MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Determination 2018/029

Regarding the refusal to issue a code compliance certificate for a 14-year-old house with mixed claddings at 14 Sandybrow, Churton Park, Wellington

Summary

This determination considers the compliance of a 14-year-old building. The determination considers the authority's reasons for refusing to issue the code compliance certificate and whether the building work complies with the requirements of the Building Code.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the current Act") made under due authorisation by me, Katie Gordon, Manager Determinations, 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 building, H Nysse, who applied for this determination ("the applicant")
- Wellington City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the authority's decision to refuse to issue a code compliance certificate. The refusal arose because the authority is not satisfied the building work complies with certain clauses[2] of the Building Code (First Schedule,

[1] The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.building.govt.nz or by contacting the Ministry on 0800 242 243.

[2] In this determination, references to sections are to sections of the current Act and references to clauses are to clauses of the Building Code.

Building Regulations 1992); in particular in regard to the weathertightness of the external claddings.

1.4 The matter to be determined[3] is the authority's exercise of its powers of decision in refusing to issue a code compliance certificate. In deciding this matter, I must also consider whether the external envelope of the building complies with Clause B2 Durability and Clause E2 External moisture of the Building Code that was in force at the time the building consent was issued.

1.5 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Ministry to advise on this dispute ("the expert") and the other evidence in this matter.

2. The building work and background

2.1 The building has two-storeys, with a split-level ground floor and foundations. The foundations are formed of reinforced concrete, and support a lightweight timber-framed structure above. All of the exterior joinery used in the building is aluminium framed.

2.2 The building has two different external wall claddings.

- Timber bevel-back weatherboards are used throughout the building's upper storey, and on the lower storey on the south elevation and west elevation, and parts of the east elevation. The weatherboards are direct fixed to the framing over building wrap.
- Rendered brick veneer is used on the north elevation and remaining parts of the east elevation on the lower story. The brick veneer has a 40mm cavity between it and the framing.

2.3 The authority issued a building consent (No. 104843) for the construction of the building on 11 August 2003. The building consent was issued to the company that was developing the property, and from the authority's file it appears the construction took place between 23 September and 5 May 2004. The authority completed a post-line inspection of the building work on 2 March 2004. For the purposes of this determination, I will take this as the date by which the building work on the building was effectively complete. Although the authority carried out two further inspections of the building after this date, they related to plumbing and drainage items only.

2.4 The applicant advises when she and her husband purchased the property in April 2004 they understood there were still 'a couple of items' relating to the drainage that required doing and these were subsequently addressed. She was unaware, however, that no code compliance certificate was applied for at that time in respect of the completed building work. It was not until the applicant later sought to sell the property, and requested a LIM report for this purpose in January 2017, that she became aware that no code compliance certificate had ever been issued.

2.5 At this point, the applicant approached the authority about issuing a code compliance certificate for the building work. In response, the authority arranged for two of its officers to inspect the building on 31 January 2018 to establish whether it complied with the Building Code and a code compliance certificate could be issued in respect of it.

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

2.6 The authority provided the applicant with the results of the inspection in a letter also dated 31 January 2018. The letter set out various matters the authority required to be addressed before it would issue a code compliance certificate. The first matter related to the sill flashings installed under the exterior joinery units.

> 1. It was noted there are no sill flashings installed to the exterior joinery units. The [authority] needs to be satisfied that the structural timber and associated elements are meeting the requirements of the building code, and that all elements have been installed in accordance with the building code.

2.7 The letter then set out the steps the applicant needed to take in order to address this matter, including engaging a registered building surveyor to carry out testing '(including invasive and destructive testing where necessary)' and provide a report to confirm 'the performance requirements of the relevant building code clauses are being met'.

2.8 The authority's letter also listed various other minor matters relating to the building work that it required to be remedied. I understand that these have now all been fixed and are no longer an issue between the parties. Accordingly, I have not considered these additional matters further in this determination.

2.9 The applicant was concerned at the authority's requirement to have testing carried out on the building, due to the amount of damage this would potentially cause and the cost involved. She queried the need for the testing with both the authority and the Ministry. The authority maintained the testing was necessary to confirm that the performance requirements of the Building Code were being met.

2.10 The applicant applied for a determination, and this was received by the Ministry on 9 February 2018.

2.11 The parties remained in correspondence with each other after the application for a determination had been lodged, and the authority confirmed its position in an email to the Ministry dated 19 February 2018:

- The Building Code clauses [the authority] believe have not been achieved are B1, B2 and E2.
- You ask what account has been taken of the present performance of the building given the time that has elapsed since completion.
  - [The authority] has conducted a visual inspection and noted the exterior is in good condition, however it was confirmed the installation of the windows is not in accordance with the approved plans and it is unknown if the lack of sill flashings has impacted on the structure.
  - As [the authority] only carry out visual inspections, a report from a member of the New Zealand Institute of Building Surveyors to confirm compliance has been requested
  - [The authority] has also requested the [applicant] apply for an amendment to modify B2 Durability due to the length of time the consented building work has been in place.

2.12 I understand the applicant has since lodged an application for a modification to the durability provisions, and this has been received by the authority (see paragraph 5.4)

3. The submissions

3.1 The applicant made a submission with her application for a determination. In the submission she set out the background to the dispute, and her concerns about the authority's requirement for invasive testing and for the building work to comply with

the current Building Code. She also advised she had contacted the builder who constructed the building, who no longer had any record of whether sill flashings had been installed as part of the building work.

3.2 With her application the applicant supplied copies of:

- the LIM report dated 12 January 2018
- a report dated 27 January 2018 by an independent building inspector, which the applicant had commissioned as part of the process of selling her building – the report indicated acceptable moisture readings throughout the building (based on non-invasive testing), and noted the building was in 'very good overall condition'
- the authority's letter of 31 January 2018 declining to issue a code compliance certificate
- her other correspondence with the authority
- her correspondence with the Ministry.

3.3 The authority did not make a submission, but acknowledged the application on 16 February 2018 for a determination and provided a copy of parts of the property file relating to the applicant's property, including copies of the consented plans and specifications relating to the building work.

4. The expert's report

4.1 General

4.1.1 As mentioned in paragraph 1.5, I engaged an independent expert, who is a member of the New Zealand Institute of Building Surveyors, to assist me. The expert inspected the building on 20 April 2018. The expert's report was received on 11 May 2018 and was sent to the parties on 14 May 2018.

4.1.2 The expert noted the following instances where the as-built work differed from the consented drawings:

- the sill flashings below the joinery units in the timber weatherboard cladding (see paragraph 4.2.3)
- the substitution of weatherboards (as shown on the plans) for a sheet cladding system in a small area of the upper level gable on the northeast elevation
- the junction between the sill and the joinery units in the rendered brick veneer cladding (see paragraph 4.2.5).

4.2 Observations

4.2.1 The expert carried out invasive and destructive testing from the interior of the building. Inspection of the exterior of the building was limited to a visual inspection, as the applicant did not provide permission for testing of the exterior.

Moisture levels

4.2.2 A number of sill and jamb junctions were selected throughout each elevation of the building as representing the highest weathertightness risk locations. Invasive and destructive testing was carried out at these locations.

- In all of the locations where invasive testing was carried out, the moisture content readings recorded from the external wall framing were within acceptable limits (i.e. under 18% moisture content[4]).
- Destructive testing, undertaken at two locations beneath joinery openings, showed no visible evidence of moisture staining to the building wrap or framing beneath the sills. Moisture content readings taken from the edge of the sills at these locations were within acceptable limits (i.e. under 18% moisture content).
- At one of the destructive testing sites a stamp on the framing indicated that it was H1[5] treated. The expert noted this would provide additional durability to the framing in the event of periodic moisture ingress, although the extent of the treated framing could not be confirmed without further destructive testing.

Timber weatherboard cladding

4.2.3 Sill flashings were not readily visible below the joinery units on the external walls with weatherboard cladding. The consented details indicated the option for a timber bead to be installed over the base of the window to encapsulate the flashing downturn. The timber beads were inserted into the gap between the sill extrusion and the face of the weatherboard. Subsequently, there is no visible evidence of the sill flashings have been installed.

4.2.4 The expert considered the following features provided a level of protection and deflection to the building:

- the jambs of the windows are finished with scribers, which extend below the bottom edge of the sills
- the sill extrusions of the window joinery project and lap over the weatherboard below.

Rendered brick veneer cladding

4.2.5 Flashings were not required in the interface between the sill of the frame and the sloped brick sill on the external walls with brick veneer cladding, although a drainage gap was required. This gap had been blocked by the plaster render that had subsequently been added to the brickwork, with the render embedding the ends of the sills.

4.2.6 In addition, either a flexible flashing or a galvanised metal flashing would have been required in these locations over the framing at the rear of the cavity. It was not possible to inspect this area to establish whether such flashing was present.

4.3 Expert's conclusions

4.3.1 The expert concluded there was no evidence the sill construction beneath the joinery units in both the weatherboard and the brick veneer clad external walls has caused, or will cause, any weathertightness failure, despite the apparent lack of sill flashings. In addition, it could 'reasonably be deduced that at least some of the exterior wall framing' had been H1 treated and this will provide additional durability.

[4] Moisture content readings of up to 18% generally won't support timber decay. Refer *Weathertightness: Guide to the Diagnosis of Leaky Buildings* (May 2011)
[5] H1 refers to a level of timber preservative treatment

4.3.2 The expert further concluded the sill construction had achieved compliance with Clauses E2 and B2 of the Building Code to date, and will continue to perform for the remainder of the mandatory performance period of 15 years (especially as the building was already 14 years old). In addition, the adjoining structural wall framing has also achieved compliance with Clauses B1Structure and B2 to date, in the areas where it was inspected.

5. Discussion

5.1 The applicant has applied for a determination about the authority's refusal to issue a code compliance certificate for her 14-year-old building. The authority has declined to issue the certificate on the basis that it cannot be satisfied that the Building Code provisions relating to Clause E2 External moisture and Clause B2 Durability are being met. I consider it was reasonable for the authority to request evidence in this situation that compliance has been achieved. It's the building owner's responsibility to satisfy the authority of the building's compliance with the Building Code.

5.2 General

5.2.1 The original 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 for work completed under this consent. Section 436(3)(b)(i) 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".

5.2.2 In order to determine whether the authority correctly exercised its power in refusing to issue a code compliance certificate, I must consider whether the building work complies with the Building Code that applied when the original building consent was issued.

5.3 Clause E2 External moisture, and B2 Durability

5.3.1 The expert's report establishes the building envelope has and continues to comply with the performance requirements in Clause E2 External moisture of the Building Code, and there is no evidence of moisture ingress. The apparent lack of sill flashings to the joinery units has not undermined the building envelope's performance in this respect.

5.3.2 The building is also required to comply with the durability requirements of Clause B2, which requires a building to satisfy the objectives of the Building Code throughout its effective life. The durability requirements of Clause B2 include a requirement for wall claddings to remain weathertight for a minimum of 15 years and for timber framing to remain structurally adequate for a minimum of 50 years.

5.3.3 I agree with the expert there is adequate evidence these requirements will be fulfilled by the building, especially when it is taken into account the cladding is already 14 years old, and hence nearly at the end of it mandatory durability period (subject to a durability modification). Provided the external envelope of the building continues to be maintained to its current standard, there is also no reason that the timber framing will not also achieve its specified lifetime of 50 years. The ongoing durability of the claddings is a question of continued maintenance and is the responsibility of the building owner.

5.4 The additional durability considerations

5.4.1 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).

5.4.2 In this case, the 14 year delay since the building work was effectively completed in March 2004 raises concerns that many elements of the building are now well through or beyond their required durability periods, and may consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.

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

- 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
- it is reasonable to grant such a modification, with appropriate notification, in the current case, 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 2004.

5.4.4 I note the applicant has already applied for such a modification, at the authority's suggestion, and I leave this matter for the parties to resolve between themselves.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004 I hereby determine the authority was correct in exercising its power of decision in refusing to issue the code compliance certificate based on the information it had at the time it made the decision.

6.2 I also determine in respect of the Building Code that was current at the time the building consent was issued the external envelope of the building complies with Clauses E2 External moisture and B2 Durability of the Building Code. Accordingly, I reverse the authority's decision to refuse to issue a code compliance certificate for the building work, subject to the modification of the durability periods as noted herein, and require the authority to make a new decision taking into account the discussion in this determination.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 June 2018.

Katie Gordon
Manager Determinations