

Determination 2010/56

The refusal to issue a code compliance certificate for a house at 10 Thomas Road, Katikati

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 this determination are:
- Mr and Mrs D Riley, the current owners of the property (“the applicants”)
 - the Western Bay of Plenty District Council, carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).
- 1.3 This determination arises from the decision of the authority not to issue a code compliance certificate in respect of a house.
- 1.4 I take the view that matter for determination², in terms of sections 177(b)(i) and 188, is whether the decision of the authority to refuse to issue a code compliance certificates for the house in terms of section 41(1)(b) of the Building Act 1991 (“the former Act”) is correct.
- 1.5 In making my decision, I have considered the submissions of the parties, the report of a firm of building consultants (“the consultants”) commissioned by the Department to advise on this dispute, and the other evidence in this matter.

2. The building

- 2.1 The house is a two-storey building constructed on a level site. It is of timber-frame construction with timber weatherboard exterior linings and aluminium exterior joinery units. The steeply sloping mansard roof has wide eaves and verge projections, and contains four dormer windows with bay projections.

¹ The Building Act 2004, 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

3. Background

- 3.1 According to the authority, it issued a building consent (No 59058) to the original owners on 6 January 1998. The authority carried out three inspections including the foundations and concrete floor in January and March 1998 and a preline inspection in July 2003.
- 3.2 I note that the authority also issued a building consent (No 57204) for a septic tank on the property that was subject to an undated code compliance certificate.
- 3.3 The current owners have owned the building for approximately 6 years.
- 3.4 Following a request from the current owners, the authority carried out a final inspection in August 2009 and wrote to the applicants on 25 September 2009. The authority was of the opinion that the transition provisions of the current Act meant the “reasonable progress” provision of the building consent process under the former Act was applicable. As the authority considered that reasonable progress had not been made on the house since the building consent was issued, it declined to issue a code compliance certificate in terms of section 43(6) of the former Act.
- 3.5 The authority issued a notice to fix late on 23 September 2009. The notice to fix noted that there was a failure to complete building consent No 59058 satisfactorily, and listed 10 items that required attention. In addition, the notice required the owners to obtain a building consent to complete the unfinished work.
- 3.6 The consultants referred to in paragraph 1.5 were originally engaged by the applicants to assess the flashings that had been retrofitted to the house. The consultants inspected the flashings on 7 and 10 December 2009 and produced a report that was dated 16 December 2009. The report stated that the flashings and associated work relating to the following items were satisfactory:
- ground floor windows and doors
 - dormer bay windows at the upper-level.
- The consultants also verified that the work in question had generally been built in accordance with the Building Code applicable at the time of construction.
- 3.7 The application for a determination was received by the Department on 10 March 2010.

4. The submissions

- 4.1 In a covering letter with their application dated 7 March 2010, the applicants stated that they had been in possession of the house for 5-plus years. Upon discovering that no code compliance certificate had been issued for the property, the applicants requested the authority to carry out a final inspection.
- 4.2 The applicants were happy to comply with the requirements of the notice to fix subsequently issued by the authority and accepted that any code compliance certificate that was issued would be ‘back-dated’ to the time of completion. The house flashings had been rectified and an inspection of the house had shown that the house timbers were sound and that there was no evidence that the building was leaking.
- 4.3 The applicants forwarded copies of:
- two floor plans of the house

- code compliance certificate for the septic tank
 - consultants' report of 16 December 2009
 - additional photographs showing the roof flashing and jamb scribes
 - a producer report from the plumber dated 2 February 2010 warranting that the stormwater drainage had been installed and completed to the requirements of AS/NZS 3500 Part 3.
 - the authority's letter to the applicants dated 25 September 2009.
- 4.4 On May 28 the applicant supplied photos showing roof flashings and jamb scribes had been installed to the dormer bay windows.
- 4.5 The authority wrote to the Department on 6 April 2010, giving some of the background to its consent and inspection processes relating to the house. The authority was of the opinion that, unless its first three inspections could be interpreted as being the "reasonable progress" envisaged by section 41(1)(b) of the former Act, it would be difficult to see how the construction progress could be so described. Though the authority did not formally lapse the consent, it might be seen that this had occurred as per section 41(1)(b) of the former Act.
- 4.6 The authority also referred to a letter sent to the applicants on 23 September 2009 stating that even though the authority was satisfied that the work carried out up to the time of the final inspection was code-compliant, it declined to issue a code compliance certificate. The authority stated that it would be prepared to issue a code compliance certificate for a new building consent for the outstanding work only. Otherwise, the authority would issue a code compliance certificate for a building consent as old as the one in question only if so instructed as a result of the determination decision.
- 4.7 The draft determination was issued to the parties for comment on 9 June 2010.
- 4.8 The applicants responded to the draft in a letter to the Department dated 16 June 2010 and sought non-contentious amendments. The submission noted additional information provided and some typographical errors. In summary the submission noted that:
- The applicants were 'committed to addressing the authority's requirements'. Three of the items included in the notice to fix had now been fixed and the applicants questioned whether any new notice to fix, referred to in paragraph 7.1, should take this into account.
 - There appear to be confusion over some matters, for example the expert questioned the type of smoke alarms installed yet the determination said this was only a recommendation.
- 4.9 The authority responded to the draft in a letter to the Department dated 18 June 2010. The authority accepted the draft with non-contentions comments noting that the building consent was issued on 6 January 1998 and that the concrete floor inspection was carried out on 18 March 1998. The authority submitted that it was reasonable for the work to have been completed during 1998 and that compliance with B2 was achieved on 31 December 1998.
- 4.10 As the applicant has subsequently agreed with the date proposed for compliance with B2 I have amended the determination decision to take this into account. I note

here that the authority has the ability to manage this aspect itself and has, upon application from the owner, the power to amend the original building consent.

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

5. The consultants' report

- 5.1 As set out in paragraph 1.5, with the agreement of the parties I engaged the consultants who had previously inspected and reported on aspects of the house for the owners, to provide some additional photos and to report on which items in the authority's notice to fix had been completed.

- 5.2 The consultants inspected the property and provided me with a report dated 14 May 2010. In summary the consultants were of the opinion that the following items were now code-compliant:

- drainage branch from the house to the septic tank
- septic tank vent
- stairwell handrail
- hot water cylinder
- silicone sealing to the main kitchen bench

- 5.3 The report raised concerns regarding the remaining items listed on the notice to fix as follows:

- Some inadequate waterproofing in respect of some flashings and roof junctions. (These items have now been rectified)
- At some locations the weatherboards are incorrectly fixed, lack sufficient waterproofing at junctions and some rustic plugs are missing.
- Painting of rear barge boards is not complete and the underside of one garden window is not painted.
- The silicone sealing to the secondary kitchen bench has not been installed.

(I note that some of these items have now been completed)

- 5.4 The expert noted that the correct type of smoke alarm has not been installed on the ground floor level. The applicants advise has matter now been rectified.

- 5.5 I note that the provision of domestic smoke detectors in the Acceptable Solution for Building Code Clause F7 "Warning Systems", F7/AS1, did not come into effect until April 2003. The consent was issued in January 1998 and any subsequent changes to the Building Code (and any associated changes to the relevant Acceptable Solutions) that occurred after this date cannot be enforced retrospectively.

6. Discussion

- 6.1 The consultants are of the opinion there are still some items relating to the notice to fix that require attention. However, I consider that the matter that I have to decide is

whether a code compliance certificate can be issued some 12 years after the building consent was issued.

- 6.2 I agree with the authority's contention that the matter in question should be considered in terms of the former Act. This is in accordance with the transitional provisions of section 436 of the current Act.
- 6.3 The authority has stated that unless its first three inspections can be interpreted as being the reasonable progress envisaged by section 41(1)(b) of the former Act, it would be difficult to accept that such progress has been made regarding the house. Reasonable progress is not defined, but in this case work requiring three inspections could be sufficient to be considered reasonable progress.
- 6.4 Section 41(1)(b) of the former Act states that a building consent shall lapse and be of no effect unless "reasonable progress" on the building work has been made within 12 calendar months after work has commenced.
- 6.5 The time lapse between reasonable progress having been made within 12 months of the issue of the building consent and request for a final inspection is not in itself grounds to lapse the consent or decline to issue a code compliance certificate in terms of section 43 (6) of the former Act.
- 6.6 In addition I note the authority did not take any action to cancel the consent after the pre-line inspection in July 2003.

7. What is to be done now?

- 7.1 The authority should withdraw the original notice to fix and issue a new notice that requires the owners to bring the house into compliance with the Building Code. The new notice should show the outstanding items listed in paragraph 5.3, but not specify how those defects are to be fixed. However, I acknowledge the applicants' advice that the majority of these items have now been fixed and the authority should take this into account after first verifying this is the case.
- 7.2 It is not for the notice to fix to specify how any defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owners to propose and for the authority to accept or reject.
- 7.3 I suggest the applicants should then produce a response to new notice to fix in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, for the rectification of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 7.4 Once the matters set out in the new notice to fix have been rectified to its satisfaction, the authority should then issue a code compliance certificate.

8. The decision

8.1 In accordance with section 188 of the Act, I determine that the decision of the authority to refuse to issue a code compliance certificate in terms of section 41(1)(b) of the former Act is reversed.

8.2 I also determine that:

- a) All the building elements installed in the house, apart from the items that are to be rectified, complied with Clause B2 on 31 December 1998.
- 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 31 December 1998 instead of from the time of issue of the code compliance certificate for all the building elements as set out in Determination 2010/56.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 June 2010.

John Gardiner
Manager Determinations

A1 Appendix A

A.1 The relevant provisions of the former Act are:

34 Processing building consents

- (3) After considering an application for a building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

43 Code compliance certificate

- (3) ...the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that—
- (a) The building work to which the certificate relates complies with the building code...
- (5) Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.
- (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

A.2 The relevant provisions of the current Act are:

433 Transitional provision for building consents granted under former Act

- (1) A building consent that was granted under section 34 of the former Act before the commencement of this section must, on that commencement, be treated as if it were a building consent granted under section 49.
- (2) However,—
- (a) section 93 does not apply; and
- (b) accordingly, a building consent authority is not required to issue a code compliance certificate for the building work concerned within the period specified in that section.