



Determination 2012/029

Regarding the exercise of powers in refusing to issue a code compliance certificate for a 13-year-old house and garage at 17A Union Street, Waihi

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current Act”) made under due authorisation by me, Tony Marshall, Manager Determinations (Acting), 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 building owner, Mr & Mrs Heald (“the applicants”)
 - Hauraki District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined² is whether the authority correctly exercised its powers when it refused to issue the code compliance certificate for the 13-year old house.
- 1.4 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.

2. The building work

- 2.1 The building work consists of a single storey house with enclosed garage that is simple in plan and form. The house is founded on a 100mm thick reinforced concrete floor slab, which was marked with a finished ground level of 100mm on the plans, and has solid plastered and painted masonry block external walls. Joinery is aluminium with the exception of two timber French doors, and the simple gable roof is clad in long run profiled metal roofing.

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 Under sections 177(1)(b), and 177 (2)(d) of the current Act

3. Background

3.1 The building consent was applied for in December 1997, and after receipt of a facsimile to the authority on 4 February 1998 from the consulting engineer, the authority issued a building consent (No 9245) for the building work under the Building Act 1991 (“the former Act”).

3.2 The consulting engineer’s statement confirmed that

The 665 mesh used in the floorslab is there primarily to stop shrinkage cracking of the concrete. Whilst it does supply some structural strength to this building element, it is not essential – 1.5kPa floor loading only.

[The author is] not familiar with the [proprietary mesh] product but understand from [the then owner] that it provides shrinkage control to concrete slabs.

The consulting engineer concluded his statement by noting the choice of shrinkage control was left to ‘the client’.

3.3 It appears that the house was constructed between February and November 1998; I have seen no record of inspections undertaken during that time. A ‘chronology of events’ provided to the original owner by the authority on 24 April 2008 doesn’t include any records of inspections.

3.4 On 3 November 1998 the authority wrote to the original owner to remind the owner of the requirement to seek a code compliance certificate on completion of the building work.

3.5 On 31 August 2000 a final inspection was carried out, and on 6 September 2000 an interim code compliance certificate³ was issued to the original owner, with a covering letter that noted the following work needed to be attended to:

1. Lower the gardens & ground around the house so that the floor is at least 150mm above ground level.
2. Fit a bird cap to the terminal vent.
3. Provide confirmation from your concrete supplier that [proprietary fibre reinforcement system] was provided in the concrete and used on the concrete floor. The floor was poured on 17 February 2000. The cracks in the floor & tiles would indicate that there were no central joins in the floor slab.
4. Provide seismic restraints for the HWC.
5. Vent the rangehood to the outside air.

3.6 It appears that ownership of the property changed in 2002 without the purchaser being aware that the matter of the code compliance certificate remained unresolved. On 23 May 2007 the authority wrote to a solicitor acting on behalf of the then owner, referring to the inspection in 2000 and stating that

It is unlikely that [the authority] would now, after nearly ten (10) years, contemplate issuing a Code Compliance Certificate for this building work particularly in view of the problems with the concrete floor.

3.7 In a letter to the authority of 29 May 2007 the solicitor responded, noting that items 2 & 4 were relatively minor, that a newly installed hot water cylinder had been provided with seismic restraints, that the range hood would be vented to the outside wall, and that the remaining items would be followed up with the original owner. In

³ Under section 43 of the Building Act 1991

a letter to the authority dated 20 July 2007, the solicitor then requested the authority carry out a further inspection.

- 3.8 On 8 August 2007 the authority carried out a further final inspection, and in a letter dated 15 August 2007 the authority advised the original owner that the inspection was unable to be completed due to lack of access, but that the authority observed that
- ... ground levels were still too high and that a number of cracks to the cladding had occurred. Because of this [the authority] would not be willing to issue a code compliance certificate due to the fact that the dwelling will not meet New Zealand Building Code clauses B2/AS1 and E2/AS1.
- 3.9 Correspondence continued with the original owner to obtain property file information to apply for a determination and the parties continued to work to resolve the issue.
- 3.10 In an email on 11 April 2008 the authority requested confirmation, by way of an invoice, that the concrete was supplied with the reinforcement fibre mixed in. On 18 April 2008 the original owner provided a copy of an invoice dated 18 February 1998 from the concrete supplier that notes the concrete included the reinforcement fibre.
- 3.11 In an email to the authority on 23 April 2008 a real estate agent proposed a remedy for item 1 (refer paragraph 3.5); noted that items 2, 4, and 5 were easily fixed if they had not already been attended to; and sought clarification regarding item 3.
- 3.12 In an internal email on 28 April 2008, the authority stated that ‘because of the age of the building, and the issues outstanding, [the authority] can not be satisfied on reasonable grounds’ that the house complies with ‘B2/AS1 (durability) and E2/AS1 (external moisture)’ and refused to issue a code compliance certificate. The email concluded ‘We don’t want to get into a debate with the owners about what the potential issues are and what will and will not work’.
- 3.13 In an email to the applicants on 23 June 2011 the authority reiterated that it would not issue the code compliance certificate, noting that its reasons remained the same as those stated in 2007 (refer paragraph 3.8)
- 3.14 The Department received an application for a determination on 8 February 2012.

4. The submissions

- 4.1 The applicants provided a covering letter with the application noting that
- the house is on a flat section with a natural slope diagonally across the property
 - the issues identified in 2008 have been resolved
 - the remaining issue is the authority’s insistence that the ground level be lowered around the house so that the floor slab is 150mm above ground level
 - the approved plans show the slab thickness as 100mm, and any requirement to increase this should have been dealt with at that time

The applicants are of the view that to remove 50mm across the entire section is ‘rather extreme’.

- 4.2 The applicants provided copies of:
- drawings and specifications, stamped approved 29 January 1998
 - a series of photographs including the hot water cylinder, venting, and repairs to cracking
 - correspondence between the parties, the original owner, and the solicitor for a previous owner.
- 4.3 The authority made no submission in response to the application. In a letter to the authority dated 13 February, I sought further information in respect of the reasons given by the authority, or evidence from either the authority or the owner to indicate that after nearly 15 years of use the building is failing to prevent the ingress of undue moisture. The Department noted that Acceptable Solutions B2/AS1 and E2/AS1 are not mandatory and compliance with the Acceptable Solutions can not be required.
- 4.4 In a letter to the Department dated 17 February 2012 the authority noted the results of the inspection carried out in 2007 (refer paragraph 3.8) and said that:
- the ground levels had been built up around the building and that there was obvious cracking in the cladding. Because of this [the authority] could not be reasonably assured that the building work complied with the [Building Code] and was therefore not willing to issue a Code Compliance Certificate.
- The authority confirmed that it did not request evidence from the owner at the time to prove otherwise but that the Department should request this ‘as part of the determination’.
- 4.5 A draft determination was issued to the parties on 19 March 2012. The draft was issued for comment, and for the parties to agree a date when the building complied with Clause B2 Durability. The applicant accepted the draft without comment.
- 4.6 The authority responded to the draft determination in an email to the Department dated 27 March 2012. The authority considered the reasons given for refusal, that the house did not meet the requirements of the Acceptable Solutions for Clauses B2 and E2, should be treated as reason for the refusal under section 95A. The authority submitted that the word ‘incorrectly’ in paragraph 6.1 should be replaced with ‘erred’.
- 4.7 I am of the opinion that paragraph 5.1 already canvasses the matter of the application of section 95A and the authority’s refusal in 2007, and is appropriate in respect of the authority’s later decisions on this matter.
- 4.8 Both parties agreed the date of 31 August 2000, being the date of the issue of the interim code compliance certificate, as the date when compliance with Clause B2 was achieved.

5. The exercise of the authority’s powers

5.1 The application of section 95A

- 5.1.1 Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:

... must give the applicant written notice of—

- (a) the refusal; and

(b) the reasons for the refusal.

- 5.1.2 In its letter of 23 May 2007 the authority referred to the five items outstanding from the inspection in 2000 and stated that ‘it is unlikely that [the authority] would now, after nearly ten (10) years, contemplate issuing a Code Compliance Certificate for this building work particularly in view of the problems with the concrete floor.’
- 5.1.3 I consider that the period of delay between the issue of a building consent and the request for a final inspection or code compliance certificate is not a ground⁴ for refusing to issue a code compliance certificate. I note however that this does raise the issue of the durability of the building work, and hence compliance with the Building Code, taking into account the age of the building work. I have addressed this matter in paragraph 5.3.
- 5.1.4 In its letter of 15 August 2007 the authority advised that the code compliance certificate was refused as the authority could not be satisfied on reasonable grounds that the dwelling met the requirements of ‘clauses B2/AS1 and E2/AS1’.
- 5.1.5 I reiterate the comments made to the authority in my letter of 13 February 2012. Acceptable Solutions B2/AS1 and E2/AS1 are non-mandatory and compliance with Acceptable Solutions is not the only method of compliance nor can it be required. I also note that no evidence of non-compliance was established at that time, nor was evidence requested of the owner to alleviate the authority’s concerns regarding potential moisture ingress as a result of cracks in the cladding.
- 5.1.6 The authority’s internal email of 28 April 2008 stated that ‘because of the age of the building, and the issues outstanding, [the authority] can not be satisfied on reasonable grounds’ that the house complies with ‘B2/AS1 (durability) and E2/AS1 (external moisture)’. The email concluded ‘We don’t want to get into a debate with the owners about what the potential issues are and what will and will not work’.
- 5.1.7 The authority did not identify items of non-compliance with the requirements of the Building Code as it is required to do. If an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which is likely to include a detailed assessment of the work concerned.

5.2 The establishment of compliance

- 5.2.1 As the building consent was issued under the former Act, the issuing of a code compliance certificate is subject to the requirements of section 436 of the current Act. Accordingly, the house and garage have to comply with the requirements of the Building Code that was in force at the time the building consent was granted in order for a code compliance certificate to be issued.
- 5.2.2 In regard to this house, the evidence as to compliance is able to be gathered from; the issue of the interim code compliance certificate, which indicates the authority was satisfied as to all elements constructed at that time with the exception of the 5 items listed (refer paragraph 3.5); the performance of the exterior envelope over the past thirteen years; and a visual assessment of remaining building elements, which may or may not reveal that further evidence needs to be gathered to determine compliance.

⁴ Under section 43(5) of the former Act or section 94 of the current Act

- 5.2.3 This methodology has been used and articulated in a number of determinations, such as 2011/116⁵, and I consider the authority was able to apply a similar methodology in reaching a decision in this instance. An inspection was carried out in 2007; however the lack of access to the interior of the house hindered the authority's ability to make a decision 'on reasonable grounds'. I note that ownership changed since and that had an inspection of the house been completed subsequently, the authority would have been able to identify whether there were any defects requiring attention without the applicants needing to apply for a determination.
- 5.2.4 In this instance, and in respect of the refusal made by the authority on 23 June 2011, I do not consider the authority has met its obligation in respect of section 95A as it has not placed itself in a position where it can make an informed contemporaneous decision about compliance of the house with the Building Code.

The expert's report

- 5.2.5 As mentioned in paragraph 1.4, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors and inspected the house on 9 March 2012, providing a report on 15 March 2012.
- 5.2.6 The expert inspected the exterior and interior of the building and took non-invasive moisture readings at several locations. The expert found no elevated moisture readings and observed no evidence of moisture ingress. In regards the external envelope the expert commented as follows:
- The house has been recently repainted and there is no evidence of cracking or premature deterioration of the plaster surface.
 - The interior of the external walls were 'clean and dry' with 'no evidence of mould or dampness'.
 - 'Close visual scrutiny of the carpet/wall junctions ... showed no evidence of dampness'. The expert took non invasive moisture readings at these junctions that he compared with test readings taken away from the walls. No elevated readings were observed.
 - The ground generally has little or no fall away from the walls of the house.
 - Floor to ground clearance is generally between 100mm and 150mm. Locations where the clearance is reduced to 50mm is paved.
 - The window sills have a slope of approximately 7°.
- 5.2.7 The expert concluded that there was no evidence of failure and that although the house may not adhere to Acceptable Solution E2/AS1 in some respects; based on the evidence of past performance the performance requirements of the Building Code were being met.
- 5.2.8 I accept the expert's findings and note that all other items recorded in the final inspection (refer paragraph 3.5) appear to have been resolved.

⁵ Determination 2011/116: Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier.

5.3 Durability

- 5.3.1 The age of the building work raises 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 consent issued in February 1998.
- 5.3.2 The relevant provision of Clause B2 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).
- 5.3.3 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.
- 5.3.4 In this case, the delay between the substantial completion of the building work and the resolution of the issue of a code compliance certificate raises concerns that various elements of the building are now well through or beyond their required durability periods. They consequently would no longer comply with Clause B2 if a code compliance certificate were to be issued effective in the near future.
- 5.3.5 It is not disputed, and I am therefore satisfied, that all the building elements in respect of consent No 9245 complied with Clause B2 on 31 August 2000 (refer paragraph 4.8).
- 5.3.6 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.
- 5.3.7 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 if requested by an owner
 - (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 1995.
- 5.3.8 If the above process is followed, then I 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.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in refusing to issue the code compliance certificate without adequate reasons for the refusal in accordance with section 436 of the Act. Accordingly, I reverse the authority's decision to refuse to issue the code compliance certificate.

6.2 I also determine that:

- a) all the building elements installed in the house, complied with Clause B2 on 31 August 2000.
- b) building consent No 9245 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 31 August 2000 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 23 April 2012.

Tony Marshall
Manager Determinations (Acting)

APPENDIX A: THE RELEVANT LEGISLATION

A1 The relevant provisions of the Act are:

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.