



Determination 2010/026

Refusal to issue a code compliance certificate for a 13-year-old house at 138 Kowhai Avenue, Matarangi, Thames-Coromandel



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the owners N and C Walker (“the applicants”) and the other party is the Thames-Coromandel District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 13-year-old house because it was not satisfied that it complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992).

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.

1.3 The matter to be determined³ is therefore whether the authority was correct to refuse to issue a code compliance certificate. In deciding this, I must consider:

1.3.1 Matter 1: The external envelope

Whether the external claddings to the house (“the claddings”) comply with Clause B2 Durability and Clause E2 External Moisture of the Building Code. The claddings include the components of the systems (such as the fibre cement weatherboards, the windows, the roof cladding and the flashings), as well as the way the components have been installed and work together. (I consider this matter in paragraph 6.)

1.3.2 Matter 2: Other relevant clause requirements

Whether various other items identified by the authority comply with the relevant clauses of the Building Code. (I consider this matter in paragraph 7.)

1.3.3 Matter 3: The durability considerations

Whether the elements that make up the building work comply with Building Code Clause B2 Durability, taking into account the age of the house. (I consider this matter in paragraph 9.)

1.4 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”) and the other evidence in this matter. I have evaluated this information using a framework that I describe more fully in paragraph 6.1.

2. The building work

2.1 The building work consists of a small single-storey detached house situated on a gently sloping site in a medium wind zone for the purposes of NZS 3604⁴. Construction is conventional light timber frame, with timber pile foundations, fibre cement weatherboards, aluminium windows and profiled metal roofing. The house is simple in plan and form and has a low weathertightness risk (see paragraph 6.2).

2.2 The 25° pitch gable roof has eaves of 600mm and verges of about 300mm overall, with a projecting gable to the north. The roof lowers in pitch to 15° over a verandah extending from the projecting bay around the northeast corner, where it becomes the roof to another projecting gable on the east elevation. A free-draining timber deck extends out from the verandah and the east bay at the northeast corner.

2.3 The expert noted no evidence as to timber treatment in the external wall framing. Given the lack of evidence as to the date of construction of the house in 1996, I consider that the external wall framing may not be treated.

³ Under section 177(b)(i) of the Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

3. Background

- 3.1 The authority issued a building consent (No. 96/6473) to the applicants on 15 April 1996 under the Building Act 1991; and carried out all inspections required by the consent conditions during construction.
- 3.2 The applicants have stated that the house ‘was completed 1 December 1996 and was occupied in that month. I note that this is confirmed by an ‘Advice of completion of building work’ form signed by and dated by the applicant 20 January 1997.

3.3 The draft certificate

- 3.3.1 The authority did not carry out a final inspection until 4 September 1997. Although I have not seen a copy of the detailed inspection record, the final inspection was apparently satisfactory and the authority prepared a draft code compliance certificate (“the draft certificate”) although this was not issued to the applicant.
- 3.3.2 The draft certificate was dated 10 December 1997 and included the requirement to provide an ‘electrical certificate’, although I note that the latter had been received by the authority on 25 July 1997. The draft certificate also stated:

Prior to the issue of a full Code of Compliance Certificate, Council requires an “as laid” drain plan (where applicable) to hold for future reference.

- 3.3.3 The draft certificate was not finalised, with a handwritten note over the form stating ‘not issued. As laid [drainage plan is] required’.
- 3.4 It appears that the applicants were not aware that a code compliance certificate had not been issued. There was no further correspondence between the parties until, preparing to sell the house in 2009; their real estate agent (“the realtor”) sought a copy of a code compliance certificate from the authority. Responding by email on 14 April 2009, the authority stated:

Unfortunately 138 Kowhai Avenue has not had its CCC issued yet as we have been waiting for a copy of the As Laid [drainage plan] to be sent in. Once we have received a copy, the paper work can be completed and the CCC will then be issued.

The realtor passed this on to the applicant, adding that it was ‘virtually impossible to sell a house at the moment without a CCC as the banks will not lend without a CCC’.

- 3.5 The applicants then obtained the as-built drainage plan (which was stamped as received by the authority on 14 August 2009) and requested a code compliance certificate. The applicants then apparently assumed that, having supplied the only outstanding item, the certificate had been issued. Following a sale and purchase agreement, the applicants sought confirmation of the code compliance certificate.

3.6 The authority’s response

- 3.6.1 In an email to the applicants dated 13 January 2010, the authority stated that it could not issue a code compliance certificate for the house due to the age of construction, stating that:

The issuing of a CCC creates a 10 year liability on ratepayers & Council underwriters from date of issue, which is likely to be questioned considering the elapsed time of the overall project.

3.6.2 The authority considered that the applicants could either apply for a determination or request a 'modification to B2 Durability', which would have the effect of:

...essentially back dating Councils 10 year liability of Building Code Clause B2 Durability from the date of practical completion, which in this case would be 04/09/1997. The decision to grant such a modification would only be considered after a final re-inspection & extensive site report is undertaken at the owner's expense by a suitably qualified building inspector.

3.7 The application for determination was received on 27 January 2010. The Department sought further information from the applicants, which was received on 3 February 2010.

3.8 In an email dated 27 January 2010, the Department requested the authority to clarify its position with respect to the code compliance of the house, noting that its principal concern appeared to be the weathertightness of the cladding, for which the durability period would be reduced to less than 3 years if a B2 modification was granted. The Department also noted that the house and its cladding was low risk and had apparently performed adequately since installation, which should make its assessment 'relatively straightforward'.

3.9 The authority responded that it was under the impression that the applicants had been happy with its approach and had understood that the authority was in the process of appointing a consultant to handle 'historic consents' in excess of five years.

4. The submissions

4.1 In a letter to the Department dated 20 November 2009, the applicants outlined the background to the situation, noting that the matter was urgent due to the sale of the property and explaining that they felt that the authority 'at present seems to be making very slow progress to resolve this issue'.

4.2 The applicants forwarded copies of:

- the consent documentation
- an inspection summary record
- the recent correspondence with the authority
- the as-built drainage plan
- various producer statements, certificates, photographs and other information.

4.3 The authority acknowledged the application but made no submission.

4.4 A draft determination was issued to the parties on 2 March 2010. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.

- 4.5 The authority accepted the draft without comment and submitted that compliance with Clause B2 was achieved in December 1996.
- 4.6 The applicant also accepted the draft saying he was ‘satisfied with the technical aspects of the determination’ and that the matters of non-compliance would be fixed. The applicant submitted that compliance with Clause B2 was achieved on 20 January 1997 because this was the date on the authority’s form “Advice of completion of building work” that had been completed by the applicant requesting the code compliance certificate.
- 4.7 The applicant also advised that the authority did not respond to the formal request for the code compliance certificate, despite the completion of the draft code compliance certificate noted in paragraph 3.3.2. The applicant advised he was not made aware of the authority’s actions until he had obtained copies of the authority’s records himself, and the applicant submitted he had not been advised of these matters by authority staff when he had made enquiries to the authority. The applicant believed the authority’s response to matters associated with the application for the code compliance certificate had been inadequate.

5. The expert’s report

- 5.1 As mentioned in paragraph 1.4, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 13 February 2010 and provided a report that was completed on 19 February 2010.
- 5.2 The expert noted that the house had been ‘generally well constructed and has been very well maintained’, with the fibre cement weatherboards showing ‘no evidence of cracking or premature deterioration’. The house generally appeared to accord with the consent drawings except for some layout changes to the bathroom.

5.3 Weathertightness

- 5.3.1 The expert inspected the interior of the house taking ‘numerous’ non-invasive moisture readings and no evidence of moisture penetration was noted. The expert also took 17 invasive ‘probe’ moisture readings through skirtings around the house at areas considered at risk, with moisture readings varying from 8% to 12%.
- 5.3.2 The expert noted that windows and doors had satisfactory metal head flashings and were generally well protected beneath the eaves, with ‘neatly fitted’ jamb scribes. However, the expert noted that sealant was required between the top of the window jamb scribe and the head flashing.
- 5.3.3 Apart from the above minor item, which I consider could be attended to as part of regular ongoing maintenance, the expert raised no other concerns regarding the weathertightness and durability of the external envelope.

5.4 Other relevant clause requirements

The expert inspected the house for compliance with the other relevant clause requirements, and made the following comments:

5.4.1 Clause B1 – Structure

The expert noted no signs of any settlement or movement, and I note that the authority inspected and passed the footings and bracing during construction.

5.4.2 Clause C1 – Outbreak of fire

Smoke detectors should be installed within 3 meters of bedroom doors. (However, while these are recommended, they were not required at the time of construction.)

5.4.3 Clause E1 – Surface water

The site is gently sloping with the house sufficiently elevated to allow natural run-off in extreme weather conditions. Rainwater is disposed from downpipes onto the ground, which the expert noted had been permitted by the authority.

However, a solid surface (such as a 400mm x 400mm tile) was required to disperse the water beneath downpipes that discharged onto the ground.

5.4.4 Clause E3 – Internal moisture

The vanity to wall junction requires sealing. Other areas were satisfactory.

5.4.5 Clause F2 – Hazardous building materials

Glazing was marked as safety glass where necessary.

5.4.6 Clause F4 – Safety from falling

The deck is less than 1m above the ground level, and appeared sound.

5.4.7 Clauses G1 to G4

The bathroom, laundry and kitchen facilities were in good working order and met the requirements. There was sufficient ventilation provided.

5.4.8 Clauses G12 and G13 – Water supply and Foul water

Water pressure was sufficient and all facilities operated satisfactorily. Foul water passes via gully traps into main sewers and the drainlayer has provided an as-built plan. I also note that the authority carried out pre-line plumbing inspections.

5.4.9 Clause H1 – Energy efficiency

The ceiling space is insulated with ‘blanket type’ insulation that appears to be R2.2, and the authority carried out pre-line inspections that would have included the wall insulation.

5.5 The expert concluded that, subject to the several minor items identified, the house complied with the requirements of the Building Code and, given regular maintenance, would continue to do so.

5.6 A copy of the expert’s report was provided to the parties on 22 February 2010.

Matter 1: The external envelope**6. Weathertightness**

6.1 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to examine the design of the building, the surrounding environment, the design features that are intended to prevent the penetration of

water, the cladding system, its installation, and the moisture tolerance of the external framing.

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 fibre cement weatherboard cladding is fixed directly to the framing
- the external wall framing may not be treated to a level that provides resistance to decay if it absorbs and retains moisture

Decreasing risk

- the house is in a medium wind zone
- the house is a simple single-storey structure
- the only deck is a free-draining timber deck at ground level
- there are eaves and verge projections to shelter the walls.

6.2.2 When evaluated using the E2/AS1 risk matrix, these features show that all elevations of the house demonstrate a low weathertightness risk rating and, if the details shown in the current E2/AS1 were adopted to show code compliance, the weatherboard cladding would not require a drained cavity.

6.3 Weathertightness performance

6.3.1 Taking account of the expert's report, the claddings appear to have been installed in accordance with good trade practice and to the recommendations of the manufacturers at the time, with the exception of the sealant to the ends of head flashings, as identified in paragraph 5.3.2.

6.4 Weathertightness conclusion

6.4.1 I consider the expert's report establishes that the current performance of the building envelope is adequate because it is preventing water penetration through the claddings at present. Consequently, I am satisfied that the house complies with Clause E2 of the Building Code.

6.4.2 However, the building envelope is also required to comply with the durability requirements of Clause B2. 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 house to remain weathertight. I consider that the expert's report establishes that, given attention to the minor maintenance item identified in paragraph 6.3.1, the house will not be likely to allow the ingress of moisture in the future. Consequently, I am satisfied that the house will comply with Clause B2 of the Building Code (insofar as it applies to E2).

6.4.3 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 Department 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: Other relevant clause requirements

7. Discussion

7.1 I note that the expert has raised the following minor items that require attention, which I consider could be undertaken as part of normal maintenance:

- provision of solid surfaces beneath downpipes (Clause E1).
- sealing between the vanity and the wall (Clause E3)

7.2 Providing the above items are attended to, I consider the expert's report establishes that the building complies with the other relevant clauses of the Building Code.

7.3 I also note that the expert raised the lack of smoke alarms. While these were not a requirement at the time the house was constructed, I strongly urge the applicants to install these.

8. The authority's actions

8.1 The main evidence as to compliance of this house is gathered from the authority's inspection records, the performance of the building over the past 13 years, and an assessment of the visual elements; which may or may not reveal that further evidence needs to be gathered to determine compliance. However, the authority has not visited the house since the only item of outstanding documentation was provided in August 2009 (see paragraph 3.5).

8.2 Five months later, the authority refused to issue a code compliance certificate due to the age of the house (refer paragraph 3.6). While accepting that an appropriate modification of Clause B2 was possible, the authority stated that any consideration of granting this would await a final re-inspection, together with an 'extensive site report' by a 'suitably qualified building inspector'.

8.3 It is reasonable (and indeed necessary) that the authority should re-visit the house, as its last inspection was carried out more than 12 years previously. However, in my view the authority could have satisfied itself as to the nature of the work and the risks associated therewith, before determining the need for 'additional specialist' inspection and reporting.

8.4 In the case of this house, I therefore consider that an initial demand for an 'extensive site report' by a 'suitably qualified building inspector' was unnecessary as:

- the 13-year-old house is a simple single-storey building with fibre cement weatherboards, which was inspected by the authority during construction and has no apparent history of problems

- if a B2 modification is made based on the substantial completion date of 1 December 1996 (refer paragraph 3.2), the 15-year durability for the claddings would reduce to less than 2 years
- the expert's report has confirmed that the assessment of the house was straightforward and no significant defects were identified
- a general inspection by the authority would have been sufficient to readily identify the minor defects that should be attended to. The ability of an authority to observe the performance of a house over a period of years can provide the best test of compliance with a performance building code and would have avoided the need for the applicants to apply for a determination.

Matter 3: The durability considerations

9. Discussion

- 9.1 The authority has concerns 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 completed in 1996.
- 9.2 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).
- 9.3 These durability periods are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building
 - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance
 - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.
- 9.4 In this case the delay between the completion of the building work in 1996 and the applicant's request for a code compliance certificate has raised concerns that various 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. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at a date in, or shortly, after 1996.
- 9.5 The authority submits that completion was achieved in December 1996, whereas the applicant believes the date of the formational application for the code compliance certificate was made is appropriate, being 20 January 1997. There is little difference between the dates and in this instance I accept the applicant's position that

compliance with Clause B2 was achieved on 20 January 1997. In the normal course of events the code compliance certificate would have been issued on or after that date.

9.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability issues raised in this determination.

9.7 I continue to hold that view, and therefore conclude that:

- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements
- (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 in 1996.

9.8 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

10. What is to be done now?

10.1 The owners should address the minor defects outlined in paragraph 6.3.1 and paragraph 7.1 and, on completion, the authority should verify that these items have been satisfactorily remedied.

10.2 If any of the items are not remedied satisfactorily, then a notice to fix should be issued that requires the owners to bring the house into compliance with the Building Code, identifying those items.

10.3 Once minor defects outlined in paragraph 6.3.1 and paragraph 7.1 have been rectified, the authority may issue a code compliance certificate in respect of the building consent amended as outlined in paragraph 9.

11. The decision

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

- the external envelope does not comply with Clause B2 of the Building Code, insofar as it relates to Clause E2
- the house does not comply with Clauses E1 and E3 of the Building Code

and accordingly, I confirm the authority's decision to refuse to issue a code compliance certificate.

11.2 I also determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 20 January 1997
- (b) the building consent is hereby modified as follows:

The building consent is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 20 January 1997 instead of from the time of issue of the code compliance certificate for all the building elements, with the exception of those items that are required to be rectified as detailed in paragraphs 6.3.1 and 7.1 of Determination 2010/026.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 March 2010.

John Gardiner
Manager Determinations