



Determination 2012/042

Regarding the refusal to issue a code compliance certificate for a townhouse at 26 Buller Street, Te Aro, Wellington



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, 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 owner of Unit 4/26 Buller Street, Frober Limited (“the applicant”)
 - Wellington City Council (“the authority”), carrying out its duties as a territorial authority and a building consent authority.
- 1.3 The matter to be determined² is whether the authority correctly exercised its powers in refusing to issue a code compliance certificate for Unit 4. The authority is of the view that while Unit 4 was considered code compliant, the building consent under which Unit 4 has been constructed cannot be amended to allow for a code compliance certificate to be issued in respect of Unit 4 only (refer paragraph 4.3). Therefore, in making my decision, I must also consider the reliance of Unit 4 on compliance of the adjacent units and whether the building consent can be amended to allow for a separate building consent for Unit 4.

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 Act.

- 1.4 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department (“the expert”), and the other evidence in this matter.

2. The building work

- 2.1 The building work in question is a three-story townhouse (“the townhouse”) that is designated as Unit 4. It is centrally situated in a block comprising units 1 to 6 (“the complex”) within a larger development, and is subject to its own unit title. The upper two floors of the townhouse are residential and the lower floor consists of a garage and entry access.
- 2.2 The development comprises nine units, with units 7 to 9 constructed under a separate building consent and having been issued a code compliance certificate.
- 2.3 The complex is constructed of timber framing on a concrete foundation: a two-storey steel portal frame is located along the front of all the units to provide lateral support. The complex is clad with timber weatherboards, with roof claddings of butyl rubber and profiled steel; the exterior joinery is aluminium.
- 2.4 Given the time of construction in 1995 I consider the framing timber to be boric treated.

3. Background

- 3.1 On 16 October 1995, the authority issued building consent (No. 14505) for the construction of the complex, under the Building Act 1991 (“the former Act”).
- 3.2 On 14 August 1998 the authority carried out a final inspection of the townhouse and an officer’s diary note in regard to this inspection records:
Unit 4 final. Cannot issue CCC; hand rail to stairs to be installed.
- 3.3 The applicant purchased the townhouse in 2004.
- 3.4 Following a request from the applicant on 14 March 2009, the authority inspected the townhouse on 18 June 2009. Following this inspection, the authority wrote to the applicant on 23 June 2009 and listed a total of 21 matters that required attention. The authority noted that these matters had to be attended to before it could issue a code compliance certificate and also stated:
... this building consent was issued for the construction of six townhouses. The [authority] needs to be satisfied on reasonable grounds that all building work complies with the requirements of the Building Act 2004 and the Building Code 1992 at the time the Code Compliance Certificate is requested.
- 3.5 The authority then issued a notice to fix dated 23 June 2009 that described the particulars of contravention or non-compliance as:
Aspects of the dwelling noted during the inspection carried out on 18 June 2009 do not comply with Clauses B2 – Durability, E2 – External Moisture & E3 – Internal Moisture of the Building Code.
The notice to fix required the applicant address the matters identified in the authority’s letter of 23 June 2009.
- 3.6 Following a request from the applicant for an “extension of time”, the authority issued a second notice to fix dated 10 June 2010. This was worded as for the initial notice but did not refer to non-compliance with Clause E3.

3.7 The applicant arranged for the requested remedial work to be carried out. In a letter to the applicant dated 20 October 2011, the authority stated that based on an inspection of the townhouse by the authority, it was now able to advise that the requirements of the notice to fix had been complied with.

3.8 In a second letter, also dated 20 October 2011, the authority wrote to the applicant confirming that the building work associated with the townhouse met the requirements of the Building Code. However, the authority noted that:

As discussed, this building consent was issued for the construction of six townhouses. The [authority] needs to be satisfied on reasonable grounds that all building work complies with the ... Building Code 1992 ...

Before the [authority] can issue a [code compliance certificate] for your unit, we would have to be satisfied that all the units comply. A building consent amendment to modify Clause B2 – Durability would also be required.

3.9 The application for a determination was received by the Department on 27 January 2012.

4. The submissions

4.1 In a covering letter dated 18 January 2012, the applicant described the background to the dispute and noted that the authority would not issue a code compliance certificate until all six units in the complex were made code-compliant. The applicant also stated that their application was:

on the basis that this is a townhouse sited on its own piece of land. There are party walls separating each unit and as such are independent of each other...

4.2 The applicant provided copies of:

- some of the consent documentation
- the unit title information
- the notices to fix dated 23 June 2009
- a summary of the diary notes of the authority's officer
- the correspondence between the parties
- a photograph of the townhouse and the adjacent units.

4.3 In a letter to the Department dated 8 February 2012, the authority stated that it:

... does not believe unit four can be isolated from [consent 14505] and considered for a Code Compliance Certificate (CCC), as it is reliant on the two adjacent units to ensure the requirements of the building code are achieved; in particular, B1 – Structure, B2 – External Moisture, C3 – Spread of Fire.

4.4 The authority supplied copies of :

- the building consent and associated documentation
- the two notices to fix dated 23 June 2009 and 10 June 2010
- the authority's inspection documents
- the correspondence between the parties
- some documentation relating to other units in the complex.

- 4.5 In an email to the Department dated 10 February 2012, the applicant took issue with the authority's approach regarding the two adjacent units. The applicant noted that this approach was "completely new" and the authority had always referred to all six units previously. All the issues raised by the authority had presumably been approved at the initial consent approval, and since the buildings had been completed there had 'never been any issue with structural cracking, durability, external moisture or spread of fire. The structural and fire stop concrete party wall between the properties has remained intact and performed as per the designers original intention.'
- 4.6 The applicant also referred to the authority's final inspection of the townhouse in 1998, noting that the only issue raised at that time was a stair handrail and this omission had been rectified.
- 4.7 A draft determination was forwarded to the parties for comment on 22 February 2012. The draft determination accepted that the authority was satisfied that the townhouse was currently compliant, and noted that there was no evidence of the townhouse being adversely affected by the adjacent units. The draft determination concluded that the authority incorrectly exercised its power when it refused to issue the code compliance certificate on the bases that it would refuse to amend the consent to create a separate consent for Unit 4.
- 4.8 The applicant accepted the draft without comment.
- 4.9 The authority accepted the draft in general, and in a letter dated 5 March 2012 said, in summary, that:
- though the inspection of the townhouse in 2009 showed no evidence of a systemic fault, it does not automatically follow that the other units are in the same condition
 - an assumption regarding compliance of the other units can not be made based only on the inspection of one unit
 - the authority will notify the owners of the remaining five units in the complex once the determination had been issued.
- 4.10 I subsequently engaged an independent expert to make an assessment as to the compliance of the townhouse in respect of the adjacent units (refer paragraph 5), and a second draft determination was issued. The second draft concluded that the townhouse does not comply with the Building Code and maintained that the authority incorrectly exercised its power when it refused to issue the code compliance certificate on the bases that it would refuse to amend the consent to create a separate consent for Unit 4.
- 4.11 In a letter to the Department dated 17 May 2012 the authority accepted the second draft without further comment.
- 4.12 The applicant responded in a letter dated 22 May 2012, accepting the draft and noting two minor amendments. The applicant also commented on the expert's report and the durability matters.

5. The expert

- 5.1 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. The expert inspected the townhouse on 16 April 2012, providing a report dated 19 April 2012. The expert's assessment was limited to the condition of the inter-tenancy walls and the junctions in the external envelope between the adjacent units; including the roof, gutters, and junctions in the timber weatherboards.
- 5.2 The expert observed that the complex has had many years of in-service exposure and that the townhouse has had some modifications and cladding repairs. The expert noted modifications made to the original flashings on the townhouse. The expert noted that the work appear to have been in response to the authority's inspection during 2009 and subsequently confirmed as compliant in November 2011 (refer paragraphs 3.7 and 3.8).
- 5.3 The expert inspected the townhouse roof which drains towards the butyl rubber gutter adjacent unit 3, and the roof of unit 5 which drains toward the northern wall of the townhouse.
- 5.4 The expert noted:
- the rainwater head from the roof gutter to unit 5 has corroded around the downpipe dropper
 - small holes are evident to the mitred joints to the weatherboard cladding at the vertical junction between the townhouse and unit 5. This junction also sits immediately below unit 5's corroded rainwater head as above. Water is able to run from the corroded rainwater head and down the wall
 - the detailing of the soffit to unit 5's entry will limit the drainage of any water entering the weatherboards above. The expert took non-invasive moisture readings of the entry soffits to the townhouse and unit 5 and recorded elevated levels behind the fibre-cement soffit lining
 - small areas of exposed plywood where the butyl-clad plywood to the gutter extends out above the rain head. However, this was unlikely to be of much significance
- 5.5 Invasive moisture tests of the wall framing beneath the gutters found no evidence of moisture ingress (readings were between 13 to 14%). The expert also noted that, aside from the identified defects in paragraph 5.4, the gutters appear to be working as required provided they are maintained and kept free of debris.
- 5.6 Repairs to the cladding had been undertaken where the townhouse's lower deck (adjacent unit 5's entry soffit) abutted the weatherboard cladding. While the expert considered it likely this junction was compliant, he recommended the junction be fitted with a flashing to deflect water running off the wall away from the joint.
- 5.7 The expert noted a flight of timbers stairs providing access to the upper deck was severely decayed; with one tread broken through and one stringer and a support post showing advanced decay. (I note the applicant had previously undertaken to have repairs made to the steps and that access had been restricted in the meantime.)

6. Discussion

6.1 The compliance of the townhouse

- 6.1.1 The townhouse has undergone a detailed inspection by the authority, in June 2009, and re-inspected at the completion of the work in October 2011; and the authority confirmed that it considered the townhouse met the requirements of the Building Code (refer paragraph 3.8). However, the authority would not issue a code compliance certificate for the townhouse because its compliance was ‘reliant on the two adjacent units to ensure the requirements of the Building Code are achieved; in particular, B1 Structure, B2 External Moisture, C3 Spread of Fire’.
- 6.1.2 I consider the expert’s report establishes that the current performance of the building envelope for the townhouse is not adequate because there is evidence of moisture ingress in at least one area at present. Consequently, I am satisfied that the townhouse does not comply with Clause E2 of the Building Code.
- 6.1.3 In addition, the building 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 townhouse to remain weathertight. Because the cladding faults paragraph will allow the ingress of moisture in the future, the building envelope does not comply with the durability requirements of Clause B2 insofar as it relates to Clause E2.
- 6.1.4 I consider the defects found by the expert (refer paragraph 5.4), which largely relate to the junction between Unit 5 and the townhouse, impact on the compliance of the townhouse; the defects are discrete in nature and fixing these will result in the townhouse being made compliant. The condition of the framing, adjacent the mitred joints to the weatherboard cladding between the townhouse and Unit 5, should be assessed as part of any remedial work to improve the weathertightness of this junction.
- 6.1.5 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 (for example, Determination 2007/60).
- 6.1.6 I consider the timber steps to the upper deck do not comply with Building Code Clauses B2 Durability and F4 Safety from falling.
- 6.1.7 The authority’s concerns about the possible adverse effect of non-compliance in the remaining units should be formally advised to the remaining owners of the outstanding code compliance certificate.
- 6.1.8 Having reached the conclusion that the townhouse does not comply with Building Code, I must consider whether a separate building consent and a subsequent code compliance certificate could apply to the townhouse once the townhouse is brought into compliance.

6.2 Amending the original consent

- 6.2.1 In previous determinations, including those involving this authority, (for example Determination 2011/051) I have taken the view that the authority has the power under the Act to deal with an administrative issue such as amending a consent that deals with two or more buildings, or in this case townhouses, where an owner requests the consent be amended to deal with one only unit in a complex separate to the remaining units.
- 6.2.2 During the building process there will often be changes in circumstance produced by design changes, changes to the scope of work proposed, the number of buildings proposed or the timing of completion. Such changes may require alterations to the scope of a building consent and the work covered by the consent. A building consent authority has the power under the Act to deal with such changes in circumstance by way of amendment to the consent.
- 6.2.3 I consider the basis for the decision reached in Determination 2011/051 also applies in this instance, and that in response to a request by the applicant the authority can amend the building consent to create a separate building consent for the townhouse. The amendment of the original consent will enable the applicant to apply for a code compliance certificate for the townhouse without requiring the cooperation of the owners of the remaining five units within the complex.
- 6.2.4 Having reached this conclusion, I note that the authority's refusal to issue a code compliance certificate was in terms of the original building consent, which covered all of the six units in the complex, and that I have not considered the compliance of the remaining five units.

6.3 Durability modification

- 6.3.1 I note that in correspondence to the applicant, dated 20 October 2011, the authority has stated that the applicant may apply to the authority for a modification of the durability requirements, given the age of the building work and the provisions of Clause B2.3.1. This would allow durability periods stated in Clause B2.3.1 to commence from the date of substantial completion rather than the date of issue of a code compliance certificate. I leave this matter to the parties to resolve.
- 6.3.2 I note that the authority's letter, dated 23 June 2009, requires the applicator of the butyl rubber roof membrane to supply a statement that, among other things, provides 'comment' on the 'the 15 year durability requirement of the building code for the [membrane] from the time the [code compliance certificate] is issued'. The modification of Clause B2.3.1 is to have the durability periods commence from the time the building work was completed, and not from the date of the code compliance certificate.
- 6.3.3 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.

7. The decision

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

- the authority incorrectly exercised its power in refusing to issue a code compliance certificate for Unit 4 on the basis that it would refuse to amend building consent No 14505 to create a separate building consent for Unit 4
- Unit 4 does not comply with Building Code Clauses B2 Durability, E2 External moisture, and F4 Safety from falling.

7.2 I also determine that, if so requested by or on behalf of the owners, the authority is to amend building consent No. 14505 to create two separate building consents as detailed in paragraph 6.2 above.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 28 May 2012.

John Gardiner
Manager Determinations