



Determination 2011/074

Regarding the refusal to issue a code compliance certificate due to a lack of inspections for an office/studio building at 16A Rotoiti Street, Dunedin



1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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:

- the applicant, Mr M Hodges, (“the previous owner”)
- the owners, Mr and Mrs A and C Spain (the owners”) acting through a legal adviser
- the Dunedin City Council (“the authority”), carrying out its duties and functions as a territorial authority or a building consent authority.

1.3 This determination arises from the decision of the authority to issue a code compliance certificate for the 17-year old office/studio because, as it did not have the opportunity to undertake any inspections during the construction of the building, it

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

cannot be satisfied that the building work complies with certain clauses² of the Building Code (First Schedule, Building Regulations 1992).

1.4 The authority has also indicated that, should the owners make a formal application, the authority would refuse to amend the building consent for the two buildings on the site so that the subject office/studio would have its own separate building consent and could be issued with its own code compliance certificate (refer paragraph 4.3).

1.5 I therefore take the view that the matters to be determined³ are:

- whether the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate. In making this decision, I must consider whether the elements that make up the building work comply with the various clauses of the Building Code that was current at the time the building consent was issued.
- whether the authority is correct in the proposed exercise of its powers to refuse to amend the building consent to allow for separate building consents for the two buildings on the site.

1.6 In making my decision, I have considered the submissions of the parties, the report of an independent expert (“the expert”) commissioned by the Department to advise on this dispute, and the other evidence in this matter.

1.7 I note that the relevant legislation is set out in Appendix A.

2. The building

2.1 The building work in question consists of a split-level single-storey detached office/studio situated on a steeply sloping site in a sea spray zone. The building is timber-framed and is supported on a pole foundation system. The roof, which is clad with nail fixed unpainted corrugated iron, consists of pitched and curved elements with complex junctions and an internal gutter system.

2.2 The majority of the walls of the building are clad with pre-finished corrugated steel that is vertically installed and directly nail fixed to the framing. There are small areas of fibre-cement cladding directly fixed to the framing at the gable ends of the curved roof. Timber slatted decks are installed at the north and south elevations.

2.3 The expert has been unable to determine the treatment, if any, of the timber wall framing.

3. Background

3.1 The authority issued a single building consent (No 940276) early in 1994 under the Building Act 1991 (“the former Act”) for two separate buildings on the site. One building was a house and the other building was the office/studio.

3.2 Due to a change in the authority’s computer systems the reference number of the original consent was changed to No 1994-324711. No other changes were made to the consent.

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 Under sections 177(1)(b), 177(2)(a) and 177 (2)(d) of the current Act

- 3.3 The only inspections undertaken by the authority during the construction of the office/studio were for foundations and ground bearing in 1994. I have not received any further evidence of other inspections having been carried out during construction. It appears that no final inspection was called for at the time of completion.
- 3.4 A site inspection record indicates that further inspections were undertaken on the house.
- 3.5 Sometime in 2008 the property was divided into two separate lots, each lot containing one of the two consented buildings.
- 3.6 On 17 September 2010 the authority carried out a final inspection of both buildings at the request of the previous owner. I have not been provided with a copy of the inspection record.
- 3.7 In a letter dated 20 September 2010, the authority informed the previous owner that an application for a code compliance certificate would be refused because, due to a lack of inspections, the authority could not establish that the building work complied with the Building Code. The authority indicated its concerns were mainly regarding Clauses B1 Structure, B2 Durability and E2 External Moisture.
- 3.8 The previous owner provided the authority with as-built drawings dated 9 April 2011 for the office/studio building.
- 3.9 On 18 April 2011 the Department received an application for a determination.

4. Submissions

- 4.1 The previous owner forwarded copies of:
- the correspondence from the authority dated 20 September 2010
 - the site inspection record dated 29 August 2008
 - some building consent documentation and approved plans
 - the as-built plans dated 9 April 2011.
- 4.2 The authority acknowledged the application and provided copies of its inspection documents relating to the property.
- 4.3 In an email to the Department on 25 May 2011 the authority stated that it would only be prepared to split the original consent and amend the application for a code compliance certificate if so directed by the Department. The authority also acknowledged that it had received the as-built plan for the office/studio.
- 4.4 A draft determination was sent to the parties for comment on 20 July 2011. The authority accepted the draft without comment.
- 4.5 The previous owner did not accept the draft. In a submission received by email on 3 August 2011, the previous owner provided details that he believed ‘covered most of the issues raised in the expert’s report’, and contended that there were ‘no grounds for taking any action’ on the following three items noted in the draft:
- The western windows had not leaked and had cap flashings and sealant applied to the sills.

- The curved balustrade does not ‘require sealing as it is constructed from tandalised [timber]’.
- The flashings to the roof penetrations were not causing leaks and have been installed correctly.

The submission also detailed proposed remedial work for each of the items raised in the draft determination.

4.6 In response to the submission of the previous owner I note the following:

- The weathertightness of the western windows should be checked as part of the recommendations contained in paragraph 9.2
- The balustrade is partly sheltered but nonetheless I do not consider it is reasonable for the balustrade to allow water ingress even if the framing is treated to the level advised.
- The expert’s report shows some of the roof penetrations are not in a poor condition.
- The details included with the submission should be submitted to the authority for its consideration in response to the notice to fix (refer paragraph 9.2).

4.7 The owners also did not accept the draft determination. In a submission dated 3 August 2011, the owners’ legal adviser noted a lack of clarity in the determination between the owners and the previous owner, sought to clarify the responsibilities of the previous owner with respect to the sale and purchase agreement for the property, and noted errors of a typographical nature.

4.8 I have amended the determination as appropriate.

5. The expert’s report

5.1 As described in paragraph 1.6, I engaged the services of an expert, who is a member of the New Zealand Institute of Building Surveyors, to advise me. The expert visited the property on 20 June 2011, and provided me with a report that was completed on 28 June 2011. Copies of this report were forwarded to the parties on 30 June 2011.

5.2 The expert described the building and the background to the dispute, and noted that there were differences between the original consented drawings and the completed building. These differences included:

- changes to parts of the roof from pitched to curved profiles
- minor changes to the WC/shower area
- the installation of a timber framed wall forming a second bedroom.

5.3 The expert carried out a series of invasive moisture level inspections and found areas of medium to very high levels of moisture ingress. The removal of a small area of plasterboard in the lounge revealed decayed timber framing. The expert also noted that water was dripping from the corrugated steel ceiling in the lounge and also beneath the kitchen window.

5.4 The expert considered that the external cladding and its fixings were in good condition and were not showing any signs of degradation. However, it was not

known whether the paint coatings or the nail fixings complied with the manufacturer's specifications for the sea spray zone.

5.5 The expert summarised those building elements that he considered to be non-compliant as follows:

- Clear sealant had been applied to glass/sill junctions, notably to the high windows overlooking the roof to the west, which suggest leaks in the past.
- The window flashings allow water to pond at critical folded junctions.
- The window head flashings are not turned up at their ends.
- The flashing details at the circular window are not robust and do not constitute a weathertight seal.
- There are no visible mechanical flashings fitted to meter box.
- The threaded rod fixings at the pole foundations show signs of corrosion.
- There is no capillary break between the un-painted fibre-cement sheets and timber deck beam.
- Black polythene membrane had been used as a flashing at the critical deck/boundary joist junction.
- The deck beam/pole connection is poorly secured.
- There are significant risks for moisture ingress at the feature beam.
- The boxed corner flashings for the cladding were fitted without swages or folds to manage water ingress.
- The hose tap penetrations are not sealed.
- The paint surfaces show severe signs of degradation.
- The timber cappings to the entry balustrade wall were top fixed and the joints are unsealed.
- The roof flashings are poorly detailed.
- The roof penetration flashing(s) are leaking and allowing water to pond on the roofing.
- The parapet/roof junction detail is unlikely to be robust.
- The curved barge flashings are poorly detailed.
- No scupper has been formed at the internal gutter that would channel water directly into the spouting.
- The timber balustrade as constructed had a height of only 770mm and nails had been used to connect the vertical balustrade members to the beams.
- Surface water is discharging over the ground beneath the pole foundations.
- The ground levels slope down towards the building.

5.6 The expert also noted that there was evidence that some maintenance requirements had not been carried out.

- 5.7 Copies of the expert's report were forwarded to the parties on 30 June 2011.
- 5.8 In a letter to the Department dated 8 July 2011, the designer of the office/studio commented on the expert's report. The designer took issue with some aspect of the report and I summarise these comments as:
- An inspection of the location in the lounge opened up by the expert revealed an incorrectly installed cladding joint. The designer was of the opinion that this was an isolated incident and was not indicative of the "general weather tightness of the building".
 - To the designer's knowledge, there is no sub-floor area that shows signs of water leakage.
 - Despite some weeks of heavy rain, there was no evidence of further moisture ingress into the lounge. The designer considered that any leak would relate to the pipe penetration that may require sealing.
 - As to the leak in the kitchen, this was thought to be a maintenance item that could involve the replacement of sealant and an adjustment of the external box flashing.
 - While the circle window is fully weathertight, the frame is in need of repainting. The designer attributed the elevated moisture at the base of the window to condensation rather than to the incursion of water. There is no evidence that the nail fixings referred to by the expert are loose.
 - The feature beam has a metal flashing with a drip edge that caps the fibre-cement cladding.
 - As the exterior handrail is constructed with tanalised timber, there is no need for it to be waterproofed.
 - The driveway above the dwelling catches and diverts surface water from the building into the storm water system. While there is a small catchment area above the dwelling, there is no evidence that moisture is running under the foundations.
- 5.9 The designer accepted that there were areas that required some rectification to minimise the risk of future leaks.

6. The compliance of the building work

- 6.1 Section 436(3)(b)(i) of the current Act states that a code compliance certificate for building work carried out under a building consent granted under the former Act may only be issued if the territorial authority is satisfied that the building work complies with the building code that applied at the time the building consent was granted.
- 6.2 It is clear from the information that has been provided to me in the expert's report that the office/studio as built does not comply with the Building Code that was current at the time the building was consented. I am also of the opinion that the majority of the defects were present at the time the building was constructed. I further note that the completed building does not match the consented plans in a number of respects.

- 6.3 In addition, there has been a lack of inspections during the construction of this house. Inspections were required in this instance in order to ensure that building work was code-compliant. It is reasonable for an authority to be concerned where inspections have not been carried out, and as it requires evidence of compliance the authority may decline to issue a code compliance certificate.
- 6.4 I also note that, in addition to the lack of inspections and variations from the consented plans, no other evidence has been provided to the authority or submitted to the Department as to the compliance of the office/studio as built.
- 6.5 The building designer has raised some issues in regard to the expert's report that I have noted. However, while I accept that the designer's comments have some validity, in general I do not consider that they impact significantly on my acceptance of the expert's report. In particular I note that photograph 9, as attached to the expert's report, clearly indicates to me that surface water is discharging under the building.
- 6.6 Based my comments in the previous paragraph and on the expert's observations set out in paragraph 5.5, which I accept, I find that the building as constructed does not comply with Clauses B1, B2, E2, and F4 of the Building Code that was current at the time the studio/office was constructed. Accordingly, I am of the opinion that the authority acted correctly when it refused to issue a code compliance certificate.
- 6.7 In respect of my findings, I note that in its letter to the previous owner dated 20 September, the authority's concerns seemed only to relate to Clauses B1, B2, and E2. From this correspondence, it is my understanding that the authority does not have any concerns regarding any of the other Building Code clauses that relate to the office/studio.
- 6.8 In view of the defects existing in the office/studio building, I consider that there may be similar non-compliant items in the house, which apparently was built at the same time as the office/studio but which does not form part of this determination.

7. Amending the building consent

- 7.1 The authority issued a single building consent that covered both the house and the office/studio. This means that, unless the building consent is amended, only a single code compliance certificate can be issued for the two buildings. Since the building consent was issued, the land has been divided into two separate titles, each containing one of the two consented buildings.
- 7.2 The previous owner has sought this determination so that a code compliance certificate can be issued for the office/studio building. In order for that to happen, the existing building consent would need to be amended, so that the code compliance of the office/studio can be dealt with separately from the code compliance of the house.
- 7.3 The authority is reluctant to divide the original consent but have stated that they would do so if directed by way of a determination (refer paragraph 4.3).
- 7.4 The amendment of a consent in respect of a number of buildings was one of the matters considered in Determination 2009/56 issued on 30 July 2009, and this approach has been confirmed in subsequent determinations. Determination 2009/56

decided that the authority had the power to create a separate consent for just one of the buildings.

- 7.5 For the reasons set out in Determination 2009/56, I take the view that, as the office/studio is a separately owned free-standing building, the authority can amend the original building consent to create a separate building consent for the office/studio. This amendment of the original consent will enable the owner, or someone acting on their behalf, to apply for a code compliance certificate for the office/studio independent of the owner of the house.
- 7.6 An amendment to the consent would not be substantive and so does not raise the concerns traditionally associated with the issuing of retrospective consents after building work has been undertaken. The building work that has been undertaken was undertaken lawfully pursuant to a building consent.
- 7.7 The authority should also include in the revised consent the changes to the original consented documentation noted by the expert in paragraph 5.2.

8. Durability

- 8.1 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 1995.
- 8.2 The relevant provision of Clause B2 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).
- 8.3 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.
- 8.4 In this case, the delay between the completion of the building work in 1995 and the previous owner’s request for a code compliance certificate may well raise concerns that various elements of the building are now well through or beyond their required durability periods. They consequently would no longer comply with Clause B2 if a code compliance certificate were to be issued effective in the near future.
- 8.5 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.

- 8.6 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 if requested by, or on behalf of, an owner
 - (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 1995.
- 8.7 The authority has informed me that it has a process whereby owners of buildings more than 5-years old can complete a simple amendment form that details the date “practical completion” achieved. If the practical completion date is not appropriate for any reason, then the authority will agree on a date when the elements were put into service. I am of the opinion that, once the authority considers that it is appropriate to issue a code compliance certificate for the building, this procedure should be applied. The code compliance certificate should also record the amended date in reference to Clause B2.
- 8.8 If the above process is followed, then I 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.

9. What is to be done now?

- 9.1 A notice to fix should be issued that requires the owners to bring the office/studio into compliance with the Building Code, identifying the defects listed in paragraph 5.5 and referring to any further defects that might be discovered in the course of investigation and rectification, but not specifying how those defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the unit brought to compliance with the Building Code. That is a matter for the owners to propose and for the authority to accept or reject.
- 9.2 I suggest that the owners and the authority adopt the following process to meet the requirements of paragraph 9.1. Initially, the authority should issue the notice to fix. The owners should then produce a response to this in the form of a detailed proposal, together with suitable amendments to the plans and specifications, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified matters. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 9.3 I also note that changes from the consent drawings have been identified and I leave the matter of appropriate documentation of these changes for the authority to resolve with the previous owner.
- 9.4 Once the matters set out in in paragraph 9.1 have been rectified to its satisfaction, the authority should issue a code compliance certificate in respect of the building consent amended herein and, if so requested by or on behalf of the owners, the authority is to amend the original consent to create two separate building consents as required and as detailed in paragraph 7 above.

10. The Decision

- 10.1 In accordance with section 188 of the Building Act 2004, I determine that the building does not comply with Clauses B1, B2, E2, and F4 of the Building Code that were current at the time that the building consent was issued, and accordingly I confirm that the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate.
- 10.2 I also determine that, if so requested by or on behalf of the owners, the authority is to amend the original consent to create two separate building consents as required and as detailed in paragraph 7 above.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 August 2011.

John Gardiner
Manager Determinations

Appendix A: The relevant legislation

A.1 The relevant section of the current Act is:

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
 - (a) remains in force as if this Act had not been passed; but
 - (b) must be read as if—
 - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
 - (ii) section 43(4) were omitted.