



Determination 2013/044

Regarding the refusal to issue a code compliance certificate and the issue of a notice to fix for a 12-year-old house at 101 Taylor Road, Waimauku

1. The matters 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 and Assurance, 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, R Wallace and S King (“the applicants”)
 - Auckland Council (“the authority”)², carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decisions of the authority to refuse to issue a code compliance certificate and to issue a notice to fix for the 12-year-old house because it was not satisfied that the building complies with certain clauses of the Building Code³ (First Schedule, Building Regulations 1992).
- 1.4 The matter to be determined⁴ is whether the authority was correct in its decisions to refuse to issue a code compliance certificate and to issue the notice to fix. I note here that there is no record of the authority giving notice of its refusal to issue a code compliance certificate under section 95A; however I take it that the issue of the notice to fix has, to the applicants, effectively been notice of that refusal.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

1.6 Matters outside this determination

- 1.6.1 The notice to fix states that the applicant may apply to the authority for a modification of the durability requirements in order to allow the durability periods to commence from the date of substantial completion. I therefore leave this matter to the parties to resolve.

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 The location in which the building work is located was formerly under the jurisdiction of the Rodney District Council. The reference to “the authority” refers to both Rodney District Council and Auckland City Council.

³ In this determination, unless otherwise stated, references are to sections of the Act and references to clauses are references to the Building Code

⁴ Under sections 177(1)(b), 177(2)(d) and 177(2)(f) of the Act

2. The building work

- 2.1 The building work consists of a single level detached house with monolithic cladding. The cladding is a proprietary form of monolithic cladding system known as EIFS⁵. The proprietary EIFS system consists of 40mm polystyrene backing sheets fixed directly to the framing over the building wrap and finished with a proprietary acrylic plaster coating system. The cladding system includes purpose-made flashings to windows, edges and other junctions.
- 2.2 The gable roof is clad in concrete tiles with varying eaves and no verges to some gable ends. Two monolithic-clad chimneys extend through the roof. A timber pergola at the entrance is supported on monolithic-clad columns, and appears to be detached from the house. The joinery throughout is aluminium.
- 2.3 Given the date of construction in 2000, I consider that the exterior wall framing is likely to be untreated.

3. The background

- 3.1 On 31 March 2000 the authority issued building consent No. ABA581 under the Building Act 1991 (“the former Act”) for the construction of the dwelling.
- 3.2 From the information supplied it appears that construction was carried out in the latter half of 2000, with a pre-line inspection on 26 July 2000, post-line on 8 August 2000, and a ‘final’ inspection on 28 September 2000 that recorded 17 items to be completed. The authority’s records indicate a further inspection was carried out on 27 February 2001, with the record noting that ‘all items requested at final 28-9-00 have now been completed. Fire place installation certificate still required.’
- 3.3 On 2 October 2003 the authority wrote to the applicants and requested a producer statement from the installer of the wood burner. A certificate dated 27 March 2001 was duly provided.
- 3.4 The authority carried out another inspection on 13 December 2004 and on 16 December 2004 wrote to the applicants advising of two items requiring attention; being lowering of the ground level around the gully to the right hand side of the entrance, and to fix the smoke alarms. The authority also requested a producer statement for waterproofing in wet areas, and noted that there was concern that the cladding system would not comply with the Building Code and a further assessment may be required. An ‘advice of completion’ form was completed on 19 January 2005 and a copy of the requested producer statement was provided.
- 3.5 On 11 May 2012 the authority carried out an inspection, which failed; the inspection record notes the spouting as ‘buried in plaster’, the ‘floor clearance’ was noted as 135mm and the ‘cladding clearance’ as 85mm, and that the authority was unsure whether control joints had been installed. The authority also took a series of photographs it annotated which included, amongst others; ‘nil head flashings over

⁵ Exterior Insulation and Finish System

garage doors', buried cladding, no eaves, barge fascia hard to plaster face, buried spouting, and various penetrations through the cladding.

- 3.6 On 30 May 2012 the authority again inspected the building work, noting that:
- A number of flashing[s] do not appear to have been installed, cracking/damage evident to the cladding system, recently painted.
- ... Further investigation into the performance of the cladding system as installed may be required.
- 3.7 The authority subsequently issued a notice to fix (No.3951 dated 29 June 2012). The 'particulars of contravention' identified included that the building work had 'not been undertaken in accordance with the requirements of [the] building consent', and 'had not been undertaken in accordance with the requirements of the ... Building Code ... Clauses B1 Structure, B2 Durability and E2 External moisture'.
- 3.8 The notice listed the details of contravention as follows:
- 2.0 Following [the authority's] non-invasive durability assessment of your dwelling, the [authority] is yet to be satisfied on reasonable grounds that this construction meets the performance requirements set out in the Building code. In addition, is in breach of the above clauses of the Building Code. At this time [the authority is] unable to issue a Code Compliance Certificate.
- 2.1 The following areas are of concern to [the authority]
- External Envelope: including but not limited to – inadequate flashing details, penetrations, cracking of the exterior cladding system
 - Insufficient clearance between the cladding system and pergolas
 - Ground clearances
- 3.0 Drainage and Ventilation
- Government has released documentation that shows that at some stage all external claddings will allow water to pass through into the wall framing. If this water does not drain away or if the building owner is not aware that external water is entering into the wall framing, timber framing can become wet and start to rot.
- The construction methods used in this building do not allow the water to drain away. There is only limited ability for air circulation in the wall framing to ensure that damp timber can dry out.
- 4.0 [Item 4.0 referred to the applicant applying for a 'waiver and modification' of Clause B2.]
- 3.9 To remedy the contravention the notice provided the option of the applicants lodging a proposed scope of works 'in writing and prepared by a suitably qualified individual' outlining how each area of non-compliance is to be rectified.

4. Submissions

- 4.1 The applicant made no submission with the application, and provided only a copy of the notice to fix.
- 4.2 The authority made no submission in response to the application but provided copies of relevant documents from the authority's records.

- 4.3 A draft determination was forwarded to the parties for comment on 26 April 2013.
- 4.4 The authority accepted the draft without further comment in a response received on 3 May 2013.
- 4.5 On 24 May 2013 I sought a response from the applicants.
- 4.6 In an email on 7 June 2013 one of the applicants responded to the draft with a number of queries relating to the building controls process in respect of receiving a code compliance certificate at the time of completion, and the application of the requirements of the Building Code to buildings constructed prior to the Building Act 2004 coming into force. The applicants also sought further information on a modification of Clause B2.3.1 and what steps may be taken after the determination is issued.
- 4.7 I responded to the applicants by way of email on 20 June 2013, outlining the effect of the transitional provisions of the Act as well as owners' responsibilities in respect of obtaining code compliance certificates. I note here also that the performance requirements of Clause E2 have not changed to any significant extent since the Act came into force; there is however a better understanding of the performance of particular materials and construction methods and changes had been made to the Acceptable Solutions. On 25 June 2013 I sought a further response from the applicants in respect of the draft determination.
- 4.8 The applicants responded to the draft by email on 2 July 2013. The applicants accepted the draft subject to the following comment (in summary):
- A 'retrospective' decision to refuse to issue a code compliance certificate for building work completed in 2000 is not in the applicants' view reasonable.
 - At no stage during the building work did the authority communicate any concerns regarding non-compliance with the Building Code; the only concern was expressed in 2004 and the authority did not 'follow this up'.
 - No communication was received from the authority around the lack of a code compliance certificate and there had been no refusal to issue a certificate.
 - An amendment will be sought to modify Clause B2.3.1 to allow the durability period to commence from the date of substantial completion in 2000.
 - There is no specific evidence in support of a failure of the building; the construction was to a high standard with appropriate materials and it has been regularly maintained; there is also no visual evidence internally of moisture ingress.
- 4.9 The applicants also advised they were in the process of arranging an assessment which would be provided to the authority.

5. Discussion

- 5.1 The particulars of contravention identified in the notice to fix (refer paragraph 3.7) refer to the building work that has 'not been undertaken in accordance with the requirements of [the] building consent'. I note that for building consents issued

under the former Act, the test to be applied by the authority is whether the building work complies with the Building Code that was in force at the time the consent was issued. Work that has not been undertaken in accordance with the consent issued under the former Act is not, of itself, a breach of the Act. However, departures from the consented documents may give rise to concerns about the compliance of the as-built construction and I have discussed the details of the particulars described in the notice in the following paragraphs.

- 5.2 The notice to fix identified non-compliance with Building Code Clauses B1 Structure, B2 Durability, and E2 External moisture. However, no further reference or particular building element that contravened Clause B1 was identified in the notice. Paragraph 2.1 of the notice concerns compliance with Clause E2 (refer paragraph 5.3). I have not seen any evidence as to the specific reasons for the authority considering that the building work is not compliant with Clause B1, as such I consider the references to Clause B1 have been incorrectly included in the notice.
- 5.3 Paragraph 2.1 of the notice to fix identifies a number of building elements that the authority considers to be ‘of concern’. The items listed were apparent to the authority in its inspection of 11 May 2012 and detailed in the authority’s photo file record of that inspection. I accept these items provide sufficient doubt as to the building’s compliance in respect of Clause E2 and Clause B2 and accordingly those items are appropriate to be included as reasons for refusing to issue a code compliance certificate as the authority cannot be said to be satisfied on reasonable grounds that the building work complies with the Building Code that was in force at the time the consent was issued.
- 5.4 Paragraph 3.0 of the notice to fix listed ‘Drainage and Ventilation’, noting that the ‘construction methods used in this building do not allow the water to drain away’ and ‘there is only limited ability for air circulation in the wall framing to ensure that damp timber can dry out.’ This statement is not related to a breach of the Act or its regulations.
- 5.5 Paragraph 4.0 of the notice outlines the durability requirements of various building elements, states the applicants may apply to the authority ‘for a Waiver and modification ... to waiver (sic) the requirements of Clause B2 (Durability) of the building code.’ I note the reference to ‘waiving’ the requirements of Clause B2 is incorrect. The reference to Clause B2 does not constitute a breach of the Act or its regulations and whilst the consent could include a modification of Clause B2.3.1 prior to the issue of a code compliance certificate, I do not believe its inclusion in the notice to fix is appropriate.
- 5.6 Item 5.0 of the notice to fix requires any remedial work to be done under a new building consent and that ‘from March 1st 2012 all restricted work ... must be completed under the supervision of an LBP ...’. This only applied in respect of consent applications lodged on or after 1 March 2012. It does not apply to remedial work that an owner may elect to undertake as an amendment to an existing consent.

5.7 In a previous determination⁶ I have discussed in detail the relationship between the requirements to give reasons for a refusal to issue a code compliance certificate (section 95A) and the issue of a notice to fix (section 164). I note here that while an authority must be satisfied on reasonable grounds that the building work complies with the Building Code before issuing a code compliance certificate, the reasons under section 95A are simply that, the reasons for the refusal, and do not have to satisfy any particular evidential threshold in terms of failure to meet the requirements of the Act or Building Code. The notice containing the reasons will be placed on the property file and will be disclosed in any LIM. This will serve to ensure that the authority's position with respect to compliance and the lack of a code compliance certificate will be apparent to any prospective purchaser.

5.8 When contemplating the issue of a notice to fix however there are particular requirements of the Act that must be satisfied. For example, an authority must consider on reasonable grounds that a person is contravening or failing to comply with the Act or regulations. The authority's belief that the Act or regulations are being contravened will require some specific evidence in support of that belief before a notice to fix can be issued.

5.9 Conclusion

5.9.1 I am satisfied that at the time of the authority's inspection there was insufficient evidence for the authority to be satisfied that the house complied with the Building Code that was in force at the time of the issue of the building consent, and the authority is correct to refuse to issue the code compliance certificate. However, I note that the refusal has not been communicated to the applicants by way of notice under section 95A.

5.9.2 In respect of the notice to fix, I note that the matters of non-compliance identified in the notice are not generally supported by evidence that establishes reasonable grounds for the authority's belief in those matters of non-compliance, as required by section 164. As the notice to fix does not correctly identify the matters of non-compliance I am of the view that the authority did not properly exercise its powers in issuing the notice to fix.

5.9.3 While I have come to the conclusion that the authority's decision to issue notice to fix was incorrect, that does not prevent the authority from issuing a new notice to fix if it believes that the requirements of the Act or the regulations have been breached, and that the notice will be used for the purpose for which it is intended, i.e. issued with the intention that it is to be enforced. The issue of a notice to fix should also take account of the circumstances and the seriousness of any breach,

6. Where to from here?

6.1 In order to assist the parties I have provided further comment on how the issue may be progressed after the determination is made.

⁶Determination 2013/018:

- 6.2 As noted in paragraph 5.9.3, it remains for the authority to issue a new notice to fix if it believes that the requirements of the Act or the regulations have been breached and that the notice will be used for the purpose for which it is intended.
- 6.3 The determination confirms that the authority was correct to refuse to issue the code compliance certificate. It is for the authority to provide notice of a refusal with reasons under section 95A. That notice provides the applicants with the opportunity to consider what work they want to undertake, how they will undertake that work and who will undertake it. If the applicants fail to carry out the work, that would also be an appropriate time for the authority to consider whether to issue a notice to fix.
- 6.4 If a code compliance certificate is sought by the applicants, the authority must be satisfied that the building work complies with the Building Code that was in force at the time the consent was issued and will continue to comply for the required durability periods.
- 6.5 In order for the authority to be satisfied as to compliance given the concerns raised, it would be appropriate for an assessment on the building's weathertightness performance to be carried out. Any such assessment should be undertaken by a suitably experienced and competent professional in this field. Should that assessment provide sufficient evidence of compliance the applicants could then seek a code compliance certificate. I note the applicants have indicated that they are in the process of having such an assessment carried out (refer paragraph 4.9).
- 6.6 I note that should remedial work be required as a result of such an assessment, the applicants will need to submit a detailed proposal to the authority for approval. I suggest that if such remedial work is required then any such proposal be produced in conjunction with a competent person with suitable experience in weathertightness remediation.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that
- there is insufficient evidence to establish on reasonable grounds that the building work complies with the Building Code that was in force at the time of issue of the consent, and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate
 - the authority incorrectly exercised its powers in issuing the notice to fix, and I therefore reverse the authority's decision to issue the notice to fix.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 July 2013.

John Gardiner
Manager Determinations and Assurance