



## Determination 2012/064

# Regarding the refusal to issue a code compliance certificate due to the lack of inspections of a 12-year-old house at 184 Evans Bay Parade, Wellington

### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current 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 owners of the house, I and B Gentlemen (“the applicants”), acting through a solicitor
  - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers in refusing to issue a code compliance certificate. The authority could not be satisfied on reasonable grounds that the building work complied with the Building Code<sup>3</sup> due to a lack of inspections carried out during construction.
- 1.4 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.
- 1.5 I have referred to the relevant legislation in Appendix A.

### 2. The building work

- 2.1 The building work consists of a house and upper ‘rail station’ situated on the top of a steeply sloped hillside, assumed to be in a high wind and sea spray zone for the purposes of NZS 3604<sup>4</sup>, and a double garage and lower ‘rail station’ located at the base of the hill. The house is two storeys in part, built

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<sup>2</sup> Under sections 177(1)(b) and 177(2)(d) of the Act.

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over three levels, and is complex in plan and form, with curved exterior walls in parts, skylights, and wide internal gutters, some areas of flat roof, and roof junctions and three balconies over habitable spaces.

- 2.2 Construction is generally conventional light timber frame, with various structural steel beams, and concrete floor slab, monolithic wall cladding and aluminium windows. The level of timber treatment has not been established; given the date of construction I consider the wall framing may not be treated to a level providing resistance to fungal decay.
- 2.3 Walls to the main house are clad in direct fixed fibre-cement board, 40mm polystyrene with fibreglass reinforced acrylic modified plaster system and two coats of mineral paint, with uPVC flashings. The guest wing and library are clad in cedar ply and battens, and the garage consists of concrete block walls.
- 2.4 Roof cladding is copper tiles, and butynol to some flat roof areas and internal gutters to the main house and guest wing, tile to the library, and timber to the garage.

### **3. Background**

- 3.1 On 31 August 1998 the authority issued building consent (SR 45086) under the Building Act 1991 (“the former Act”) for the construction of a new dwelling. Note #7 on the consent stated that a code compliance certificate would not be issued ‘for works where there are outstanding inspections, [or] where it is no longer possible to inspection work undertaken...’ The consent also noted that ‘all structural work is to be supervised by the engineer responsible for the design’.
- 3.2 Construction commenced in January 1999 and the authority undertook a drainage inspection on 4 March and an under slab inspection on 22 April.
- 3.3 On 23 April 1999 the authority granted an amendment to the consent (SR 52262).
- 3.4 Further inspections carried out by the authority included
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| 4 May 1999        | Drainage |
| 13 September 1999 | Plumbing |
- 3.5 On 27 July 2000 a contractual certificate of practical complete was issued by the contract administrator; however no application for a code compliance certificate was made.
- 3.6 On 26 November 2001 the authority wrote to the applicants noting that a code compliance certificate had not been issued for consent SR45086 and requesting the applicants book an inspection. According to the engineer the letter did not reach the applicants as it was addressed to 184 Evans Bay Parade and the postal address for the property is 170 Evans Bay Parade.
- 3.7 At some time in 2008 the applicants became aware of the lack of code compliance certificate for the house and raised the matter with the authority.
- 3.8 On 30 October 2008 the engineer provided a Producer Statement PS4 which stated that based on reviews undertaken by the engineer and information supplied by the contractor the engineer was of the belief that the specific

design elements were completed to the extent required by the amended building consent in respect of Clause B1 of the Building Code.

- 3.9 On 3 March 2009 authority wrote to applicants, noting that before a code compliance certificate could be issued the authority needed to be satisfied on reasonable grounds that the building work complied with the requirements of the Building Code that was in force at the time the consent was granted. The authority outlined the process that could be taken, which would include an inspection by the authority and remedial work if required. The authority also noted its concerns regarding durability as the building work was nearly ten years old.
- 3.10 On 25 March 2009 there was a meeting between parties. The engineer has submitted that the authority explained that it was not now prepared to inspect the building work.
- 3.11 On 30 November 2009 the authority undertook a 'desk top review' and again wrote to the applications on 11 December 2009. The letter noted that it was the building owner's responsibility to request a code compliance certificate immediately after the work is completed and discussed the durability period requirements for building work. The authority advised the applicants that a modification of the consent could be made in respect of the durability periods, but that 'a full report' to establish compliance would be required from a suitably qualified person to support such an application, and that the authority would still undertake a final inspection.
- 3.12 The parties continued email correspondence during February 2010, and on 3 March 2010 the authority emailed the engineer reiterating its position and that the applicants needed to seek a report on compliance of building. The authority required confirmation that the assessment would be undertaken by a suitably qualified person. A further email followed on 29 March 2012 in which the authority stated that it maintained that view.
- 3.13 The engineer met with the authority and in an email of 30 March 2010 confirmed that apart from plumbing there was no evidence of the authority having carried out inspections during construction, and the applicants were prepared to have an assessment of compliance carried out and provide a report to the authority.
- 3.14 It appears that no such assessment has taken place or report provided. The Ministry received an application for determination on 20 August 2012.

## **4. Submissions**

- 4.1 Applicants provided copies of
- a covering letter from the consulting structural engineer outlining the background to the events and suggesting a date for the commencement of durability periods as 26 November 2001
  - the plans and specifications for the house
  - correspondence from the authority

- 4.2 The authority acknowledged the determination application in a letter dated 23 August 2012 but made no submission in response and did not provide any further information on the matter.
- 4.3 A draft determination was issued to the parties for comment on 6 September 2012.
- 4.4 The authority accepted the draft in a letter dated 11 September 2012, subject to minor non-contentious amendments. The authority provided copies of the engineer's producer statements and email correspondence between the authority and the engineer.
- 4.5 The applicants accepted the draft in a letter from their solicitor dated 19 September 2012, subject to minor amendments. In regards to timber treatment the submission noted that 'the specification states that all timber and wood based products are to comply with NZX3602: 1995 plus amendments'. I note here that this would have allowed for the use of kiln dried untreated timber.
- 4.6 I have amended the determination as I consider appropriate to take account of the submissions.

## **5. Discussion**

### **5.1 The authority's refusal**

- 5.1.1 The transitional provision in section 436 of the Act requires the authority to consider such an application under the former Act. Section 43(3) of the former Act (as modified by section 436(3) of the Act) requires the authority to issue a code compliance certificate 'if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code that applied at the time the building consent was granted'.
- 5.1.2 It is apparent from the submissions that insufficient inspections were carried out by the authority during construction for it to be satisfied on reasonable grounds that the building complies with the Building Code. Inspections are required to verify that completed building work complies with the Building Code. It is reasonable for an authority to be concerned where inspections are not carried out and for the authority to decline to issue a code compliance certificate as it requires evidence of compliance.
- 5.1.3 Where an authority does not carry out particular inspections itself, it is entitled to rely on inspections by others, or verification by another means. In this instance, aside from the engineer's producer statement for specific design elements and in respect of Clause B1, I have seen no further evidence provided by the applicants to establish compliance and in conclusion I am of the view that the authority was correct in its decision to refuse to issue a code compliance certificate on the grounds that there was insufficient evidence before it.

5.1.4 I note that the engineer has submitted that there was a refusal by the authority to undertake any further inspections (refer paragraph 3.10). In my view the authority is unable to decline to carry out the normal functions of a building consent authority as provided for in the Act. This includes carrying out an inspection if one is requested.

## **5.2 Evidence to establish compliance**

5.2.1 To overcome the lack of inspections it is for the owners to provide appropriate evidence as to the compliance of the completed building work for the authority to be satisfied on reasonable grounds, which may include for example

- inspections carried out by others such as structural engineers etc
- producer statements from competent practitioners
- the builder's or owners' records of the building work carried out
- a record of variations from the plans and specifications and review of the impact of those variations on compliance
- a current report on the performance of the building work.

5.2.2 It appears that the authority has not carried out a final inspection. The authority should inspect the building work and this information, along with information supplied by the owner, will assist the authority in forming a view as to compliance with the Building Code.

5.2.3 I note that in this instance the building work involves a building that is complex in form with a number of high risk weathertightness features, and along with the lack of inspections carried out during construction I consider it is not unreasonable for the authority to request a comprehensive report by a suitably experienced person to provide evidence of proven performance. I note that investigation as part of that report is likely to require invasive testing in high risk areas and possibly cut-outs to confirm construction details.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct in the exercise of its powers in refusing to issue a code compliance certificate on the grounds that it had insufficient evidence to establish compliance with the Building Code and accordingly I confirm the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 October 2012.

John Gardiner  
**Manager Determinations**

## Appendix A:

### A.1 The Building Act 2004

The relevant provisions of the Building Act 2004 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.



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- inspections carried out by others such as structural engineers etc
- producer statements from competent practitioners
- the builder's or owners' records of the building work carried out
- a record of variations from the plans and specifications and review of the impact of those variations on compliance
- a current report on the performance of the building work.

5.2.2 It appears that the authority has not carried out a final inspection. The authority should inspect the building work and this information, along with information supplied by the owner, will assist the authority in forming a view as to compliance with the Building Code.

5.2.3 I note that in this instance the building work involves a building that is complex in form with a number of high risk weathertightness features, and along with the lack of inspections carried out during construction I consider it is not unreasonable for the authority to request a comprehensive report by a suitably experienced person to provide evidence of proven performance. I note that investigation as part of that report is likely to require invasive testing in high risk areas and possibly cut-outs to confirm construction details.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was correct in the exercise of its powers in refusing to issue a code compliance certificate on the grounds that it had insufficient evidence to establish compliance with the Building Code and accordingly I confirm the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 15 October 2012.

John Gardiner  
**Manager Determinations**

## Appendix A:

### A.1 The Building Act 2004

The relevant provisions of the Building Act 2004 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.



## Determination 2012/064

# Regarding the refusal to issue a code compliance certificate due to the lack of inspections of a 12-year-old house at 184 Evans Bay Parade, Wellington

### 1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current 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 owners of the house, I and B Gentlemen (“the applicants”), acting through a solicitor
  - Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers in refusing to issue a code compliance certificate. The authority could not be satisfied on reasonable grounds that the building work complied with the Building Code<sup>3</sup> due to a lack of inspections carried out during construction.
- 1.4 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.
- 1.5 I have referred to the relevant legislation in Appendix A.

### 2. The building work

- 2.1 The building work consists of a house and upper ‘rail station’ situated on the top of a steeply sloped hillside, assumed to be in a high wind and sea spray zone for the purposes of NZS 3604<sup>4</sup>, and a double garage and lower ‘rail station’ located at the base of the hill. The house is two storeys in part, built

<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b) and 177(2)(d) of the Act.

<sup>3</sup> (Schedule 1 of the Building Regulations 1992 that was current at the time the consent was granted)

<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

over three levels, and is complex in plan and form, with curved exterior walls in parts, skylights, and wide internal gutters, some areas of flat roof, and roof junctions and three balconies over habitable spaces.

- 2.2 Construction is generally conventional light timber frame, with various structural steel beams, and concrete floor slab, monolithic wall cladding and aluminium windows. The level of timber treatment has not been established; given the date of construction I consider the wall framing may not be treated to a level providing resistance to fungal decay.
- 2.3 Walls to the main house are clad in direct fixed fibre-cement board, 40mm polystyrene with fibreglass reinforced acrylic modified plaster system and two coats of mineral paint, with uPVC flashings. The guest wing and library are clad in cedar ply and battens, and the garage consists of concrete block walls.
- 2.4 Roof cladding is copper tiles, and butynol to some flat roof areas and internal gutters to the main house and guest wing, tile to the library, and timber to the garage.

### **3. Background**

- 3.1 On 31 August 1998 the authority issued building consent (SR 45086) under the Building Act 1991 (“the former Act”) for the construction of a new dwelling. Note #7 on the consent stated that a code compliance certificate would not be issued ‘for works where there are outstanding inspections, [or] where it is no longer possible to inspection work undertaken...’ The consent also noted that ‘all structural work is to be supervised by the engineer responsible for the design’.
- 3.2 Construction commenced in January 1999 and the authority undertook a drainage inspection on 4 March and an under slab inspection on 22 April.
- 3.3 On 23 April 1999 the authority granted an amendment to the consent (SR 52262).
- 3.4 Further inspections carried out by the authority included
- |                   |          |
|-------------------|----------|
| 4 May 1999        | Drainage |
| 13 September 1999 | Plumbing |
- 3.5 On 27 July 2000 a contractual certificate of practical complete was issued by the contract administrator; however no application for a code compliance certificate was made.
- 3.6 On 26 November 2001 the authority wrote to the applicants noting that a code compliance certificate had not been issued for consent SR45086 and requesting the applicants book an inspection. According to the engineer the letter did not reach the applicants as it was addressed to 184 Evans Bay Parade and the postal address for the property is 170 Evans Bay Parade.
- 3.7 At some time in 2008 the applicants became aware of the lack of code compliance certificate for the house and raised the matter with the authority.
- 3.8 On 30 October 2008 the engineer provided a Producer Statement PS4 which stated that based on reviews undertaken by the engineer and information supplied by the contractor the engineer was of the belief that the specific

design elements were completed to the extent required by the amended building consent in respect of Clause B1 of the Building Code.

- 3.9 On 3 March 2009 authority wrote to applicants, noting that before a code compliance certificate could be issued the authority needed to be satisfied on reasonable grounds that the building work complied with the requirements of the Building Code that was in force at the time the consent was granted. The authority outlined the process that could be taken, which would include an inspection by the authority and remedial work if required. The authority also noted its concerns regarding durability as the building work was nearly ten years old.
- 3.10 On 25 March 2009 there was a meeting between parties. The engineer has submitted that the authority explained that it was not now prepared to inspect the building work.
- 3.11 On 30 November 2009 the authority undertook a 'desk top review' and again wrote to the applications on 11 December 2009. The letter noted that it was the building owner's responsibility to request a code compliance certificate immediately after the work is completed and discussed the durability period requirements for building work. The authority advised the applicants that a modification of the consent could be made in respect of the durability periods, but that 'a full report' to establish compliance would be required from a suitably qualified person to support such an application, and that the authority would still undertake a final inspection.
- 3.12 The parties continued email correspondence during February 2010, and on 3 March 2010 the authority emailed the engineer reiterating its position and that the applicants needed to seek a report on compliance of building. The authority required confirmation that the assessment would be undertaken by a suitably qualified person. A further email followed on 29 March 2012 in which the authority stated that it maintained that view.
- 3.13 The engineer met with the authority and in an email of 30 March 2010 confirmed that apart from plumbing there was no evidence of the authority having carried out inspections during construction, and the applicants were prepared to have an assessment of compliance carried out and provide a report to the authority.
- 3.14 It appears that no such assessment has taken place or report provided. The Ministry received an application for determination on 20 August 2012.

## **4. Submissions**

- 4.1 Applicants provided copies of
- a covering letter from the consulting structural engineer outlining the background to the events and suggesting a date for the commencement of durability periods as 26 November 2001
  - the plans and specifications for the house
  - correspondence from the authority

- 4.2 The authority acknowledged the determination application in a letter dated 23 August 2012 but made no submission in response and did not provide any further information on the matter.
- 4.3 A draft determination was issued to the parties for comment on 6 September 2012.
- 4.4 The authority accepted the draft in a letter dated 11 September 2012, subject to minor non-contentious amendments. The authority provided copies of the engineer's producer statements and email correspondence between the authority and the engineer.
- 4.5 The applicants accepted the draft in a letter from their solicitor dated 19 September 2012, subject to minor amendments. In regards to timber treatment the submission noted that 'the specification states that all timber and wood based products are to comply with NZX3602: 1995 plus amendments'. I note here that this would have allowed for the use of kiln dried untreated timber.
- 4.6 I have amended the determination as I consider appropriate to take account of the submissions.

## **5. Discussion**

### **5.1 The authority's refusal**

- 5.1.1 The transitional provision in section 436 of the Act requires the authority to consider such an application under the former Act. Section 43(3) of the former Act (as modified by section 436(3) of the Act) requires the authority to issue a code compliance certificate 'if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code that applied at the time the building consent was granted'.
- 5.1.2 It is apparent from the submissions that insufficient inspections were carried out by the authority during construction for it to be satisfied on reasonable grounds that the building complies with the Building Code. Inspections are required to verify that completed building work complies with the Building Code. It is reasonable for an authority to be concerned where inspections are not carried out and for the authority to decline to issue a code compliance certificate as it requires evidence of compliance.
- 5.1.3 Where an authority does not carry out particular inspections itself, it is entitled to rely on inspections by others, or verification by another means. In this instance, aside from the engineer's producer statement for specific design elements and in respect of Clause B1, I have seen no further evidence provided by the applicants to establish compliance and in conclusion I am of the view that the authority was correct in its decision to refuse to issue a code compliance certificate on the grounds that there was insufficient evidence before it.

5.1.4 I note that the engineer has submitted that there was a refusal by the authority to undertake any further inspections (refer paragraph 3.10). In my view the authority is unable to decline to carry out the normal functions of a building consent authority as provided for in the Act. This includes carrying out an inspection if one is requested.

## **5.2 Evidence to establish compliance**

5.2.1 To overcome the lack of inspections it is for the owners to provide appropriate evidence as to the compliance of the completed building work for the authority to be satisfied on reasonable grounds, which may include for example

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