



Determination 2010/009

The issuing of a code compliance certificate for a house at 23 Ashwood Street, Wellington



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- Mr G Fenemor, one of two joint-owners of the property (“the applicant”)
- Dr J Kirman, the second joint-owner
- the Wellington City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).

1.3 I acknowledge that the second joint owner has raised concerns that the application for a determination was made without her consent and that she is opposed to a determination being made in favour of the applicant. In respect of these concerns, I note that section 177² states that “a party” (as defined under section 176) may apply to the Chief Executive for a determination. Accordingly, I am of the opinion that any

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department 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.

joint-owner of a property can make an application for a determination in their own right.

- 1.4 This determination arises from the decision of the authority to issue a code compliance certificate for a two-year old house.
- 1.5 I take the view that the matters to be determined, in terms of sections 177(a), 177(b)(i), and 188 of the Act, are:
- whether the house as constructed complied with the requirements of the Building Code (Schedule 1, Building Regulations 1992 that was current at the time the building consent was issued)
 - whether the authority's decision to issue a building consent was correct
 - whether the authority's decision to issue a code compliance certificate was correct.
- 1.6 In making my decision, I have considered the submissions of the parties, the report provided by a firm of building consultants on behalf of the applicant ("the building consultants"), and the other evidence in this matter.

2. The building work

- 2.1 The building work comprises a single-storey free-standing house, built on an excavated sloping site that is in a very high wind zone for the purposes of NZS 3604³. The house is of timber framed construction on concrete floor slabs with a corrugated steel roof and aluminium joinery to windows and doors. The house is relatively simple in shape and form but has some complex features. The pitched roofs have hip and wall-to-roof junctions, with 800mm projections to the majority of the eaves and verges. All roofs have a 15° pitch.
- 2.2 I have not received any evidence as to the treatment of the external timber wall framing.
- 2.3 From ground level to the window head height the exterior of the house is clad with fibre-cement weatherboard and above the window head level with plywood. Both lining types are fixed over a cavity to the wall framing, and are finished with a paint system.

3. Background

- 3.1 On 3 July 2006, the authority issued a building consent (No.145591) under the current Act to a development company for the house.
- 3.2 According to the authority, the development company transferred ownership of the property to the two joint-owners on 2 October 2006.
- 3.3 The applicant made a complaint to the authority on 17 November 2006 regarding deviations from the building consent. The applicant noted that the as-built work differed from the consented plans with respect to:
- window sizes and positions
 - the framing adjoining the corners

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- the “engineering” of the house
 - the installation of the cladding.
- 3.4 The authority carried out a site inspection on 30 November 2006 to check the position and size of the exterior joinery. The inspection site report noted that there were minor amendments as regards the positioning and size of some of the windows. Site measurements showed that the majority of the windows were within approximately 50mm of the sizes shown on the consented plans. Six windows varied by approximately 160mm in size. It was also noted that revised plans showing the changes to window sizes and bracing elements were required.
- 3.5 A set of revised window details was produced by the development company on plans that were dated 27 January 2007.
- 3.6 On 21 May 2007 the authority received an application for a code compliance certificate from the development company. Following a final inspection, the authority approved the building works and on 2 July 2007 the authority issued a code compliance certificate for the house to the development company. On 4 July 2007, the authority issued a second code compliance certificate for the house to the joint owners.
- 3.7 The authority wrote to the applicant on 12 February 2009, attaching a response made on behalf of the authority by its legal advisers. The response, which was dated 11 February 2009, addressed two main issues relating to the matters to be determined, which I summarise as follows:
- Based on the wording of the Act, and as set out in Forms 2 and 6, it was submitted that applications for building consents and code compliance certificates may be made by an agent on behalf of an owner. The contract between the joint owner and the development company also empowered the latter to lodge the building consent, the amendment to the building consent, and obtain a code compliance certificate. Accordingly, the authority was entitled to rely on the authority of the development company as agent for the property owners.
 - The authority had investigated the matter relating to the window amendments and had taken the appropriate steps to record those changes. The authority had applied the appropriate test to assure that it had reasonable grounds on which to be satisfied that the completed work complied with the building consent, as altered to incorporate the window amendments.
- 3.8 A firm of building consultants inspected the house on 12 February 2009 on behalf of the applicant and produced a report dated 29 April 2009. The report detailed defects that the consultants considered needed rectifying and listed some recommendations for remediation. The following items of concern, supported by photographic evidence, were noted:
- The junction of the verge (fascia) apron and valley flashing was poorly formed.
 - There were no turn-ups to the high-level ends of the roofing sheets, some sheets were fixed through their troughs, and some sheets drained under roof flashings.

- The apron flashings were penetrated by batten fixings which the consultant did not consider was good practice.
 - The flashing at the junction of the soffits and the cladding was not continuous.
 - The corner junctions and joints of the horizontal inter-cladding flashings are simply butt jointed or poorly mitred, and the junctions between these flashings and the window head flashings were poorly formed.
 - The junction of the plywood cladding with the jambs and sills of the exterior joinery is poorly formed and lacks foam strips or sealant beads.
 - The seal at the garage door jamb is allowing rain-driven water to enter.
 - The windows and doors set into the fibre-cement weatherboards have scribes located close to internal corner junctions that are not possible to paint.
 - The timber boxed corners to the plywood cladding are poorly installed and do not comply with the consented plans that show a proprietary external corner flashing. However, the consultants also noted that the details as installed did follow Acceptable Solution E2/AS1 to some extent.
 - The paint finish is poorly applied and there are areas where only one coat of paint has been applied.
- 3.9 The consultants also noted that the consented plans did not detail the internal roof junctions, only those at the perimeter, and that many of the defective elements are not built in accordance with the consented plans.
- 3.10 In an email dated 18 November, the applicant also raised a concern regarding a difference between the drawings and as-built work in relation to joints within the steel work.

4. The submissions from the parties

- 4.1 The applicant forwarded copies of:
- the plans and specifications relating to the building
 - the building consent
 - the two code compliance certificates
 - the authority's inspection details
 - the correspondence between the parties
 - the building consultants' report dated 29 April 2009.
- 4.2 The authority provided a submission in a letter to the Department dated 17 November 2009. In summary, the authority noted:
- it was satisfied the house was built in accordance with the Building Code and the building consent. The departures from the consented documentation were minor and the changes did not affect the code-compliance of the building
 - amended plans had been provided and the authority was satisfied that it was able to issue a code compliance certificate on reasonable grounds that the work complied with the building consent

- the authority's officers were not expected to inspect every detail and aspect of the construction
 - there was no evidence to show from the consultants' report that any moisture was entering the building, and consequently, that the requirements of Clause E2 had not been met
 - there is no evidence in the consultants' report to show that the building is not meeting the Clause B2 requirements as a consequence of the alleged failure to comply with Clause E2.
- 4.3 The authority also attached a copy of a letter that it had written to the Department on 14 September 2009 relating to concerns raised by the applicant. This letter deals with matters outside the ambit of this determination and also repeats some of the matters raised in the submission of 17 November 2009.
- 4.4 The authority forwarded copies of:
- the two code compliance certificates
 - some of the authority's inspection details and reports
 - the site inspection report of 30 November 2006
 - a diary note dated 17 November 2006 regarding the complaint made by the applicant.
- 4.5 The second joint-owner wrote to the Department on 24 November 2009, stating that the determination application had been made without her consent and that she opposed the determination.
- 4.6 In an email to the Department, dated 18 November 2009, the applicant noted that the joints to steelwork forming two openings in the house had not been formed as consented, using web cleats, but that the joints between had been either 'bolted directly' or that the joints were welded. The applicant submitted this change was contributing to cracking to the plasterboard lining at these locations.
- 4.7 The draft determination was issued to the parties for comment on 12 January 2010. The applicant and the authority accepted the draft without comment.
- 4.8 The co-owner, in a submission to the Department dated 24 January 2010, contended that the Department had erred when it accepted the application for determination as an "owner" as a party to a determination application was a singular person or entity. The co-owner said:
- ... "the owner" is the registered proprietor, which is this case in two individuals and that where there are joint owners one person is not empowered in law to act alone, rather they must act in unison. Had the legislator intended that a co-owner could act alone in seeking an application in relation to a property the reference would have been to "a co-owner" rather than "the owner", as in section 177 which refers to "a party" to denote that one or all of a number of persons or entities may apply for a determination.
- The co-owner said this view was supported by other related legislation. Refer to paragraph 5.6 for my response to this submission.

5. Discussion

5.1 The building consultants' report

- 5.1.1 As noted in paragraph 3.8, a firm of building consultants was engaged by the applicant to provide a report on the condition of the house. In summary, the consultants' report raised concerns regarding some of the building elements as described in paragraph 3.8. The report noted that the roof junctions had not been fully detailed on the consented plans. The report observed that much of the as-built work did not follow the consented details.
- 5.1.2 I accept the findings of the consultants' report as a basis for ascertaining the state of the observable building work. However, I note the consultants did not carry out any invasive moisture measurements to determine the performance of the observed details against the requirements of the Building Code. I also note that some of the matters raised relate to workmanship and not necessarily to code compliance.
- 5.1.3 In part the building consultants have also assessed the compliance of the as-built work against the requirements of Acceptable Solution for Clause E2 External Moisture, being E2/AS1⁴. E2/AS1 is not a mandatory document and provides only one means of complying with the Building Code.

5.2 Compliance of the house with the Building Code

- 5.2.1 Based on the building consultants' report, I am of the opinion that the following items did not comply with either the building consent or the Building Code at the time the code compliance certificate was issued:
- the junction of the verge (fascia) apron and valley flashing.
 - the defects to the roof flashings (sheets fixed through troughs, sheets draining under flashings)
 - the defects to the plywood cladding at the junctions with the exterior joinery
- 5.2.2 I am of the opinion that the defects described in paragraph 5.2.1 would have been observable at the times that the authority carried out its inspections.
- 5.2.3 I consider there is sufficient evidence to establish that the defects to the roof cladding will enable the ingress of water and therefore the roof cladding does not comply with Building Code Clause E2 External Moisture.
- 5.2.4 I have been supplied with insufficient evidence to establish that the wall cladding does not currently comply with Clause E2 leading to the ingress of moisture likely to cause damage to building elements. However, I consider the nature of the wall cladding defects listed in paragraph 5.2.1 is sufficient evidence to establish that the wall cladding will fail in the future and therefore the wall cladding does not comply with Clause B2 Durability in so far as it relates to Clause E2. I consider the defects to the inter-cladding flashings, the junction of these flashings and the window head flashings, and the defects to the boxed corners to the plywood cladding to be poor workmanship rather than matters of non-compliance.

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.

- 5.2.5 I consider the poor paint finish reported by the building consultant is a matter of continued maintenance which is a contractual matter between the joint owners and the development company. Similarly, the location of the scribes adjacent the internal corners of the weatherboard cladding makes the application of paint to the scribes awkward but in my opinion not impossible. A paint coating will be able to be applied into this junction; however, it may not be possible to apply a paint film to this junction evenly and in accordance with good trade practice.
- 5.2.6 I do not consider the garage is a habitable space and the sealing of the garage door jamb is necessarily a matter of non-compliance. Garages are, by the nature of their use, spaces that will be subject to water ingress, typically from vehicles entering when wet. In my view the water ingress via the jamb of the garage door is not sufficient to cause 'undue dampness or damage' within the garage space.
- 5.2.7 I have been provided with insufficient evidence to determine whether the changes to the fixing of the steelwork to the openings would have lead to the cracking of the plasterboard at these locations (refer paragraph 4.6). However, given the size of the steel members used I consider the steelwork is unlikely to have been bolt-fixed without the use of web cleats. That being the case the steelwork is more likely to have been joined by welding; this fixing method by itself is unlikely to have caused the localised cracking of the plasterboard.
- 5.2.8 While I consider the house did not comply with the building consent and the Building Code at the time the code compliance certificates were issued, I am of the view that satisfactory rectification of the items outlined in paragraph 5.2.1 will result in the house meeting the requirements of the Building Code.

5.3 The decision of the authority to issue the building consent

- 5.3.1 With regard to the building consent issued by the authority, I must consider whether the consented drawings and specification provided reasonable grounds for the authority to form the view that the house when constructed would comply with the Building Code if the building work were properly built in accordance with the plans and specifications submitted. In addressing this question I have considered whether the documentation I have been supplied with provided the authority with reasonable ground in order to issue the building consent.
- 5.3.2 The building consultants were of the opinion that most of the defective work arose from the work not being built in accordance with the consented details. The drawings detail the simpler perimeter roof details, and the valley gutter, but not the termination of the verge (facia) apron flashing and the valley gutter, which has a higher criticality in terms of the roof's on-going performance.
- 5.3.3 While I accept that consent documents are unlikely to describe every junction and joint, I consider the more difficult junctions should be included. The lack of such junctions in the consent documentation will require the authority to be more diligent at time of inspection. I consider the omission of the roof detail described in paragraph 5.3.2 alone is insufficient for me to reverse the authority's decision to issue the building consent. In this respect there would appear to be two approaches available to an authority in such situations, either the detail/s can be clarified before the consent is issued, or the authority carries out more thorough inspections of the as-built work.
- 5.3.4 I conclude that the authority had reasonable grounds on which to be satisfied that the building work covered by the building consent would comply with the Building

Code, and accordingly the authority had sufficient grounds on which to issue the building consent.

5.4 The issuing of the code compliance certificate

- 5.4.1 Section 94 states that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work in question complies with the building consent.
- 5.4.2 In Determination 2008/30 I considered there were two decision steps required to issuing a code compliance certificate. The first step being whether the as-built work complied with the approved building consent, and the second step being whether the as-built work complied with the Building Code. Determination 2008/30 considered the instances where, if the consent documentation lacked all the details required to establish compliance with the Building Code, the code compliance of the un-detailed as-built work could also be taken into account in deciding the validity of an authority's issuing of a code compliance certificate.
- 5.4.3 During the course of construction, amendments were made to the window sizes. Noting this change after an inspection, the authority requested amended plans showing these changes, plus associated bracing revisions. According to the authority's submission of 17 November 2009, these amendments were then provided. The building consent would therefore have been amended appropriately to accommodate these revisions.
- 5.4.4 I accept the building consultants' position that some of the cladding defects arise from the as-built work not having been completed in accordance with the details shown in the approved consent. However, while the deviations from the approved consent are evident these changes by themselves are relatively minor and in my view would not require the corresponding revision of the consent documents. Where as-built variations exist, it falls to the authority to determine that the as-built work is code-compliant.
- 5.4.5 The non-complaint changes from the consented work, along with the assessment of the as-built work that was not detailed in the approved consent (in particular the junction of the verge (fascia) apron and valley flashing), are sufficient for me to accept that the house was not completed in accordance with the building consent or the Building Code. I consider the flashing defects to the roof were readily observable and that it was not reasonable for them to have been accepted as code compliant. Therefore the authority's decision to issue the code compliance certificate should be reversed.
- 5.4.6 While they are not germane to my decision, the departures from the building consent, other than the items listed in paragraph 5.2.1 are relatively minor and are, in the main, arise from poor workmanship. Accordingly, those items alone would not be considered as grounds for the authority to refuse to issue a code compliance certificate in this instance.

5.5 Workmanship and contractual matters

- 5.5.1 I consider some of the matters raised herein are concerned with poor workmanship, rather than non-compliance, and are therefore related to the contractual relationship between the joint owners and the development company. I am not able to determine such matters under section 177 of the Act and I leave these to the joint owners and the development company to resolve.

5.5.2 I also consider matters arising from development company obtaining the amendment to the building consent and the code compliance certificate are also contractual matters between the joint owners and the development company. I note that builders and developers commonly act as agents for owners throughout the building control's process.

5.6 The applicant as a party to the determination

5.6.1 The co-owner has submitted that for the application to have been accepted by the Department it should have been made jointly by both owners. Having taken legal advice on the matter, I am of the view that the Act does not require all owners to apply for a determination.

6. What is to be done now?

6.1 Once the code compliance certificate has been withdrawn, the authority should issue a notice to fix requiring the owners to bring the building up to compliance with the Building Code current at the time the house was constructed. The notice should identify the defects listed in this determination, and also refer to any further defects that might be discovered in the course of rectification. It is not for the notice to fix to specify how the defects are to be fixed. That is a matter for the current owner to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- the house as constructed does not comply with the Building Code current at the time the building consent was issued
- the authority's decision to issue a building consent is confirmed
- the authority's decision to issue a code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 February 2010.

John Gardiner
Manager Determinations