Ministry of Business, Innovation & Employment | Building & Housing

Determination 2012/063

Regarding the refusal to issue a code compliance certificate for a 15-year-old house at 285 Lawford Road, West Melton, Christchurch

1. The matters to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- the building owner, V McNaughton ("the applicant")
- Selwyn District Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 15-year-old house, because it is not satisfied that the building work complies with certain clauses[2] of the Building Code (First Schedule, Building Regulations 1992). Concerns about compliance of the house primarily relate to its age and to the weathertightness of its claddings (see paragraph 4.2).

[1] The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

[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.

1.4 The matter to be determined[3] is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this, I must consider:

1.4.1 Matter 1: Compliance with the Building Code

Whether the building work complies with the clauses of the Building Code relevant to this house that was current at the time the building consent was issued. (I consider this in paragraph 6.)

1.4.2 Matter 2: The durability considerations

Whether the building elements comply with Clause B2 Durability of the Building Code, taking into account the age of the house. (I consider this in paragraph 7.)

1.5 In making my decision, I have considered the parties' submissions, the report of the expert commissioned by the Ministry 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 detached house that is two-storeys-high in part and is situated on a large level rural site in a high wind zone for the purposes of NZS 3604[4]. Although fairly simple in plan, the house is more complex in form and is assessed as having a medium weathertightness risk.

2.2 Construction is generally conventional light timber frame, with concrete foundations and floor slab, brick veneer and weatherboard claddings, profiled metal roofing and aluminium windows. The 35^{o} pitch gable roof accommodates a bedroom and sitting room within the slope, with two dormer windows to the north, a dormer over an ensuite bathroom to the south and a void open to the west living areas below.

2.3 The roof pitch reduces to 10^{o} to form a 1.5m deep verandah that wraps around the north side of the house, finishing against single-storey gabled projections on the east and west elevations with the latter including a membrane-roofed bay window. On the south the roof pitch also reduces to 10^{o} to form another projection. Apart from the verandah, eaves and verges are about 400mm.

2.4 Ground floor walls are clad in brick veneer, and horizontal rusticated weatherboards are applied to gable ends and around upper level dormers with timber facings used at corners. The timber weatherboards are, fixed through the building wrap directly to the framing and finished with a stain.

2.5 The specification called for wall framing to be H1-treated radiata pine or equivalent. Given the date of framing installation in 1996, the wall framing of this house is likely to be boric-treated. However, given the lack of evidence, I am unable to determine the particular level treatment described as 'H1'.

[3] Under sections 177(1)(b) and 177(2)(d) of the Act
[4] New Zealand Standard NZS 3604:1999 Timber Framed Buildings

3. Background

3.1 The authority issued building consent no. R415192 for the house to the former owner on 24 April 1996 under the Building Act 1991, and carried out ten inspections between May 1996 and October 1996.

3.2 The last recorded inspection was for drainage on 7 October 1996, when an as-built plumbing and drainage plan was submitted to the authority. The house appears to have been substantially completed and occupied by the end of 1996, although no further inspections were carried out.

3.3 The interim code compliance certificate

3.3.1 In a pro-forma letter to the former owner dated 9 September 1999, the authority noted that a final inspection had not been carried out on the house and recommended that this be done to allow resolution of the outstanding building consent.

3.3.2 According to the applicant, 'only some painting remained [outstanding]' at that stage. Although there is no inspection record, it appears that a final inspection was undertaken as the authority issued an interim code compliance certificate dated 22 May 2000 'in respect of part only' of the building. The certificate stated:

> Further building work is required to be completed as detailed in the most recent building inspection site sheet. When all works are completed the building owner is required to notify the [authority] where a further inspection may be required to ensure compliance. When all building works approved under the above building consent comply, a full Code Compliance Certificate will be issued.

3.4 The 2009 final inspections

3.4.1 The applicant inherited the house in 2005 and remained unaware of the lack of a code compliance certificate until preparing to sell the property in 2009. The authority carried out a final inspection on 14 May 2009, and the inspection record listed ten items requiring attention. Items relating to claddings were:

> Downpipe first floor requires spreader (item 3)
> Meter box penetrations to seal. Rusticated weatherboards (item 4)
> Weatherbrd/window junction requires scribers or plugs, seal (item 10)

3.4.2 Outstanding work was completed and the re-inspection record dated 29 July 2009 notes 'items 1-10 now completed'. The applicant then applied for a code compliance certificate on 17 August 2009.

3.5 The authority's refusal

3.5.1 In a letter to the applicant dated 26 August 2009, the authority stated that it was unable to issue a code compliance certificate

> ...due to the extended time which has elapsed between the date on which the building consent was granted and the later date on which the final inspection was carried out (being over 13 years).

3.5.2 The authority also outlined other reasons for refusing the application for a code compliance certificate as follows (in summary):

- The authority's 10-year liability starts from the date the certificate is issued, which would lead to more than 23 years since the consent was issued.
- Required durability periods start from the date the certificate is issued, meaning that an element required to last only 'say 5 years is expected to last 18 years'.
- There is no evidence that the 'required regular maintenance of the building elements has been carried out.'
- The final inspection 'highlights issues that have a direct impact on weathertightness and moisture ingress', and which may have compromised durability 'given that some of these issues were overlooked for more than twelve years'.
- An electrical certificate of compliance has not been provided, and 'failure to provide an energy certificate is sufficient reason to refuse to issue' a code compliance certificate.

3.6 The applicant then engaged a property inspection company ("the inspection company") to report on the condition of the house. The inspection company inspected the house on 14 December 2011; the resulting report outlined the background to the situation and described features of the house. The inspection company noted maintenance required on the exterior and some other minor items, but no signs of significant movement resulting from recent earthquake activity, and concluded:

> The home was presented in a tidy condition.
> Although there are some issues to attend to they are mostly maintenance type issues.
> Overall the house has originally been well built and appears to be in a generally sound condition.

3.7 Unable to locate the original electrical certificate of compliance, the applicant engaged a registered electrician to inspect the house. The electrician issued a certificate dated 23 April 2012 that stated:

> This house complies with regs as of 2000 – wiring in good condition. Installation by ChCh Electrical. [Certificate of Compliance] to replace lost COC.
> Tested OK 23-4-12 ...

3.8 The Ministry received an application for a determination on 13 July 2012.

4. The submissions

4.1 The applicant's submission dated 6 July 2012 explained much of the background and the applicant's view of the situation. The applicant provided copies of:

- the consent drawings and specifications
- the building consent and consent documentation
- the authority's inspection records
- the interim code compliance certificate dated 22 May 2000
- correspondence with the authority

- the inspection company's report dated 14 December 2011
- various photographs, certificates and other information.

4.2 In a letter to the Ministry dated 23 June 2012, the authority outlined the background; noting the lack of maintenance on the house 'given the fact that on the inspection notice dated 14/05/2009 the [authority] noted a number of outstanding issues that could have potentially compromised the durability of some building elements'. The authority stated that it 'stands by the decision it made at the time and expressed in the letter 29 August 2009'.

4.3 The draft determination

4.3.1 A draft determination was issued to the parties on 27 August 2012. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.

4.3.2 The applicant responded to the draft in a submission dated 1 September 2012. The applicant questioned:

- 'How … does an Act written in 2004 apply to something built in 1996?'
- 'If the bathroom and its window [have] always been substandard, why was this not picked up [before]'
- 'why the [soffits] on the southern side of the house have been mentioned in the [expert's] report when none of the other inspectors have noted this. … Should this not have been mentioned by [the authority] at an earlier time?'

4.3.3 The authority did not accept the draft determination and in a letter dated 14 September 2012 submitted:

- text quoted from the authority's letter contained in paragraph 3.5.2 was incomplete
- Paragraph 8.1 should have referred to the items noted in paragraph 6.12.3 as well as the maintenance items in paragraph 6.12.1.
- The 'inspection details' section of the electrical certificate of compliance (refer paragraph 3.7) had not been signed. It was also 'unclear which electrical fittings were installed under this building consent and which were installed without a building consent'.

4.3.4 Both submissions noted a typographical error. I have amended the determination as appropriate, and responded directly to the parties' submissions in paragraph 4.4.

4.3.5 The authority submitted that the compliance with B2 had been achieved on 31 December 1996. The owner submitted that the house was occupied from January 1997 and presented invoices in support of this date. I have taken 1 January 1997 as the agreed date.

4.4 My response to the party's submissions

4.4.1 In response to the applicant's submission I note the following:

- The Building Act 2004 has transitional provisions that apply to work consented under the Building Act 1991. Section 436 of the Building Act 2004, in

essence, says that compliance is to be assessed against the provisions of the Building Code that applied when the consent was issued. The provisions of the Building Code, in respect of Clauses B2 Durability and E3 Internal moisture, have not changed to any great extent in the time since the consent was issued.

- The defect to the bathroom and its window may not have been apparent at the time the work was inspected by the authority.
- The condition of the soffits, some 15 years after being installed, is unlikely to be the same as when the work was inspected. It is unclear whether the matter is one of compliance, or one of workmanship and ongoing maintenance.

4.4.2 In response to the authority's submission I note the following:

- I consider the items in paragraph 6.12.3 to be matters requiring maintenance and not defects in terms of code-compliance. I strongly suggest that this work be undertaken.

With respect to the energy works certificate:

- Section 94(3) of the Act says that failure to provide an energy works certificate is 'sufficient reason' to refuse to issue a code compliance certificate. In my view this provision allows the authority apply this requirement as it considers appropriate.
- While the electrical certificate of compliance form may not have been completed fully, in my view it presents ample evidence to the authority that the work has been inspected and is compliant.
- Energy work is self-certifying and may not form part of the consented work.

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert who is a member of the New Zealand Institute of Building Surveyors to assist me. The expert inspected the house on 26 July 2012 and provided a report dated 13 August 2012.

5.2 General

5.2.1 The expert described the overall standard of workmanship as 'generally of reasonable quality throughout', although the house had not been well maintained. Wall claddings were in reasonable to good standard, with some isolated problems and excessive weathering. The expert also noted that roof flashings appeared 'well-formed and effective', including the membrane roof to the east bay window which incorporated 'a well-formed drip detail'.

5.2.2 The expert noted that the rusticated weatherboards had been double-nailed, which had restricted movement and caused limited splitting around some fixings. Windows and doors were face-fixed against weatherboards, with metal head flashings installed and sealant applied at the edges of the jamb flanges and filling recesses formed by the rustic profile of the boards.

5.3 Moisture levels

5.3.1 The expert inspected the interior of the house and took non-invasive moisture readings, noting no evidence of moisture penetration through the exterior walls. However, the expert noted very high readings in the timber reveal to the ground floor bathroom window, resulting from the proximity of the shower (see paragraph 5.5.1).

5.3.2 The expert also took invasive moisture readings through linings on the weatherboard walls; at windowsills and at bottom plates below sills. Readings varied from 9% to 11%, compared to a base level of 9% taken in an internal wall. The expert concluded that no moisture was entering the structure. In view of the low readings and the type of claddings, the expert considered it unnecessary to undertake further invasive moisture testing.

5.4 Clauses E2 and B2: Weathertightness

5.4.1 Commenting specifically on the external envelope of the house, the expert noted:

- mortar joints to some brick sills are eroding
- there are no seals between window jamb flanges and the weatherboards, with surface-applied sealant degrading and unlikely to remain weathertight
- some fibre-cement soffit linings are unsealed and there is no timber bead to protect the junction with the weatherboards
- some roof flashing surfaces are deteriorating and some roof fixings are loose.

5.4.2 The expert considered that the isolated frost damage observed on some brick sills is cosmetic in nature, with no significant effect on weathertightness.

5.5 Clause E3: Internal moisture

5.5.1 The expert observed very high moisture readings resulting from shower splash onto the timber reveal of the ground floor bathroom window, and noted that:

- the window is within the bounds of the shower enclosure, with no protection from the shower splash
- further investigation of the extent of damage to the timber reveal and underlying framing is needed.

5.6 Other relevant code clauses

5.6.1 The expert also assessed the house for compliance with the other relevant clauses of the Building Code and I have included his comments in paragraph 6.

5.7 The expert concluded that ‘minor remedial work and maintenance will be required to comply with mandatory durability requirements’ of the Building Code.

5.8 A copy of the expert’s report was provided to the parties on 16 August 2012.

Discussion

6. Matter 1: Compliance with the Building Code

6.1 Taking account of the expert's report and the other available evidence, the following addresses the compliance of this house with relevant clauses of the Building Code.

6.2 Clauses B1: Structure

6.2.1 The house is a simple conventional structure and the inspection summary records satisfactory inspections of foundations, floor slab and bracing. The applicant has stated that recent earthquake activity caused only minor paint cracking and mortar problems, which have since been repaired.

6.2.2 The expert noted no visible signs of structural settlement or movement of the perimeter foundations, and verandah posts satisfactorily connected with no problems observed.

6.3 Clause E1: Surface water

6.3.1 The inspection records show satisfactory drainage inspections, with an as-built drainage plan provided. The expert noted that stormwater from the roof was transferred to soak holes and appeared to be operating in a satisfactory manner.

6.4 Clauses E2 and B2: Weathertightness

6.4.1 Although exterior claddings have generally been installed in accordance with good trade practice at the time of construction, some areas have not been satisfactorily completed or maintained.

6.4.2 The claddings conformed to the Acceptable Solution at the time of consent, and the expert's report has satisfied me that there is no evidence of current moisture penetration into the timber framing; I therefore consider that the house complies with Clause E2 of the Building Code. Claddings are also required to comply with the durability requirements of Clause B2, which includes a requirement to remain weathertight. I note that in this instance the 5 and 15-year durability periods stated in Clause B2.3.1 have now passed.

6.4.3 Taking into account the above and that the building elements have achieved the level of performance for the required durability periods from the time of construction, I consider those items outlined in paragraph 5.4.1 to be maintenance only. I note for the benefit of the applicant that the identified faults are discrete but may allow future moisture ingress.

6.5 Clause E3 Internal moisture

6.5.1 I accept the expert's findings in regard to the ground floor bathroom and conclude that the ground floor bathroom shower does not comply with Clause E3.

6.5.2 The expert observed no other areas of non-compliance or evidence of interior moisture and I consider the house complies with Clause E3 in all other respects.

6.6 Clause F2 Hazardous building materials

6.6.1 The expert observed that safety glass had been installed where necessary.

6.7 Clause F4 Safety from falling

6.7.1 The expert observed no items of non-compliance.

6.8 Clause G1 to G9 (Personal hygiene, Laundering, Food preparation, Ventilation, Interior environment, Natural light, Electricity and Artificial light

6.8.1 The drawings show adequate provision to comply with the requirements and the house generally complies with the consent drawings. The authority has inspected and passed the house, and the expert also considered that facilities were compliant.

6.8.2 An energy certificate dated 23 April 2012 has been supplied for the house, which confirms that the house complies with electrical requirements when it was built. While the form may not be completed fully I accept this provides reasonable grounds that the completed work is code-compliant.

6.9 Clause G11 Gas as an energy source

6.9.1 An energy work certificate dated 9 July 2009 for fitting the gas hob and cylinder has been provided, and the expert has confirmed that a registered tradesman carried out the work.

6.10 Clause G12 Water Supplies and G13 Foul Water

6.10.1 The authority's inspection records indicate satisfactory inspections of pre-pour drainage and pre-line plumbing, together with a final plumbing inspection which passed, with an as-built drainage plan provided.

6.10.2 The expert also observed that water and foul water services appeared to be 'operational and effective'.

6.11 Clause H1 Energy Efficiency

6.11.1 The authority carried out satisfactory preline inspections and the inspection company noted fibreglass insulation in walls and roof space 'to suit regulations of the time'.

6.12 Conclusion

6.12.1 Taking account of the above observations and the expert's report, I conclude that remedial work is necessary in respect of the inadequate shower splash protection to the lower bathroom window and investigation and repair of the water damaged timber reveal, including the underlying framing, is required.

6.12.2 I consider that the expert's report, the authority's inspection records, the interim code compliance certificate and the other documentation, allow me to conclude that the remaining building work complies with the Building Code that was current at the time of issue of the consent.

6.12.3 I also note the expert's comments in regard to the lack of maintenance and minor deterioration of the claddings. Effective maintenance is the responsibility of the building owner. I am of the view that the following items identified by the expert are maintenance and remedial work would ensure ongoing weathertightness:

- eroding mortar joints to some brick sills
- inadequately sealed window jambs in the weatherboards walls
- unsealed fibre-cement soffit linings and inadequate protection of the soffit junction with the weatherboards
- some loose roof fixings and deteriorating surfaces to some roof flashings.

7. Matter 2: The durability considerations

7.1 There are concerns about the durability, and hence the compliance with the Building Code, of certain elements of the building taking into consideration the completion of the house in 1997.

7.2 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).

7.3 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.

7.4 In this case the delay since the completion of the building raises concerns that many elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if code compliance certificates were to be issued effective from today's date. However, I have not been provided with any evidence that elements did not comply with Clause B2 by the end of 1996.

7.5 It is not disputed, and I am therefore satisfied that all the building elements, with the exception of those items that are to be rectified as described in paragraph 6.12.1, complied with Clause B2 on 1 January 1997. This date has been agreed between the parties (refer paragraph 4.3.5).

7.6 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.

7.7 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 1997.

7.8 I strongly recommend 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.

8. What is to be done now?

8.1 A notice to fix should be issued that requires the owner to bring the house into compliance with the Building Code, including the defects identified in paragraph 6.12.1, but not specifying how those defects are to be fixed. It is not for the notice to specify how the defects are to be remedied and the building brought to compliance with the Building Code, that is a matter for the owner to propose and for the authority to accept or reject.

8.2 I suggest that the parties adopt the following process to meet the requirements of paragraph 8.1. Initially, the authority should inspect the house and issue the notice to fix. The owner should then produce a response to this in the form of a detailed proposal produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

8.3 Once the matters set out in in paragraph 6.12.1 have been rectified to its satisfaction, the authority shall issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 7.7.

9. The decision

9.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the ground floor bathroom shower does not comply with Building Code Clauses E3 and B2, and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.

9.2 I also determine that:

(a) all the building elements installed in the house, apart from the items that are to be rectified as described in paragraph 6.12.1 of Determination 2012/063 complied with Clause B2 on 1 January 1997.

(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 1997 instead of from the time of issue of the code compliance certificate for all the building elements except the items to be rectified as set out in paragraph 6.12.1 of Determination 2012/063.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 12 October 2012.

John Gardiner
Manager Determinations