



Determination 2011/058

Regarding the refusal to issue a code compliance certificate for 10-year-old additions and alterations to a house at 133 Bruce Wallace Rd, Whangamata



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.
- 1.2 The parties to the determination are:
- the Thames Coromandel District Council, which is the applicant, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”)
 - the owners, R and J Bailey (“the owners”).
- 1.3 This determination arises from the authority’s decision to issue and then withdraw a notice to fix following its refusal to issue a code compliance certificate for 10-year-old additions and alterations to a house. The authority was not satisfied that the

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.

additions and alterations complied with the Building Code (First Schedule, Building Regulations 1992).

- 1.4 The matter for determination² is whether the authority was correct in its decision to refuse to issue a code compliance certificate for the additions and alterations.
- 1.5 In making my decision, I have considered the submissions of the parties, the authority's inspection records and photos, the report of the expert commissioned by the Department to advise on this matter ("the expert") and the other evidence.

2. The building work

- 2.1 The original dwelling was constructed in 1976. The additions and alterations, undertaken in 2001, comprised of:
- an extension to the entry hallway
 - the installation of a new stairwell
 - an extension of the northern side of the dwelling that incorporated the front deck of the (original) dwelling as well as part of the side deck on the east elevation and a new kitchen
 - the alteration of the original kitchen to a study area and dining area
 - the refurbishment of the existing ground floor laundry/bathroom
 - the installation of a lift.
- 2.2 The expert (referred to in paragraph 5), was advised that a conservatory had been removed from the front upper storey deck and a handrail installed prior to the 2001 building work.
- 2.3 The northern side extension was clad in face-fixed texture coated fibre-cement cladding, with aluminium joinery to the windows and doors.
- 2.4 I note that the authority's records indicate that the street number of the property was previously 141, but that at some date the numbers were changed and the property became 133.

3. The background

- 3.1 On 29 May 2001 the authority issued a building consent (ABA 20010574) for additions and alterations to the existing dwelling under the Building Act 1991.
- 3.2 Building work commenced and the authority's records indicate inspections were carried out in June 2001, including a pre-lining inspection on 20 June 2001. It appears that a final inspection was not undertaken until 12 April 2009. I am not aware of the reasons for the delay.
- 3.3 The owners purchased the property on 4 June 2004.
- 3.4 Another final inspection was undertaken by the authority on 15 March 2010. The inspection record notes that the inspection failed due to multiple issues of non-compliance. Twelve photographs were taken which identified defects observed by the authority.

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

- 3.5 On 22 March 2010 the authority wrote to the owners outlining the reasons for refusing to issue a code compliance certificate. These reasons included:
- weathertightness issues, of which ten items of non-compliance were noted
 - insufficient inspection records, with respect to the lack of a cladding inspection, given the weathertightness issues observed
 - changes to layout that were not constructed in accordance with the consented plans
 - the installation of a lift that was not consented (however, the authority recorded that as there was a producer statement it would consider granting an exemption under Paragraph k of Schedule 1 for the building work)
 - the application for the modification of the consent in relation to the commencement date for Clause B2 Durability³ was incomplete.
- 3.6 A notice to fix was issued on 30 March 2010 (I have not seen a copy of this notice).
- 3.7 On 12 April 2010, the owners' legal representative wrote to the authority requesting the withdrawal of the notice to fix. The basis for this request was that the owners had not been responsible for carrying out any of the building work to which the notice to fix related.
- 3.8 In April 2010 the owners engaged a building surveyor to undertake moisture testing. The surveyor provided a report to the owners on 14 April 2010, which noted:
- elevated moisture content readings in the north elevation on each side of the front door and under the window
 - a planter box had been built-up against the fibre-cement cladding under the window, although there was no visible evidence of timber decay
 - the step down between the entry hall floor and the exterior paving was between 25 and 50mm
 - the bottom edge of the fibre-cement sheeting had not been spaced away from the floor slab.
- 3.9 An application for a determination was received by the Department on 3 May 2010.
- 3.10 The application was put on hold while the owners took legal advice. The application was reactivated on 6 December 2010.
- 3.11 I sought advice from the authority on 6 April 2011 as to the status of the notice to fix. The authority advised that the notice had been withdrawn pending the outcome of the determination.

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. The submissions

4.1 The authority forwarded copies of:

- correspondence to the owners outlining why a code compliance certificate would not be issued
- the building consent plans, specifications and inspection records, including the record of the final inspection undertaken on 15 March 2010
- the application for a modification or waiver to the Building Code signed (but otherwise not filled in) by the owners
- the electrical compliance certificate (dated 20 January 2010) and producer statement for the installation of the lift (dated 15 October 2007)
- the application for a code compliance certificate signed by the owners' agent but not dated. (I note that the automatic footer dates the document at 28 April 2009.)

4.2 The owners forwarded copies of:

- a report dated 14 April 2010 from the building surveyor engaged by the owners
- the authority's inspection records, including photos and descriptions of the non-compliances recorded during the final inspection, and comments from the owners noting remedial work undertaken and some minor items of disagreement
- a letter dated 12 April 2010 from the owners' legal representatives to the authority.

4.3 A draft determination was issued to the parties for comment on 18 April 2011.

4.4 The authority accepted the draft subject to a non-contentious amendment. I have subsequently made that amendment.

4.5 On 21 April the owners sought an extension of time to seek legal advice before responding to the draft. On 8 June 2011, in the absence of a response to the draft, I rang the owner. It was agreed that the best course of action would be that the determination be made so that the owners' grievances can be pursued through other more appropriate mechanisms.

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to inspect the building work. The expert is a member of the New Zealand Institute of Building Surveyors.

5.2 I obtained the agreement of the parties to his engagement as he had previously been engaged by the owners to undertake moisture testing (refer paragraph 3.8). The expert inspected the house on 15 December 2010 and 10 January 2011, and provided a report dated 4 February 2011.

5.3 The expert found that the building work, described by ABA 20010574, did not comply with the Building Code in a number of respects. The expert inspected the additions and alterations and found:

Clause B2 Durability

The building work does not comply with Clause B2 in respect of Clause E2 because of the weathertightness detailing to the external envelope of the additions and alterations, including the formation of the junctions, sealing of penetrations, and insufficient ground clearances

Clause E2 External moisture

There were elevated moisture readings, indicating evidence of moisture ingress. Invasive moisture tests provided evidence of decay to the timber framing, including discoloured drillings and saturated drillings in one location, and the external envelope did not comply with Clause E2. (Given the evidence of decay, I note that further investigation is also required as to the ongoing compliance of the external framing with Clause B1 Structure.)

Clause F4 Safety from falling

The handrail along the eastern side of the new stairs had not been taken continuously up to the top of the stairs and did not comply with Clause F4.

Clause H1 Energy efficiency

The expert found the insulation was concealed and there was no evidence to support compliance with Clause H1.

5.4 A copy of the report was provided to the parties for comment on 8 February 2011.

6. Discussion

6.1 Based on the evidence provided to me by the parties, I am satisfied that there were elements of the building work that did not comply with the Building Code and therefore the authority was correct to refuse to issue a code compliance certificate.

6.2 In coming to this view, I have relied on the report of the building surveyor (refer to paragraph 3.8), the records of the authority from the final inspection, and the records of the owners that demonstrate remedial work was subsequently undertaken for some items of building work.

6.3 I also note that the fact that there were elements of the building work that did not comply with the Building Code was not disputed by the parties.

7. What is to be done?

7.1 The authority requested guidance on whether a notice to fix should be issued in this instance.

7.2 Notices to fix are issued for contraventions of the Act and its Regulations, including the Building Code. In order to issue a notice to fix, under section 164(1)(a), the authority must consider on reasonable grounds that a specified person is contravening or failing to comply with the Act or its regulations.

7.3 To make an assessment on reasonable grounds whether to issue a notice to fix, it is my view that the authority should consider a number of factors including:

- the age of work
- the extent of non-compliances

- the extent of work to be carried out
 - whether a variation or amendment to the consent is required
 - the expectation that progress will be made to make the building work code-compliant.
- 7.4 In some cases, for instance where the extent of non-compliances is not significant or where the remedial work does not require a building consent, it might be more appropriate to deal with the matter by way of a site notice or agreement between an authority and the building owner(s).
- 7.5 The owners, through their legal representative, questioned whether the notice to fix could be issued to them as they were not responsible for carrying out the building work. Under the Act, a notice to fix is issued to a specified person, who in most cases is the building owner. The Act does not distinguish between different owners throughout the period that building work is being carried out. In other words there is no basis for limiting the provisions of a notice to fix to one particular owner, such as the owner who had applied for the building consent and/or who had undertaken the building work.
- 7.6 Due to the context of the situation, in order to assist the parties in resolving the matters, and to satisfy myself as to the extent of the non-compliances of the building work, I engaged an expert to inspect the house (refer to paragraph 5).
- 7.7 Given the extent of non-compliance with the Building Code found by the expert (refer paragraph 5.3), it is my view that the authority should issue a notice to fix requiring the owners to bring the building into compliance with the Building Code.
- 7.8 Information from the expert's report and the authority's own records should inform the content of the notice to fix. The notice should not specify how those defects are to be fixed and the building brought into compliance with the Building Code, as that is a matter for the owners to propose and the authority to accept or reject.
- 7.9 In response to the notice to fix, the owners should engage a suitably qualified person to investigate the areas of non-compliance and produce a detailed proposal describing how these areas are to be remedied. The proposal should be submitted to the authority for approval. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that the additions and alterations do not comply with the Building Code, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 9 June 2011.

John Gardiner
Manager Determinations