



Determination 2014/016

Regarding the refusal to issue a code compliance certificate for a 19-year-old house with monolithic cladding at 11 Country Lane, Western Heights, Hamilton



1. The matter 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 owner of the house, the Maxwell Family Trust (“the applicant”)
 - Hamilton City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for the 19-year-old house because it was not satisfied that the building work complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The authority’s concerns regarding compliance of the building work appear to relate to the age of the house and the weathertightness of its claddings; the authority did not provide its reasons for the refusal in writing to the applicant.
- 1.4 The matter to be determined³ is therefore whether the authority correctly exercised its powers of decision when it refused to issue the code compliance certificate. In deciding this, I must consider:

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 Act and references to clauses are to clauses of the Building Code.

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

1.4.1 Matter 1: The external envelope

Whether the external building envelope of the house complies with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The building envelope includes the components of the systems (such as the brick veneer and monolithic claddings, the windows, the roof cladding, the deck and the flashings), as well as the way the components have been installed and work together. In this matter I have also included items identified by the authority during its inspection in 2000. I consider this matter in paragraph 6.

1.4.2 Matter 2: The durability considerations

Whether the building elements comply with Clause B2 Durability of the Building Code, taking into account the age of the house. I consider this in paragraph 7.

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 consists of a detached house that is two-storeys-high in part and situated on a level site in a medium wind zone for the purposes of NZS 3604⁴. The house is fairly complex in plan and form and is assessed as having a moderate weathertightness risk.

2.2 Construction is generally conventional light timber frame, with concrete foundations and floor slab, monolithic and brick veneer wall claddings, pressed metal tile roofing and aluminium joinery. The 15° pitch hipped roofs to the lower level form lean-tos against upper walls, with a gable roof over the garage. Lower roofs have overhangs of 600mm or more, while the 35° pitch gabled roof to the upper level has no eaves or verge overhangs.

2.3 The lower walls of the house are clad in traditional brick veneer. The wall cladding to upper walls consists of 7.5mm thick fibre-cement sheets fixed through the building wrap to the framing over which decorative timber battens are fixed. The timber battens are painted and the fibre-cement surface is finished with an applied textured coating system.

2.4 A timber framed deck extends to the north from the upper floor master bedroom. The deck is attached at the internal corner formed by the ground floor dining room and lounge, with a timber framed brick veneer column at the northwest corner. The deck has clad balustrades and a butyl membrane floor over a plywood substrate.

2.5 The expert took a cut-out below the top of the deck balustrade (see paragraph 5.3.4) and sighted timber markings on the balustrade top plate noting H3 treatment. However, the expert was unable to identify the treatment of the general wall framing timber and the specification is silent on the matter. Given the date of wall framing installation in 1994, I consider that the timber wall framing is likely to be boric treated to resist decay but the level of treatment is not known⁵.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ In 1993, the primary risk was considered to be insect attack rather than decay, with the required preservative level reduced accordingly.

3. Background

- 3.1 The authority issued building consent No. 1994/0572 on 6 July 1994 under the Building Act 1991 (“the former Act”). The authority carried out various inspections from August to December 1994, including preline inspections from October to December 1994. The last inspection was of foul water on 13 December 1994, and it appears that the house was occupied early in 1995.
- 3.2 No further inspections were carried out and in a letter to the applicant dated 10 March 1999 the authority noted that, although it appeared that the project has been completed, no advice of completion had been received. The authority carried out a final inspection on 25 May 2000 and issued the following list of outstanding items:
- Items to rectify
1. Gully traps to raise
 2. Bathroom vent to exterior
 3. Fix back downpipes
 4. Safety glass to bathrooms?
 5. Handrails to stairs
 6. HW cylinders restraint.
- 3.3 There is no record of further inspections and, in a letter to the applicant dated 28 March 2006, the authority referred to its 2000 final inspection and attached a copy of its memo listing the items to be rectified. The authority noted that a further inspection was necessary and stated that if no response was received it:
- ...will be noting that this consent has not received a Code of Compliance Certificate. This could affect the sale of this property in future, as this will be included on a LIM for prospective buyers.
- 3.4 There was apparently no response to the above and the authority’s internal records note a ‘general memo’ dated 30 August 2006, which summarised the background of the building consent as follows:
- Letter sent 10/3/1999 for access. No response. Final inspection requested 25/5/2000. Outstanding items as per memo 218. No response from owner. Letter sent for access 28/3/2006. No response and due to age of the building consent we have not issued a Code Compliance Certificate.
- 3.5 There is no record of any further correspondence until the applicant prepared to sell the property in 2014, at which time the applicants have stated that the authority advised that no code compliance certificate could be issued ‘as it was out of time’. The applicant was also verbally advised that the authority would consider a weathertightness report prepared by an ‘approved person’.
- 3.6 The applicant was unable to obtain a weathertightness report and the Ministry received an application for a determination on 22 January 2014.

4. The submissions

- 4.1 In response to the Ministry’s request for further information, the applicant described the circumstances leading to the application for a determination.
- 4.2 The applicant forwarded copies of the authority’s property file, including:
- the drawings and specification
 - the building consent

- the authority's inspection summary
 - correspondence from the authority
 - various other photographs, internal memos and information.
- 4.3 The authority has made no submission in response to the application.
- 4.4 In making no submission and not providing the reasons for the refusal to the applicant, the authority has not fulfilled its statutory duty under section 95A of the Act. I address this further in paragraph 8.
- 4.5 A draft determination was issued to the parties for comment on 21 February 2014.
- 4.6 The applicant accepted the draft in a response received on 25 February 2014.
- 4.7 The authority provided a submission dated 14 March 2014 in response to the draft. The authority accepted the draft subject to the following comments:
- the reference to the authority's policy in relation to consents issued under the former Act should be removed
 - the owner was asked to obtain a weathertightness report to assist the authority in making a decision about the compliance of the building
 - the items identified in paragraph 7.5 'need to be rectified and brought into compliance' and that the authority 'can't be satisfied on reasonable grounds that they will continue to perform and function as required.'
 - the commentary in paragraph 8 'offers an opinion' on how the authority arrived at the decision not to issue a code compliance certificate; the authority requested the commentary be removed.
- 4.8 My response to the authority's submission is as follows:
- The authority has made no submission regarding the grounds for its refusal to issue the code compliance certificate.
 - The reference to the authority's policy has been removed. However, in response to the draft determination the authority said it 'has a process for managing outstanding building consents': the effect of the policy described in previous determinations involving the authority is still evident in this case.
 - I do not agree with the authority's view that the items listed in paragraph 7.5 need to be made compliant and that the authority needs to be satisfied they will continue to perform. I consider these items have complied for 19 years, which is in excess of the 15-year minimum durability period described in Clause B2.3.1. Under section 18 of the Act the authority is unable to seek performance requirements in excess of those described in the Building Code.
 - The matter to be determined is the authority's decision in refusing to issue a code compliance certificate. Paragraph 8 considers the grounds for that refusal and the information that the Act requires the authority to provide to an owner under section 95A. This issue has been discussed in previous determinations⁶ involving the authority.

⁶ For example Determination 2013/054 Regarding the refusal to issue a code compliance certificate for an 11-year-old house with monolithic cladding; and Determination 2013/056 Regarding the refusal to issue a code compliance certificate for 11- to 13-year-old alterations and additions to a house

5. The expert's report

5.1 As mentioned in paragraph 1.5, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert inspected the house on 30 January and 7 February 2014, providing a report dated 10 February 2014 which was provided to the parties on 11 February 2014.

5.2 General

5.2.1 The expert noted that the claddings were 'in reasonably good condition considering the age of the house'. The finish to the textured fibre-cement cladding appeared to be in accordance with the manufacturer's recommendations at the time, with only one small crack evident in the cladding which otherwise had a good paint finish.

5.2.2 However, the expert observed a lack of maintenance to the decorative timber battens; with flaking paint, deterioration of bottom edges of battens and an area of batten missing. The expert also observed overgrown planting against the brick veneer in some areas, with garden levels compromising ground clearances.

5.2.3 The expert noted that the upper deck had a flat-topped clad balustrade, a single drain outlet, limited fall to the membrane floor, and limited clearances to the interior floor level. However, the cut-out to the balustrade revealed dry treated timber and there were no signs of current or past moisture penetration to the deck soffit.

5.3 Moisture testing

5.3.1 The expert inspected the interior of the house, noting no signs of 'cracked, discoloured or stressed wall linings, swelling skirting boards or other evidence of leaking'. The expert also lifted the carpet in several rooms and noted no signs of dampness or water staining at the exterior walls.

5.3.2 The expert inspected the exterior and identified the following junctions and areas at risk of moisture penetration:

- The upper deck, which has a flat-topped clad balustrade, a single drain outlet, limited fall and minimal clearances to the interior floor level.
- The bottom plates to brick veneer where gardens approach the cladding.
- The round top windows.
- The butt-jointed corner windows.

5.3.3 The expert took invasive moisture readings using long probes through linings into bottom plates to the above areas and noted that the interior moisture readings ranged from 5% to 15%. However, the reading into the top plate of the clad balustrade was 18%.

5.3.4 The expert removed a small section of cladding below the deck balustrade top plate and noted that the top plate appeared dry and H3 timber markings with the Woodmark⁷ symbol were apparent.

5.3.5 Commenting on the exterior envelope, the expert noted that:

- timber battens over the upper wall cladding are deteriorating, with paint peeling, one area missing and moisture damaging some ends
- the fibre-cement beneath the battens is not sealed

⁷ Indication of the quality assurance programme operated by the Timber Preservation Council at the time

- rear downpipes are not secured to the brickwork
- ground to the lower bathroom and toilet walls is above the level of the first brick course and impedes drainage from the cavity
- a pipe penetration above the toilet gully trap is not sealed to the brickwork
- the deck lacks provision for overflow should the single outlet block.

5.4 The outstanding items

5.4.1 The expert also assessed items identified by the authority during its 2000 final inspection and his findings are summarised as follows:

Items per authority's list	Expert's opinion
Level of gully traps	Levels are sufficient, with two traps set within a 'well' which provides sufficient protection. One gully trap requires a grate.
Vent bathroom to exterior	Bathrooms have sufficient opening windows. Internal toilet has ventilating roof-light which provides sufficient ventilation.
Fixings to rear downpipes	Downpipes are not fixed to the brickwork
Safety glass to bathrooms	This is understood to apply to the window in the upstairs bathroom. The bathroom has been used for almost 20 years without incident
Stair handrails	There are no handrails to the internal stairs.
Hot water cylinder restraint	The hot water cylinder is now restrained.

5.5 Conclusion

5.5.1 The expert concluded that the house is not leaking and there is no evidence of past leaks, although maintenance is required to the battens over the upper cladding and some other items require attention.

Matter 1: The external envelope

6. Discussion

6.1 The evaluation of building work for compliance with the Building Code and the risk factors considered in regards to weathertightness have been described in numerous previous determinations (for example, Determination 2004/001).

6.2 Weathertightness risk

6.2.1 This house has the following environmental and design features, which influence its weathertightness risk profile:

Increasing risk

- the house is fairly complex in form
- there are no eaves or verges to shelter the monolithic wall cladding
- there is an enclosed deck attached to the upper level

Decreasing risk

- the external wall framing is treated to provide some resistance to decay if it absorbs and retains moisture.

6.2.2 Using the E2/AS1 risk matrix to evaluate these features, the elevations are assessed as having a medium weathertightness risk rating. If details shown in the current E2/AS1 were adopted to show code compliance, a drained cavity would be required for the upper level cladding. However, this was not a requirement at the time of construction.

6.3 Weathertightness performance

6.3.1 Taking account of the expert's report, the external envelope generally appears to have been constructed in accordance with good trade practice and applicable manufacturers' instructions at the time of construction, with the exception of the clad balustrade.

6.3.2 With regard to the clad balustrade, I note the moisture reading of 18% (refer paragraph 5.3.3) and consider that levels are likely be higher in wetter seasons. Because readings over 18% generally indicate that moisture is penetrating into the framing, I am of the view that some moisture may be penetrating the monolithic flat top of the balustrade. Although the H3-treated balustrade framing appears to have resisted decay to date, I consider that the cladding to the balustrade has not achieved the performance requirements of Clause E2, and although the balustrade is outside the applicable durability period described in B2.3.1 in my view it is likely never to have complied with E2. The addition of a capping to the top of the balustrade should bring the balustrade into compliance and ensure that moisture in the underlying framing does not rise to levels that could lead to decay within the durability period required for the framing timber under Clause B2.3.1.

6.3.3 Notwithstanding that the fibre-cement is fixed directly to timber framing, thus inhibiting drainage and ventilation behind the cladding, I note certain factors that have assisted the performance in this case:

- The cladding is installed to a good standard.
- Although timber battens are deteriorating, these are decorative and the fibre-cement cladding is in reasonably good condition for its age.
- Except for the deck balustrade, there is no evidence of moisture penetration after 19 years.

6.3.4 The expert's report has satisfied me that, with the exception of the cladding to the balustrade, there is no evidence of current moisture penetration into the timber framing and the external envelope has satisfied the required minimum 15-year durability period described in Clause B2.3.1.

6.3.5 The expert has noted one of the battens to the fibre-cement cladding is missing with a damaged section of bare fibre-cement cladding forming a hole that will allow water ingress. While the replacement of the batten is a matter of maintenance, the damage to the fibre-cement cladding should be repaired to ensure that the cladding is currently compliant.

6.4 Other outstanding items

6.4.1 Taking account of the expert's report the following other items identified by the authority during its inspection in 2000 still require attention (relevant code clauses are shown in brackets):

- the lack of handrails to the internal stairs (F4)
- the lack of a grate to one gully trap (G13).

6.4.2 The glazing to the upstairs bathroom is required to comply with Clause F2 'Hazardous building materials' that was in force at the time the consent was issued. At this time the Acceptable Solution for Clause F2, F2/AS1, referred to compliance with NZS 4223: Part 1: 1985 as a means of satisfying Clause F2: NZS 4223 did not require safety glass to bathroom windows, and only required safety glass to shower and bath enclosures.

6.5 Maintenance

6.5.1 Effective maintenance of claddings is important to ensure ongoing compliance with Clauses B2 and E2 of the Building Code and is the responsibility of the building owner. The Ministry has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

Matter 2: Modification of the durability periods in Clause B2.3.1

7. Discussion

7.1 The relevant provision of Clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") "from the time of issue of the applicable code compliance certificate" (Clause B2.3.1).

7.2 In this case the 19-year delay since the completion of the house in 1995 raises concerns that many elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.

7.3 I have considered this issue in many previous determinations and I maintain the view that:

- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements, if requested by an owner
- (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued at the time of substantial completion in 1995.

I therefore leave the matter of amending the building consent to modify Clause B2.3.1 to the parties once outstanding matters are resolved.

7.4 A modification of the Code's durability provisions will allow the durability periods stated in B2.3.1 to commence from the date of substantial completion in 1995. This means that the wall claddings have already met the 15-year minimum durability period required by the Building Code. However, the expected life of the building

itself is a minimum of 50 years and careful attention to the performance of the claddings is needed to ensure that the external envelope continues to protect the underlying structure for its minimum required life of 50 years.

7.5 In the case of this particular house, and for the benefit of the applicant, I note the house design includes a number of high risk features, which require careful attention to their performance in order to ensure ongoing weathertightness of the cladding system. Particular attention should be paid to:

- the unsealed fibre-cement under the timber battens
- the limited ground clearance to the bathroom and toilet brick veneer
- the lack of sealing to penetrations through the brick veneer
- the lack of provision for drainage overflow to the upper deck
- the timber battens to the fibre-cement cladding have not been well-maintained, with peeling paint, and deteriorating end-grain.

8. The authority's refusal to issue the code compliance certificate

8.1 The building consent was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate. Section 436(3)(b)(i) 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'. In my view, this requires an authority to turn its mind to the compliance of the work which may include a review of its records and a contemporaneous inspection of the building work.

8.2 If an authority declines to issue a code compliance certificate Section 95A of the Act requires the authority to give an owner 'written notice of the refusal and the reasons for the refusal' to issue a code compliance certificate.

8.3 In this case, the authority provided no written notice but indicated verbally that it would not issue a code compliance certificate because of the age of the work but that it would consider a report from an assessor.

8.4 The owner was given no specific reasons for the refusal, and no idea what aspects must be fixed in order to obtain a code compliance certificate. I do not believe this is acceptable. It is important that, should an owner be declined a code compliance certificate, they be given clear reasons why. Owners can either then act on those reasons or apply for a determination if they dispute them.

8.5 In my opinion, the authority has failed to fulfil the obligations set out in section 95A. A verbal refusal that does not identify any compliance matters is not sufficient to satisfy the requirements of section 95A. If the authority believes compliance has not been achieved, and will not issue the code compliance certificate, it must formally advise an owner of the reasons for the refusal.

9. What happens next?

- 9.1 I suggest that the parties adopt the following process. The applicant should bring the items identified in paragraphs 6.3.26.3.4 and 6.4.1 into compliance with the Building Code. An application can then be made to the authority for a modification of Clause B2.3.1 and a code compliance certificate issued once the authority is satisfied as to the remediation of the non-compliant items.
- 9.2 Any outstanding items of disagreement can be referred to the Chief Executive for a further binding determination.

10. The decision

- 10.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority did not exercise its powers correctly when it refused to issue the code compliance certificate without providing its reasons in writing as required under section 95A.
- 10.2 Notwithstanding the above, I also determine that:
- the cladding does not comply with Clause E2 with respect to the balustrade
 - the staircase does not comply with Clause F4
 - one gully trap does not comply with Building Code Clause G13.
- and accordingly, I confirm the authority's refusal 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 March 2014.

John Gardiner
Manager Determinations and Assurance