



Determination 2013/077

Regarding the authority's exercise of powers of decision in refusing to issue a code compliance certificate for building work at 11 Riverlinks Lane, Hamilton

(to be read in conjunction with Determination 2008/044)

Applicant: SL & LM Aldridge Family Trust (“the applicant”) acting through an agent (“the agent”)

The authority: Hamilton City Council (“the authority”)

1. The matter 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 I have previously described certain building matters regarding this house in Determination 2008/044 (“the first determination”). This second determination arises because recladding work was carried out under a separate consent and the authority has now refused to issue a code compliance certificate for the remaining original building work.
- 1.3 The matter to be determined² is whether the authority has correctly exercised its powers of decision in refusing to issue the code compliance certificate for the reasons provided.
- 1.4 In making my decision, I have considered the applicant’s submission and the other evidence in this matter, including the first determination.

2. The building work and background

- 2.1 The original construction of the house was carried out under building consent No. 96/2570 (“the first consent”) issued under the Building Act 1991 (“the former Act”). The construction was completed during 1998 and a final inspection carried out in February 2000.
- 2.2 The original cladding was a proprietary monolithic cladding system with 7.5mm thick fibre-cement sheets fixed through the building wrap to the framing, and finished with an applied textured coating system. (A more detailed description of the building work is set out in the first determination.)

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

- 2.3 On application in 2007, the authority refused to issue a code compliance certificate for the building work and the matter was subject to determination. The determination was made as follows:
- 10.1 In accordance with section 188 of the Act, I determine that the building does not comply with Clauses B2 and E2 of the Building Code, and accordingly confirm the territorial authority's decision to refuse to issue a code compliance certificate.
 - 10.2 I also determine that:
 - (a) all the building elements installed in the building, apart from the items that are to be rectified as described in [determination 2008/44], complied with Clause B2 on 8 February 2000.
 - (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 8 February 2000 instead of from the time of issue of the code compliance certificate for all building elements except the roof and wall claddings as set out in paragraphs 5.6 and 5.7 of Determination 2008/44.
 - (c) [the authority] is to issue a code compliance certificate in respect of the building consent as amended, once the matters set out in paragraph 5.6 together with any other matters arising from a more extensive investigation, and 5.7, have been rectified to its satisfaction.
- 2.4 Following the issue of the first determination the applicant obtained a building consent (No. 2010/23835; "the second consent") issued under the Building Act 2004 to re-clad the house with plastered brick veneer and EIFS³ over a cavity and carry out remedial work required to bring the house into compliance with the Building Code. The authority issued a code compliance certificate for the work carried out under the second consent on 10 October 2012.
- 2.5 On 4 July 2013 an agent acting for the applicant applied for a code compliance certificate for the first consent.
- 2.6 On 5 September 2013 the authority emailed the agent providing the following as its reasons for refusing to issue the code compliance certificate:
2. [The authority] was never in a position to be satisfied that the building complied with the building code and we had advised the original owner that we were not in a position to consider issuing a code compliance certificate because we had not received a clean weathertightness report.
 3. The building as it stands has been extensively changed with new claddings, additions/extensions and modifications under a separate building consent and a code compliance certificate has been issued for this consent. The building no longer resembles the original building subject to the 96/2570 consent.
- Therefore we advise we are not in a position to consider issuing a code compliance certificate.
- 2.7 The agent responded by email on 6 September 2013, noting that the defects highlighted in the first determination had been remediated and again requesting the authority issue a code compliance certificate for the first building consent.
- 2.8 On 12 September 2013 the authority emailed the agent restating that its primary reason for refusing to issue the code compliance certificate remained as stated in item 3 of its email of 5 September 2013.

³ External Insulated Finishing System

2.9 The Ministry received an application for determination on 16 October 2013.

3. Submissions

3.1 The agent set out the background to the dispute in a covering letter dated 1 October 2013. The application included copies of:

- the notice to fix, dated 13 June 2008, issued after the first determination
- as-built plans for the work carried out under the second consent
- the code compliance certificate for the second consent
- the application for a code compliance certificate for the first consent
- email correspondence between the agent and the authority.

3.2 The Ministry did not receive acknowledgement of the application for determination from the authority or a submission in response to the application.

3.3 A draft determination was issued to the parties for comment on 5 November 2013.

3.4 The applicant accepted the draft without further comment in a response received on 14 November 2013.

3.5 The authority indicated it would respond by 29 November, however despite a reminder from the Ministry on 4 December 2013 no response to the draft has been received.

4. Discussion

General

4.1 The authority has refused to issue a code compliance certificate for the original construction because the building has subsequently been re-clad along with other additions and alterations carried out under the second building consent.

4.2 I note that the first 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'.

4.3 The authority has no concerns about the code compliance of the work, simply that the 'building no longer resembles the original building subject to the [first consent]'.

4.4 The first determination set out a modification of the first building consent in respect of Clause B2.3.1 and determined that the authority was to issue a code compliance certificate in respect of building consent as amended once the remedial work had been carried out to the authority's satisfaction (refer paragraph 2.3). The first determination was not appealed⁴.

⁴ Section 208 of the Act provides that any party to a determination may appeal to a District Court against a determination by the Chief Executive under section 188.

- 4.5 The authority should now undertake the administrative process necessary to amend the first building consent. The amendment of the first building consent must clearly exclude the work has been carried out under the second consent. I note that this is not an uncommon administrative process undertaken by other authorities in similar circumstances.
- 4.6 Following the amendment of the original building consent, the authority should then issue a code compliance certificate in respect of the amended building consent.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- a) The authority incorrectly exercised its powers of decision in refusing to issue the code compliance certificate for building consent No. 96/2570 on the grounds provided.
 - b) The first consent is to be amended to exclude the building work completed under the second consent.
 - c) Following the amendment described in (b) the authority shall issue the code compliance certificate in respect of the first consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 10 December 2013.

John Gardiner
Manager Determinations and Assurance