



Determination 2014/007

Regarding the refusal to issue a code compliance certificate for an 18-year-old house at 25 Chorley Grove, Wellington



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, D Rayner & G Lang (“the applicants”)
 - Wellington City Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent 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 complies with the Building Code² (Schedule 1, Building Regulations 1992) that was current at the time the consent was issued.
- 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. In making this decision I must consider the grounds on which the authority made its decision, and whether the building work complies with the Building Code that was current at the time the building consent was issued.

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.

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

- 1.5 In making my decision, I have considered the submissions of the parties, 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 in question consists of a two-storey house and attached single-level garage situated on a steeply sloping residential site in a high wind zone for the purposes of NZS 3604⁴. The house is assessed as having a moderate weathertightness risk.
- 2.2 The house and garage are predominantly of timber-frame construction, with a section of concrete-filled Styrofoam block retaining wall. The living quarters are built on piled foundations and the garage built over a concrete slab. The pitched hip roof is covered with chip coated metal tiles, and has good eaves and lined soffits on all elevations.
- 2.3 The exterior walls are lined with cedar weatherboards and fibre-cement sheet directly fixed to the framing. The fibre-cement sheet cladding is generally flush-jointed and texture-coated, with some PVC-jointing. There is also a section of unsealed butt-jointed fibre-cement cladding above the retaining wall. The exterior joinery is comprised of powder coated aluminium units.
- 2.4 There are two timber-framed cantilevered decks with open timber decking and balusters, constructed over non-habitable space on the upper east elevation.
- 2.5 There is a barrier to the car parking area adjacent the main entry to the dwelling comprising a solid plastered concrete base with a tubular steel rail above.
- 2.6 No treatment was detected in the three laboratory-tested timber samples. Given the date of construction in 1996, it is unlikely that the framing timber is treated to a level that provides resistance against prolonged moisture ingress.

3. Background

- 3.1 On 2 April 1996 the authority issued a building consent (No. 15918) for the house under the Building Act 1991 (“the former Act”).
- 3.2 An interim code compliance certificate was issued on 24 November 1998, indicating that the construction was substantially complete with the exception of ‘completion of the driveway and the barrier along the drive complying’. The applicants purchased the property in 2001.
- 3.3 In 2012, when preparing the property for sale, the applicants commissioned a property inspection report. The report, dated 3 October 2012, noted:
- moisture adjacent to both showers with vinyl short and lifting and some damage to flooring
 - vanity to wall junction not sealed
 - re-fixing of some plumbing fixtures required
 - some damaged wiring in the ceiling space above the garage, which was inspected by a registered electrician who considered there to be no risk
 - high moisture readings in the laundry floor but currently dry with no damage

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- cladding to ground clearance less than 100mm at garage
 - some nails to roofing tiles require re-fixing
 - no sealant to one wire penetration through cladding
 - water able to run under house at one location (location unclear), with a large build-up of debris
 - deck handrail loose in one area
 - some alterations/additions from approved plans
- 3.4 I am not aware of any remedial work the applicants may have carried out in response to the property inspection report. On 17 October 2012 the applicants requested the authority consider issuing a code compliance certificate.
- 3.5 The authority wrote to the applicants on 23 October 2012, advising that an inspection could be arranged, but
- it is possible that due to the age of the building work and the length of time that has passed since the work was completed, the [authority] may not be able to be satisfied that the durability requirements of the Building Code can be met.
- 3.6 The authority visited the site on 2 November 2012, and carried out an inspection on 7 December 2012. The authority then wrote to the applicants on 10 December 2012, listing a number of remedial items to be rectified before it could consider issuing a code compliance certificate (refer Table 1 paragraph 3.7). Lodgement of documentation was also required, including a report from a registered building surveyor confirming that the fibre-cement cladding met the performance requirements of Clause E2 of the Building Code.
- 3.7 A report by a registered building surveyor dated 4 March 2013 was provided to the authority and a meeting was held on site on 18 March 2013. The site report recorded that various report statements were highlighted for the applicants, identifying where further investigation was required to confirm compliance with Clauses E2 and B2. I have summarised the building surveyor's comments in the table below against the items identified by the authority in its letter of 10 December 2012.

Table 1

Authority's concerns as per letter of 10 December 2012	Surveyor's comments	Clauses
Exterior envelope		
Seal [monolithic cladding] at side wall of garage	Small area unpainted but appears to be well protected/sheltered and shows no signs of premature deterioration	B2,E2
Provide jointers to exterior corners	No comment	
Lack of cladding clearance to timber decking	No provision for drainage or drying in some sections – remedial work required	
No saddle flashings to driveway retaining wall junctions with garage and lounge wall	Retaining wall to lounge junction requires some protection or change in design; detail is no longer weathertight. Elevated moisture and staining in laundry may be caused by moisture ingress from this detail. Retaining wall to garage: Wall is flat without capping; flashing in place but construction detail unknown. No evidence of failure. Risk of non-compliance at the top of the wall immediately beside the garage junction due to ponding.	

Install rustic plugs and seal where missing or required to weatherboard joints	No comment	
Protect sealant around upper level kitchen extract fan cover with scribes	No comment	
Toilet extract fan (upper level) to exit the building in a manner compliant with E2	No comment	
Remove upper level deck barrier fixings & posts attached to cladding of the dwelling	Prone to allowing moisture ingress. No evidence of leaking identified, though observation is after a dry summer	
Ground heights at the lower level rear of the dwelling to be lowered to E2 requirements	No comment	
Inter floor joists beneath the upper level at the rear of the dwelling to be closed out to E2 requirements - Lack of saddle flashings to upper level deck joists	Both upper free draining wooden decks have an alloy flashing fitted – considered to be adequate weatherproofing.	
Cladding in same area to be sealed		
Unsealed penetration by aerial cable beside front door	No evidence of leaks – recommend sealing	
Lack of control joints in [monolithic clad] walls over 5 metres in length	2 walls extend to 6m. No sign of any failures – considered to be performing	
Missing flashings to meter box	No flashing but well-sealed and maintained. No indication of failure, though observation after a dry summer	
Limited cover to various head-flashings, performance of joinery flashings	Though short of manufacturer's requirement, generally appeared adequate. Sealant could be applied to improve performance. No evidence of failure.	
Head flashing missing over garage door opening	Detail well sealed though without flashing. At risk if not well maintained. Small joint crack present.	
Locate field drainage and confirm E2 compliant water proofing to rear of side wall of garage and clear out all vegetation, dirt and debris from behind wall to permit drainage in accordance with E2	Is not a retaining wall but rather a debris wall and has no membrane. Debris and plant growth require clearing.	
E2 compliance of the fibre-cement cladding generally	Fibre-cement cladding generally well maintained and in good condition. High moisture reading recorded in soffit end frame/or beam above entry door.	
	Two plastic waste pipe clamps fixing into the cladding are broken and pipe no longer secured	
Stairs		
Stairs to upper level deck off lounge to have structure evaluated against NZS 3604	No comment	B1
Stair risers to be closed off and graspable handrail to be fitted	No comment	D1
Interior		
Seal mid-level bathroom vanity to bench-top walls	No comment	E3
Whether lifted vinyl in bathrooms and leaking showers are affecting flooring/framing	Moisture levels (dry) indicate resolved historic leak. Damage to floor vinyl requires repair to ensure ongoing compliance. Small area of particle board damage below the downstairs shower, but no indication of structural damage. Subfloor space beneath both showers show minimal signs of damage.	

Barriers		
Provide an F4 compliant barrier to top of driveway barrier wall where a fall of 1metre or greater is present	No comment	F4
Baluster spacing's of both upper level decks to be closed to a F4 compliant dimension of 100mm	No comment	
Balustrade post sizing and fixing to be made compliant with figure 7:10c of NZS 3604:2011	No comment	B1
Insulation		
Insulation in rear wall beneath upper level to be protected / held into voids as building paper has perished in places	No comment	H1
Plumbing		
Extend drainage vent on rear wall of garage through roof with complying flashings	No comment	G13
Required documentation		
Butynol roof gutters condition to be assessed by registered applicator and a report issued to [the authority] to consider		
Plaster system to [cladding] – condition to be assessed by a registered plaster applicator and a report issued to [the authority] to consider		
Electrician to provide a report on the electrical wiring for the dwelling confirming compliance with the code at the time of installation		
As built plans showing additions of upper level external stairs & decks and modified internal layouts		
Amendment for durability application and covering letter from owner, winding back to June 1997		
A registered member of the NZ institute of building surveyors is to provide a report commenting on the buildings performance in regards to E2 ... particular comments required.	(see comments above)	

3.8 The authority also noted that the large deck constructed below the dwelling is less than 1.5m in height and accordingly did not require consent, but that it must still comply with the Building Code.

3.9 The applicants discussed the report with the authority on 18 March 2013 but the authority considered that further invasive investigation was required to 'confirm compliance with E2 and B2', and the issue remained unresolved.

3.10 The Ministry received an application for a determination on 21 August 2013.

4. The submissions

4.1 The applicants provided a covering letter setting out the background to the matter in dispute between the parties, and provided copies of

- summary information of the building consent
- the interim code compliance certificate
- a LIM dated 5 October 2012
- a building permit application for the construction of a retaining wall and driveway, dated as approved on 21 February 1989
- the property inspection report, dated 3 October 2012
- correspondence from the authority and site reports

- an email from the builder regarding treatment levels of timbers used in construction of the lower deck
 - the building surveyor's report, dated 4 March 2013
 - correspondence with the Minister for Building and Construction.
- 4.2 The authority made no submission in response to the application for determination.
- 4.3 A draft determination was issued to the parties for comment on 22 January 2014.
- 4.4 The authority responded by email on 5 February 2014, accepting the draft determination but requesting that Clause D1 be included in the decision.
- 4.5 The applicant responded by letter dated 3 February 2014, noting some typographical errors that have subsequently been corrected.

5. The expert's report

- 5.1 As described in paragraph 1.5 I engaged an expert, who is a registered building surveyor, to assist me. The expert inspected the property on 15 and 29 October 2013 and produced a report that was completed and sent to the parties on 5 December 2013.

5.2 General

- 5.2.1 The report described the house, the risk factors present for weathertightness, and some of the background to the dispute. The expert noted that the approved consent documentation contained no construction details and the specifications were not site specific; there are also a number differences between the consented plans and the house as constructed, including a portion of the retaining wall doubling as the rear garage wall.
- 5.2.2 The expert observed that the house was generally adequately constructed although there are some areas where the attention to detail is poor, and the house is generally well maintained except for areas that are more difficult to access, such as the north and west walls of the garage.

5.3 Moisture testing

- 5.3.1 The expert was only able to carry out a limited number of invasive moisture tests. The testing was carried out after an extended period of wet weather, and a small number of core samples were sent to a testing laboratory for decay and preservative analysis.
- 5.3.2 The expert noted that moisture readings increased nearer to the bottom edge of the fibre-cement cladding. Elevated readings were recorded in the following locations:
- 100% in the front garage wall adjacent to the west retaining wall, with extensive build-up of debris behind the retaining wall. Analysis of the timber found pockets of advanced soft rot, incipient brown rot and toxic mould spores.
 - 26% in the lounge wall framing adjacent to the eastern retaining wall.
 - 21% in house framing behind a balustrade post nailed through the cladding.
 - 21% in the bottom plate at the southwest corner of the garage, possibly due to water wicking up into the timber by way of capillary action
 - two elevated readings of 21% in five external framing locations

- 48% in the fibre-cement clad roof beam above the entry porch. Analysis of the timber from the beam found pockets of early soft rot and brown rot.
 - 27% in a floor joist.
- 5.3.3 The lower ground floor laundry bottom plate was also significantly decayed and analysis of the timber found advanced soft rot, incipient brown rot, arthropod grazing damage and toxic mould spores. The damage is likely to be from water entering at the junction between the retaining wall and the house.
- 5.3.4 I note here that moisture levels above 18% or which vary significantly from the equilibrium levels generally indicate that external moisture is entering the structure and investigation is needed. Readings over 40% indicate that the timber is saturated and decay will be inevitable over time.
- 5.4 In respect of the external envelope the expert made the following observations:
- Fibre-cement sheets on the garage west wall are unpainted and butt jointed.
 - The junction between the west retaining wall and front wall of the garage lacks a saddle flashing is not watertight.
 - There is extensive build-up of debris behind the west retaining/garage wall.
 - The east (driveway) retaining wall abuts the house; the proximity does not allow free drainage.
 - The continuous flashing applied to the cantilevered joists closes off the gap between the decking and the wall cladding and prevents free draining from a portion of the deck, however, no evidence of water penetration was found; there is also a building up of wet debris in the gap.
 - The textured cladding terminates at the top of the decking; the gap between the decking and house wall is also minimal and in some places there is no gap.
 - Some balustrade posts are nailed through the cladding.
- 5.5 With regard to Clause E3 Internal Moisture the expert noted:
- The authority's inspection recorded the failure of floor vinyl and water stained particle board in the lower ground floor laundry. The underside of the particle board was water stained but dry and sound. The expert attributed the elevated moisture content of around 22% recorded in the sub floor framing to water entering at the junction between the retaining wall and the house. The leaking washing machine likely caused the uplifted vinyl and stained flooring.
 - Similar damage to the floor vinyl and particle board flooring in the ground floor bathroom was attributed to a leaking shower cubicle. The localised particle board staining indicated the damage was from a leaking plumbing fixture. The stained areas of flooring were dry and sound.
 - The expert considered that both laundry areas comply with the performance requirements of Clause E3 but remedial work should be carried out on the vinyl to ensure continued compliance.

6. Discussion

6.1 General

- 6.1.1 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'.
- 6.1.2 In order to determine whether the authority correctly exercised its power in refusing to issue a code compliance certificate because of its concerns about durability, I must consider whether the building work complies with the Building Code.

6.2 The external envelope (Clause E2)

- 6.2.1 The building envelope is required to comply with the durability requirements of Clause B2. Clause B2 requires that a building continues to satisfy the objectives of the Building Code throughout its effective life, and that includes the requirement for the building work to remain weathertight.
- 6.2.2 The expert carried out a series of invasive moisture tests and found elevated readings of 100%, 26%, 25% and two readings of 21% at five external framing locations and 48% in a timber beam, with evidence of soft and brown rot.
- 6.2.3 Given the above, I am satisfied that the house does not comply with Clause E2 of the Building Code that was current at the time the consent was issued.

6.3 Internal moisture (Clause E3)

- 6.3.1 I consider the expert's report establishes that the work complies with Clause E3. The matters considered by the expert in paragraph 5.5 can be addressed by the owner as items of normal maintenance.

6.4 The driveway barrier (Clause F4 Safety from falling)

- 6.4.1 I consider the paved area adjacent the main entry will not be used solely for car parking, and given its size and close proximity to the house is likely to be an area frequented by children under the age of 6. Consequently any barrier to the drive should be constructed so that it meets the requirements of Clause F4.3.4(g), the present barrier does not meet satisfy this requirement.

6.5 The deck and external stairs (Clause F4 Safety from falling and D1 Access routes)

- 6.5.1 The barriers to the decks to the house also serve areas which are likely to be frequented by children under the age of 6, and I accept that any openings to the barriers should also comply with F4.3.4(g) (refer Appendix). I note that this requirement also applies to the stairway serving the upper deck.
- 6.5.2 The stairway to the upper deck forms an access route which is required to have graspable handrails to provide support (Clause D1.3.3(j), refer Appendix).
- 6.5.3 I accept the authority's position that any opening to the barrier greater than 100mm wide, stairway having horizontal openings greater than 100mm high, and the lack of a graspable handrail to the stairway will not satisfy the requirements of Clause F4.

6.5.4 The authority is of the opinion that ‘balustrade post size and fixing’ shall be made compliant with the requirements of the NZS3604:2011. The Building Code is not retrospective and the authority is not able to require work undertaken in 1996 to now be amended to satisfy a standard issued in 2011. There is no apparent failure of these components after 18 years of in-service use.

6.6 Clause G9 Electricity

6.6.1 The authority has sought a report on the electrical wiring for the dwelling confirming compliance with the code at the time of installation.

6.6.2 Clause G9 is self –certifying, and electrical work does not appear to form part of the issued consent. Even if electrical work had formed part of the approved consent there would be very limited value in providing any statement as to compliance some 18 years after the building was first occupied.

6.7 The durability considerations

6.7.1 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.

6.7.2 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 cladding to remain weathertight for a period of 15 years from the date a code compliance certificate is issued.

6.7.3 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 39, August 2009). I therefore leave the modification of Clause B2.3 1, and the agreement of a suitable date, to the parties to resolve.

6.7.4 It is also strongly recommended that decisions be recorded on the property file and any LIM (land information memorandum) issued for the property concerned.

6.8 The delay in seeking a code compliance certificate

6.8.1 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.’

6.8.2 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 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.

6.8.3 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.

- 6.8.4 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).
- 6.8.5 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.

7. What happens next?

- 7.1 I note that the authority has not issued a notice to fix. The authority now should issue a notice to fix; taking into account the findings of this determination, identifying the items requiring remedial work identified in paragraphs 5.4, 6.4 and 6.5, and referring to any further defects that might be discovered in the course of investigation and rectification but not specifying how those defects are to be fixed. It is not for the notice to fix to stipulate directly how the defects are to be remedied and the house brought to compliance with the Building Code. That is a matter for the applicants to propose and for the authority to accept or reject.
- 7.2 The applicants should then produce a response to this 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.
- 7.3 Once the building work has been rectified to its satisfaction, the authority can issue a code compliance certificate in respect of the amended building consent as outlined in paragraph 6.7.
- 7.4 I also note that the expert has described some differences between the house as constructed and the consented plans. I recommend that the parties take the necessary steps to amend the consent to record the as-built construction.

8. The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the house does not comply with Clauses B2, E2, D1 and F4 of the Building Code that was current at the time the building consent was issued, and accordingly I confirm the authority's decision to refuse to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 13 February 2014.

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 that were in force at the time the consent was issued include:

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.

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

D1 Access routes

D1.3.3 Access routes shall

- (j) Have smooth, reachable and graspable handrails to provide support and to assist with movement along a stair or ladder

F4 Safety from falling

F4.3.4 Barrier shall

- (g) restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them