



Determination 2013/065

Regarding the refusal to issue a code compliance certificate for an 8-year-old house at 195 Rocky Cutting Road, Tauranga



1. The matters to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the 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 building owners, P & J Southgate (“the applicants”), acting through a registered building surveyor as an agent (“the agent”).
 - Western Bay of Plenty District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the house because it was not satisfied that the building work complied with certain clauses of the Building Code² (Schedule 1, Building Regulations 1992). The authority’s concern relates to the effect of minimal cladding to ground clearance on the weathertightness and durability of the exterior building envelope.

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 respective Building Acts and references to clauses are to clauses of the Building Code.

- 1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers when it refused to issue a code compliance certificate for the house for the reasons given to the applicants. In making this decision I must consider whether the building work, in particular the external envelope where there is minimal cladding to ground clearance, complies with the Building Code that was in force at the time the building consent was issued. I have not considered any other building elements or other clauses of the Building Code.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.

2. The building work

- 2.1 I have not seen the building consent, consent documentation or inspection records for this building work. No information was received from the authority in response to the application for determination. The description of the building work relies on information provided in the application and from a site visit by a registered building surveyor (“the building surveyor”) on 3 September 2013.
- 2.2 The building work considered in this determination consists of a two-storey house (“the house”) situated on a gently sloping site. I have assumed it is located in a high wind zone for the purposes of NZS 3604⁴.
- 2.3 The construction of the house is generally conventional light timber frame, with a concrete floor slab and foundations, timber framed intermediate floor, aluminium joinery and concrete tiles over hip roof. The cladding is predominantly rendered brick veneer, with sections of direct-fixed fibre-cement weatherboard and textured fibre-cement sheet cladding over cavity battens. There is eaves protection to most walls.

2.4 The front entrance and garage

- 2.4.1 The building surveyor confirmed that the floor to ground clearances at the south-facing front entry and garage are generally 50mm. The front entry is clad with fibre-cement weatherboard with a roof overhang to the south and west. The garage is clad with textured fibre-cement sheet with eaves to the garage entry (south) but no verges on the east or west elevations. There is a garden directly adjacent to the west wall of the garage.
- 2.4.2 The building surveyor provided the following observations:
- The fibre-cement weatherboard cladding is direct-fixed.
 - The fibre-cement textured sheet cladding is fixed over cavity battens. Solid timber cavity closers are installed at the base of the cavity. No drainage provisions were found in the cavity closers either side of the garage door.
 - Two 10mm drilled holes were found in the cavity closer on the 900mm long south-east facing wall to the west of the front entry. Four 10mm drilled holes were found in an 1120mm section of the cavity closer on the garage east wall.
 - No drainage provisions were found in the cavity closers on the garage west wall or the south-west facing wall to the west of the front entry, though the

³ Under sections 177(1)(b) and 177(2)(d) of the Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

closers were difficult to view fully and there could be some drill holes obscured behind building wraps and plaster thickenings.

- The asphalt driveway slopes away from the building.
- The garden to the west of the garage drained adequately during 20 minutes of high pressure domestic water hose testing.

3. Background

3.1 On 1 April 2004 the authority issued a building consent (No. 70695) for the house. I have no information as to when the building work was substantially complete; a code compliance certificate has not been issued.

3.2 It appears that the agent contacted the authority on 5 October 2012, and in a response on 18 December 2012, the authority noted it was 'still concerned about ground clearances' and sought further information on the cladding.

3.3 The agent provided further information by email on 19 December 2012 and noted that although the ground clearances in the locations identified by the authority did not comply with the Acceptable Solutions, the agent considered it was appropriate to rely on evidence of performance and that:

- the cladding is in excellent condition
- moisture content readings taken from the bottom plates in those locations showed no evidence of failure
- there is no opportunity for water to pond, and the bark surface of the adjacent garden provides ample drainage

The agent concluded that the cladding is performing and with routine maintenance will likely continue to perform satisfactorily.

3.4 On 16 May 2013 the agent emailed the authority to advise that two items of outstanding work had been completed, and that

The mowing strips have been cut back from the cladding, however, increasing the asphalt-to-cladding distance at the entrance and to the right of the garage door is not achievable without making major changes to the levels of the asphalt and sumps. ...why make changes to something that has a satisfactory service history for 8 years now?

3.5 The authority responded by email on 31 May 2013 noting that both the manufacturer's installation instructions and E2/AS1 required the same clearances, and suggested that confirmation from the manufacturer that it approved of the current configuration and didn't see it as causing any detriment 'could assist with providing reasonable grounds' on which the authority could be satisfied that compliance had been achieved.

3.6 In a letter to the authority dated 11 June 2013, with supporting photographs, the agent noted he had carried out an assessment of the two locations. The agent noted

- moisture readings from invasive testing ranged from 13% to 15%
- the bottom plate to the right hand side of the garage door was clean, with no evidence of mould on the back of the plaster board or on the building wrap, and the plate was covered in dry building dust

- the entrance to the house is well protected by a porch.

3.7 I have seen no further correspondence from the authority on the matter, however it appears the only outstanding issue remained the ground levels next to the front entry and garage door.

3.8 The agent wrote again to the authority on 25 June 2013 reiterating his views on the matter and advising a determination would be sought.

3.9 The Ministry received an application for a determination on 10 July 2013.

4. The submissions

4.1 In a covering letter to the application the agent set out the matter in dispute between the parties and provided copies of the correspondence between the parties and photographs taken during the two assessments undertaken.

4.2 The authority acknowledged the application for determination but made no submission in response.

4.3 A draft determination was issued to the parties for comment on 17 September 2013.

4.4 In a response received on 25 September 2013, the authority accepted the draft subject to comment. The authority submitted that:

- the only outstanding issue had been the ground clearance and the authority requested further information from the agent, for example an opinion from the cladding manufacturer, to establish reasonable grounds for accepting the alternative solution
- the reason for refusing to issue the code compliance certificate was not the authority's liability (refer paragraph 5.4); liability was noted in the correspondence because the authority is aware of its exposure when assessing alternative solutions
- the central issue is whether or not the advice and investigation submitted by the agent (past performance of the building work) can be relied upon or accepted as reasonable grounds by the authority.

4.5 The authority also considered that apart from 'specific past Determinations, there is no acceptable method as to how "past performance" should be assessed and used to demonstrate compliance'; the authority asked whether the decision reached here could be applied in other cases.

4.6 In response to the authority I note that the Building Code is performance-based; the mandatory requirement of Clause E2.3.2 is that external walls 'must prevent the penetration of water that could cause undue dampness, damage to building elements, or both.' The assessment for compliance with the Building Code must be made on the merits of the work in each individual case, and while an alternative solution may be considered compliant in one situation, it may not be adequate in others.

4.7 The agent accepted the draft determination on behalf of the applicants in a response received on 25 October 2013.

5. Discussion

5.1 I note that the original building consent was issued under the former Act, and accordingly the transitional provisions of the Act apply when considering the issue of a code compliance certificate for work completed under that consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.

5.2 In order to determine whether the authority correctly exercised its power in refusing to issue a code compliance certificate because of its concerns about the ground clearance at the front entrance and to the garage, I must therefore consider whether those two elements of the building work comply with the Building Code.

5.3 The code compliance of the building work

5.3.1 The Building Code is performance-based and compliance with an Acceptable Solution provides one way, but not the only way, of complying with the Building Code. In this case the ground clearances at the front entrance and garage are approximately 50mm and do not comply with the Acceptable Solution E2/AS1, accordingly the building work is to be assessed against the performance requirements of the Building Code (that was in force at the time the consent was issued) as an alternative solution.

5.3.2 Taking note of the evidence provided by the consultant, I make the following observations:

- The asphalt slopes away from the building at the entry canopy and east end of the garage door.
- There is no opportunity for water to pond at the west end of the garage door and the bark garden provides ample drainage.
- The cladding is 50mm clear of the paving and bark garden, providing a drip edge to drain rainwater off the cladding.
- Rainwater may bounce off the paving onto the underside of the cladding and cavity system. However invasive and destructive tests indicate that water has not penetrated behind the cavity to the bottom plates and no indication of mould or dampness was found.
- The front entrance is well sheltered under a roof overhang.

5.3.3 I note that the cladding has been installed as a cavity system but that drainage to the base of the cavity has not been provided in some places. Should moisture penetrate the fibre-cement wall cladding, there is no provision to drain water out of the cavity. In this respect I consider that the house and garage do not comply with the requirements of Clause B2 insofar as it relates to Clause E2 of the Building Code that was current at the time the consent was issued.

5.4 The delay in seeking a code compliance certificate

5.4.1 The authority included in its email of 31 May 2013 that 'BCAs have liability for a building-consented project for 10 years from the date of issuing of the Code Compliance Certificate. Amending durability has no effect on that.'

- 5.4.2 I consider that the period of delay between the issue of a building consent and the request for a final inspection or code compliance certificate does not prevent the authority making a decision with respect to compliance, and is not a ground under section 43 of the former Act for refusing to issue a code compliance certificate. I also note that it is an owner's responsibility to seek a code compliance certificate on completion of work undertaken under a building consent.
- 5.4.3 I accept that when the issue of a code compliance certificate is being considered, concerns may be raised regarding the durability, and hence the compliance with the Building Code, of certain elements of the house, taking into consideration the age of the building work.
- 5.4.4 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 fibre-cement cladding to remain weathertight for a period of 15 years from the date a code compliance certificate is issued.
- 5.4.5 I continue to hold the views expressed in previous relevant determinations that an authority, following the appropriate application from the owner, has the power to grant a modification to the requirements of Clause B2.3.1 of the Building Code for an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39⁵, August 2009).
- 5.4.6 The authority is aware of its ability to amend the building consent so that the durability periods in Clause B2.3.1 commence from when the work was substantially complete, and not from the date a code compliance certificate is issued. This matter has been canvassed in many previous determinations involving the authority, and a determination is not required to undertake that process. I therefore leave the modification of Clause B2.3 1, and the agreement of a suitable date, to the parties; I strongly recommended that decisions be recorded on the property file and any LIM (land information memorandum) issued for the property concerned.
- 5.4.7 Section 393 provides that, in respect of the issue of a code compliance certificate, the 10 year long-stop limitation period commences from the time the code compliance certificate is issued (section 393(2) and (3)(a) of the Act).
- 5.4.8 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions.

6. What happens next?

- 6.1 The authority may issue a notice to fix that requires the owner to bring the building work into compliance with the Building Code, including the defects identified in paragraph 5.3.3, but not specifying how those defects are to be fixed. It is not for a notice to fix to specify how the defects are to be remedied and the building brought

⁵ Codewords articles are published by the Ministry and are available on the Ministry's website at www.dbh.govt.nz/codewords-index
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to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.

6.2 Alternatively the authority may elect to deal with the matter via a notice issued under section 95A of the Act.

6.3 The applicant can then produce a response, to either the notice to fix or the notice issued under section 95A, in the form of a detailed proposal produced in conjunction with a competent and suitably experienced person, as to the rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I determine that the authority incorrectly exercised its powers of decision in its refusal to issue a code compliance certificate on the grounds given; however, I also determine that the building work does not comply Clause B2 of the Building Code insofar as it relates to Clause E2 and accordingly I confirm the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 October 2013.

John Gardiner
Manager Determinations and Assurance

Appendix A: The relevant legislation

A.1 The relevant sections of the Act

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.
- (1) 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.
- (2) 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.

A.2 The relevant performance provisions of the Building Code are:

E2 External moisture

E2.3.2 Roofs and external walls must prevent the penetration of water that could cause undue dampness, damage to building elements or both.

E2.3.5 Concealed spaces and cavities in buildings must be constructed in a way that prevents external moisture being accumulated or transferred and causing condensation, fungal growth, or the degradation of building elements.

E2.3.7 Building elements must be constructed in a way that makes allowance for the following:

- (a) the consequences of failure