

Determination 2006/38

Refusal of a code compliance certificate for a building at 287 Amberley Beach Road, Amberley



1. The dispute 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, Determinations Manager, Department of Building and Housing, for and on behalf of the Chief Executive of that Department. The applicant is Ms Duncan of Today Homes Ltd (“the applicant”), who is acting on behalf of the owners, Mr and Mrs Wardell (“the owners”) and the other party is the Hurunui District Council (“the territorial authority”).
- 1.2 The dispute for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for a 1-year-old house because it was not satisfied that the house complied with the Building Code² (First Schedule, Building Regulations 1992) is correct.
- 1.3 The question to be determined is whether I am satisfied on reasonable grounds that the building complies with the Building Code (see sections 177 and 188 of the Act).
- 1.4 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute (“the expert”), and the other evidence in this matter.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

2. The building

- 2.1 The building work consists of a single storey detached house situated on a large flat site, which is in a high wind zone in terms of NZS 3604³. Construction of the house is conventional light timber frame, with concrete slab and foundations, aluminium windows and brick veneer cladding to all walls. The house shape is a reasonably simple L-shape, and has a 30° profiled metal hipped roof with a gabled canopy over the south entry and bay window projections to the north and east elevations. A 2-metre deep verandah extends from the sides of the bay window along the north elevation. Elsewhere, eaves projections are provided by the gutter width only.
- 2.2 The specification describes the wall framing as “Lazer frame dry frame or NZ Oregon” without any mention of treatment. Based on this evidence, I consider that the external wall framing is unlikely to be treated.
- 2.3 I note that the brick veneer cladding to this house will fall within the scope of the Acceptable Solution⁴ to clause E2 External Moisture of the Building Code.

3. Sequence of events

- 3.1 The territorial authority issued a building consent on 30 October 2003 based on a building certificate issued by Malcolm Davis (“the building certifier”) on 22 October 2003. The scope of engagement attached to the building certificate noted only one exclusion; that of “Truss design”. The consent documentation included calculations of bracing required for the house.
- 3.2 The building certifier made various inspections during the course of construction, including inspecting the structural bracing and the brick veneer installation. The building certifier carried out the final inspection on 14 February 2004, and the “Building Certifiers Inspection Report No 06156” noted that the inspection passed, although several minor items appeared to require completion. I note that some of these items were subsequently marked as “OK”, despite there being no record of any further inspections undertaken by the building certifier.
- 3.3 The building certifier’s approval to operate as a building certifier expired on 30 June 2005.
- 3.4 In a letter dated 20 November 2005, the building certifier notified the territorial authority that the house was complete and that the owners wished to obtain a code compliance certificate. The building certifier noted that:

I have completed all inspections as required for the dwelling. The items in my final inspection notice have been advised as complete.

I understand that the Council is to complete the final inspection and documentation on this project.

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁴ An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way, but not the only way, of complying with the Building Code. The Acceptable Solutions are available from the Department’s website at www.dbh.govt.nz.

On these grounds, I would be satisfied on reasonable grounds that the completed building work now complies with the listed provisions of the Building Code.

- 3.5 In a letter dated 22 November 2005, the territorial authority notified the building certifier that a code compliance certificate would not be issued as it had not been involved in approving the consent documentation or inspecting the construction. The territorial authority also noted that the owner had earlier insisted that it should not be involved in his building projects. The territorial authority noted that the building certifier could no longer issue building certificates and that:

Council will not issue a code compliance certificate based on the inspection docket from a business that is no longer approved or registered as a private certifier.

The territorial authority went on to state that the 1991 Building Act did not include “inspection dockets” as appropriate documentation for means of compliance.

- 3.6 In a letter to the owner dated 19 December 2005, the territorial authority confirmed discussions that had taken place at a meeting on 15 December 2005 and outlined two options available for the owner (a certificate of acceptance or a code compliance certificate), providing estimates of likely charges applicable for each option. The territorial authority noted that, if a code compliance certificate was sought, the building certifier’s inspection records would need to be independently verified in order to be accepted as adequate documentation, and that:

There will be significantly more council time involved and the external information to be provided will require quite in depth reports.

- 3.7 In a letter to the territorial authority dated 19 December 2005, the owner explained that he was willing to co-operate in regard to access for inspections, but noted that:

At this time, the builder, Today Homes Ltd, is contractually obligated to provide me with a code compliance certificate. Therefore I am personally unable to give the Council authority to complete the process and incur the relevant costs.

- 3.8 The territorial authority did not issue a notice to fix as required under section 164(2) of the Building Act 2004.

- 3.9 In a letter to the Department dated 2 February 2006, the owners gave approval for the applicant to act on their behalf and confirmed:

...our authority for Today Homes Limited, Christchurch, to undertake whatever steps are necessary to obtain a Code of Compliance Certificate for our new dwelling...

- 3.10 The applicant’s application for a determination was received by the Department on 14 February 2006.

4. The submissions

- 4.1 In a statement titled “Matter of doubt or dispute” the applicant noted:

Due to withdrawal in registration of private Building Certifier (Malcolm Davis) Hurunui [District] Council Consent Services were unable to issue valid certificates under the Building Act 1991 to complete this project.

4.2 The applicant forwarded copies of:

- a floor plan and specification
- some of the consent documentation
- some of the inspection records
- some of the correspondence with the territorial authority
- a copy of the “Gas Certification Certificate” dated 20 April 2004
- various warranties, producer statements and other statements.

4.3 In a lengthy submission the territorial authority outlined the history of the project, noted that it had not been aware that the building certifier would not be completing the project until informed in November 2005, and described subsequent communication with the building certifier and the owners. The territorial authority explained its position in regard to the Building Act and the refusal to issue a code compliance certificate, summarising the reasons as follows:

1. Council had not received notification that Council was to complete the project
2. Council had previously been informed that owner was not prepared to pay Council's associated costs
3. Not all information has been supplied to Council with regard to the building inspections completed by Mr Davis private certifier
4. Inspection docketts or monthly reports required under section 8 of the Building Regulations 1992 are not an acceptable alternative to a section 56 certificate under the Building Act 1991, therefore Council will need to inspect the building and peer review the docketts provided
5. Council's Building department had not been a part of the building consent process or even seen the building to be able to determine compliance
6. In reviewing the consent application it is questionable as to whether the building complies with B1 or B2 of the Building Code 1992.

4.4 The territorial authority also noted that a review of consent documentation had revealed that bracing calculation had been based on incorrect assumptions of wind and earthquake zones, and that when the correct zones were used the resulting calculations revealed that two points in the building lacked adequate bracing. The territorial authority noted that a notice to fix should be issued in regard to the bracing, but that

...Council will hold off pursuing the compliance of this dwelling pending the outcome of this determination in accordance with section 183 of the Building Act 2004.

4.5 The territorial authority forwarded copies of:

- the plans and specification
- the consent documentation, including amended bracing calculations
- the building certifier's inspection records
- the communication with the building certifier and the owner
- various sections from the Act and regulations and other statements.

4.6 Copies of the submission and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.

4.7 The draft determination was forwarded to the parties for comment on 20 April 2006. The applicant accepted the draft.

4.8 The territorial authority responded to the draft determination in a letter to the Department dated 3 May 2006. In it the territorial authority said:

- *(with reference paragraph 6.3) The issue of whether the Council should have issued the code compliance certificate just on the private certifier's say so was the issue of the determination. The adequacy of the bracing does form part of the determination. If Council had just accepted the private certifiers works this issue would not have been identified.*
- *(with reference to paragraph 6.4) There is a differing opinion with regard to the content of the building certifiers inspections reports. Council's submission clarified that not all inspection docket had been supplied and that a full account of the construction could not be identified from the inspection dockets hence requiring to independently review the building.*

5. The expert's report

5.1 The expert visited the house on 30 March 2006 and furnished a report that was completed on 31 March 2006. The expert observed that the site was in an "open rural location, exposed to high winds", and noted that the house appeared to have been "completed to a satisfactory standard".

5.2 The expert examined the original (handwritten) record of the certifier's final inspection report, and interpreted the items noted as outstanding as meaning:

- Air admittance valves not installed and cap to be fitted to the terminal vent pipe
- Brick veneer overhang is excessive, foundation wall requires plastering.

5.3 The expert inspected the items described in paragraph 5.2, and noted that both items had been satisfactorily completed.

- 5.4 The expert also noted that the owner had advised him that he was aware of only two outstanding items. The expert speculated that the third item referred to in the final inspection report may have been associated with the bottled gas installation and, if this was the case, then satisfactory completion was covered by the gas installation certificate.
- 5.5 Copies of the expert's report were provided to each of the parties.

6. Discussion

6.1 In considering whether this building complies with the provisions of the building code, I consider that the following sequence of events need to be taken into account:

- at the time of construction, the building certifier's approval included all parts of this building except for the roof trusses
- the building certifier (while approved to act as a building certifier) carried out all inspections of the construction and maintained inspection records
- the building certifier (while approved to act as a building certifier) "passed" the final inspection, with the exception of some minor outstanding items
- the building certifier's approval to operate as a building certifier expired, along with the ability to issue any building certificate
- the building certifier was apparently notified that the items were complete, and accepted that advice without inspecting the building again
- the building certifier was no longer able to issue a code compliance certificate
- the building certifier passed the project to the territorial authority for completion of code compliance certificate
- the territorial authority did not accept the inspection records as adequate documentation on which to issue a code compliance certificate.

6.2 I note the territorial authority's concern with regard to the adequacy of the bracing within the house (refer paragraph 4.4). After consideration, I accept that the bracing appears to be inadequate, and agree that this should be remedied.

6.3 I note also that the territorial authority does not consider that the adequacy of the bracing is a matter that needs to be addressed within this determination. I make this observation in response to the submission to the application made by the territorial authority (see paragraph 4.3) which said:

However Council will hold off on pursuing the compliance of this dwelling [in respect of the bracing] pending the outcome of the determination in accordance with section 183 of the Building Act 2004.

- 6.4 The content of the building certifier's inspection records appears to adequately cover the results of inspections undertaken during construction. Taking into account the sequence of events as summarised in paragraph 6.1, I consider the substance and timing of the inspections undertaken to be of more importance than the form in which the inspection records were presented. I therefore consider that the Department and the territorial authority should be entitled to rely on the report of the building certifier's final inspection of this house despite the form in which it was presented.
- 6.5 The expert has confirmed in paragraph 5.3 that the items noted as outstanding in the certifier's final inspection report appear to have been adequately completed.
- 6.6 I also note the expert's comment in paragraph 5.4 with regard to the third outstanding item, and accept that this item has been completed as evidenced by the issuing of the Gas Certification Certificate on 20 April 2004.
- 6.7 As the certifier's inspections undertaken during construction appear acceptable, as discussed in paragraph 6.4, I consider that the building is likely to comply with the provisions of the building code (with the exception of clause B1 Structure).

7. Conclusion

- 7.1 I am satisfied that the building complies with the relevant clauses of the Building Code, with the exception of clause B1 Structure.
- 7.2 Due to the inadequacy of the bracing in the building, the house does not comply with the structural requirements of clause B1.
- 7.3 Subject to further investigations that may identify other faults, I consider that, because the structural faults that have been identified with the building occur in discrete areas, I am able to conclude that satisfactory rectification of the bracing as outlined in paragraph 6.2 should be expected to result in the building becoming in compliance with clause B1 and therefore code compliant.
- 7.4 The territorial authority should then issue a code compliance certificate.
- 7.5 It is emphasised that each determination is conducted on a case-by-case basis.
- 7.6 In the circumstances, I decline to incorporate any waiver or modification of the Building Code in this determination.

8. The decision

- 8.1 In accordance with section 188 of the Act, I hereby determine that the building complies with the relevant clauses of the Building Code, with the exception of clause B1 Structure.

- 8.2 I also find that rectification of the items outlined in paragraph 6.2 to the approval of the territorial authority, along with any other faults that may become apparent in the course of that work, is likely to result in the house becoming code compliant.
- 8.3 I note that the territorial authority has not issued a notice to fix. A notice to fix should be issued that requires the owners to bring the house into compliance with the building code, without specifying the features that are required to be incorporated. It is not for me to decide directly how the defects are to be remedied and the house brought to compliance with the building code. That is a matter for the owner to propose and for the territorial authority to accept or reject.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 May 2006.

John Gardiner
Determinations Manager