilities are in good working order.

G2 Laundering

- Laundry facilities meet the functional requirements of Clause G2

G3 Food preparation and prevention of contamination

- The kitchen and kitchen area meet the functional requirements of Clause G3

G12 Water supply and G13 Foul Water

- Water supply and pressure is good.
- Foul water is conveyed from the building into gully traps and into the [authority's] reticulation system.

⁶ NZS 4223: Part 3: 1999: Glazing in buildings, Human impact safety requirements

- The top of the gullies are sufficiently elevated to prevent ground water entering the system.

H1 Energy efficiently

- The ceiling space is fully insulated with what appears to be 100mm thick ceiling insulation.

6.6 Summary

- 6.7 In the expert's view the dwelling complies with the Building Code, product manufacturers' literature and/or industry trade standards that were applicable at the time of construction.
- 6.8 The expert did not identify any building work that was required for Building Code compliance other than to note that adequate maintenance would be required to ensure that the building work would continue to meet the relevant Clauses of the Building Code.

Matter 1: The external envelope

7. Discussion

7.1 The external envelope

- 7.1.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/1).

7.2 Weathertightness risk

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

Increasing risk

- the envelope is relatively complex
- the roof to wall intersections are partly exposed and there are internal gutters

Decreasing risk

- the house is in a medium wind zone
- there are 400mm, 600mm and 1000mm soffits and verandahs
- there are no decks
- the dwelling is single storey.

- 7.2.2 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 7.2.1 show the house has a medium weathertightness risk rating.

7.3 Weathertightness conclusion

- 7.3.1 I consider the expert's report establishes that the current performance of the external envelope is adequate. Consequently, I am satisfied that the external envelope complies with Clause E2 of the Building Code.

- 7.3.2 The external envelope 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. There is no evidence of moisture ingress and no faults to the external envelope that are likely to allow the ingress of moisture in the future, therefore the external envelope complies with Clause B2.
- 7.3.3 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: Other relevant code requirements

8. Discussion

- 8.1 Taking into account the comments of the expert outlined in paragraph 6.5, and the other evidence, I am satisfied that the dwelling complies with the other relevant Clauses of the Building Code.

9. The appropriate certificate to be issued

- 9.1 Having found that the dwelling complies with the Building Code, I must now determine whether the authority can issue either a certificate of acceptance or a code compliance certificate.
- 9.2 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 issue a certificate of acceptance. In the case of this dwelling, the applicants are seeking a code compliance certificate.
- 9.3 In this situation, where I have reasonable grounds to conclude that the building work complies with the Building Code, I take the view that a code compliance certificate is the appropriate certificate to be issued in due course.

Matter 3: The durability considerations

10. Discussion

- 10.1 I note that the building work was substantially completed and an interim code compliance certificate was issued on 7 March 2003.
- 10.2 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).

10.3 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.

10.3.1 In this case the delay between the completion of the building work in 2003 and the applicants' request for a code compliance certificate means 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.

10.4 It is not disputed, and I am therefore satisfied, that all the building elements, with the exclusion of those items identified in this determination as requiring remedial work, complied with Clause B2 on 7 March 2003. This date has been agreed between the parties, refer paragraph 4.4.

10.5 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.

10.6 I continue to hold the view, and therefore conclude that:

- The authority has the power to grant an appropriate modification of Clause B2 in respect of the building elements.
- It is reasonable to grant such a modification because in practical terms, the building is no different from what it would have been if a code compliance certificate had been issued when the building work was completed in 2005.

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

11. The decision

11.1 In accordance with section 188 of the Building Act 2004, I determine that the dwelling complies with the Building Code, and accordingly 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 7 March 2003
- 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 7 March 2003 instead of from the time of issue of the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 8 April 2011.

John Gardiner
Manager Determinations