



## Determination 2012/072

### Regarding the authority's exercise of its powers in refusing to issue a code compliance certificate for a 9-year-old house at 12 Parkwood Place, Hamilton



#### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to the determination are:
- T Burgess, one of the co-owners of the house (“the applicant”)
  - Hamilton City Council, carrying out its duties as a territorial authority or building consent authority.
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers of decision when it refused to issue a code compliance certificate for the house, because it was not satisfied that the house complied with Clauses B2 Durability and E2 External moisture of the Building Code<sup>3</sup> (First Schedule, Building Regulations 1992) that were current at the time the building consent was issued.

<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under sections 177(1)(b), and 177(2)(d) of the current Act

<sup>3</sup> In this determination, unless otherwise stated, references are to sections of the current Act and references to clauses are references to the Building Code

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

1.5 The relevant sections of the current Act are set out Appendix. A

## 2. The building work

2.1 The building work in question consists of a single-storey house and attached garage situated on a level site in a medium wind zone for the purposes of NZS 3604<sup>4</sup>.

2.2 The house is of timber-frame construction built on concrete ground floor slabs and foundations. The steeply pitched roofs are covered with corrugated pre-finished metal roofing and generally have 600mm eaves and verge projections. The exterior walls are lined with 60mm polystyrene EIFS<sup>5</sup> sheets directly fixed to the framing and finished with a textured plaster overlay.

2.3 The expert did not take samples of the exterior wall framing, but noted that the consent specification required the bottom plates to be treated to a H3 level and the remaining wall elements to a H1 level.

## 3. Background

3.1 The authority issued building consent No. 2003 07161 (which I have not seen) for the house some time in 2003, under the Building Act 1991 (“the former Act”).

3.2 The authority carried out various inspections of the building work during its construction. According to the expert, the authority inspected and approved all stages of the construction.

3.3 Following an inspection in December 2003, the authority issued an interim code compliance certificate. The interim certificate, which was dated 9 December 2003, referred to the following areas requiring attention:

- Repair damage to building
- Producers (*sic*) statement on poly required
- Smoke detector to be fitted
- Insulation to be tidied up
- Electrical cert required.

3.4 It appears that no code compliance certificate was sought and the applicant purchased the property in November 2004.

3.5 On 23 August 2012 the authority inspected the property; I have not seen a copy of the inspection record. In a subsequent letter to the applicant dated 2 September 2012 the authority advised that it would not be issuing a code compliance certificate as:

Due to the lapse in time HCC can not be satisfied on reasonable grounds that the building complied or will continue to comply with provisions of the Building Code for

- 1) Durability on terms of B2
- 2) Weathertightness in terms of E2

Have been met and maintained in the period since the issuing of the building consent.

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<sup>4</sup> New Zealand Standard NZS 3604:1999 Timber Framed Buildings

<sup>5</sup> Exterior Insulation and Finish System

3.6 The Ministry received an application for a determination on 12 September 2012.

#### **4. The submissions**

4.1 In a covering letter dated 4 September 2012 forwarded with the application, the applicant described some of the background to the dispute and submitted that the property was in good condition and no weathertightness or structural issues had arisen in the nine years since the house was built. The applicant also noted that the authority had not advised that final code compliance certificate had not been issued, despite the authority having visited the site in 2007 to inspect a new swimming pool.

4.2 The applicant attached copies of the following:

- The authority's code compliance certificate inspection report of 9 December 2003.
- The interim code compliance certificate dated 9 December 2003.
- The Producer Statement dated 11 November 2003 and the Workmanship Guarantee dated 27 September 2004, as issued by the cladding installer.
- The electrical certificate of compliance.
- The letter of 2 September 2012 from the authority.

4.3 In a letter to the Ministry dated 10 September 2012, the authority noted that the building consent was issued under the former Act. Given the length of time that had lapsed since the house had been constructed, the authority was 'not in a position to issue a code compliance certificate' on the grounds that the authority could not be satisfied on reasonable grounds that the building met the provisions of Clauses B2 and E2.

4.4 The authority also stated that it could not be satisfied that the house had been maintained to the standard required to ensure continual code-compliance. The ongoing compliance of Clauses B1 and B2 was dependant on the maintenance and performance of the cladding system. On that basis the authority did not accept that the house complied with Clause B2 insofar as it related to Clause E2.

4.5 The draft determination was issued to the parties for comment on 23 October 2012. The applicant accepted the draft without comment on 29 October 2012.

4.6 The authority responded to the draft in a letter to the Ministry dated 20 November 2012. The authority did not accept the draft determination and submitted that:

- it had given 'adequate reasons' for declining the code compliance certificate thereby meeting the requirements of section 95A
- 'it [was] critical that any authority exercise a duty of care to safeguard the interests of all parties when making a decision on a building such as this where in fact the durability of the building is questionable given the timeframe that has lapsed since construction'
- the decision in the draft determination that the authority had not exercised its powers correctly was 'unfounded' as the authority was an 'approved building consent authority' that had been audited by the Ministry as part of the approval process.

- The authority also noted the ‘changes in methodology that are now applied to claddings as opposed to when this building was constructed.’

4.7 In response to the authority’s submission I note the following:

- The authority’s decision that the work was not complaint is based on the time since the work was completed, which I do not believe provides an adequate reason for such a decision. In my view such a decision should be based on the results of any site inspection completed by the authority, taking into account the nature of the building work and its associated weathertightness risk profile. While the authority inspected the property in December 2011, I have not been provided with the inspection report, nor does it appear to have been provided to the applicant.
- The authority is required to assess compliance against the requirements of the Building Code that were in place at the time the consent was issued in 2003. The changes in the Compliance Documents since that time can only have a limited bearing in its assessment of compliance. However, the current Compliance Documents would have assisted the authority in assessing the building’s weathertightness risk profile.
- An authority’s approval as a building consent authority does not, of itself, lend weight to the arguments presented by the authority, or mean that all the decisions it makes should be considered to be correct.

I have taken the authority’s comments into account and amended the determination accordingly.

## 5. The expert’s report

- 5.1 As described in paragraph 1.4, I engaged the services of an expert who is a registered architect<sup>6</sup> and a member of the New Zealand Institute of Architects, to assist me. The expert examined the house on 27 September 2012 and produced a report that was completed on 8 October 2012. Copies of this report were forwarded to the parties on 15 October 2012.
- 5.2 The report described the house in general terms and gave some of the background to the dispute. The expert stated that the construction quality was above average and that ‘very good’ maintenance had been carried out. Generally, the cladding was well fixed and aligned and there was no evidence that the plaster finish had cracked or contained any other imperfections. The roof and exterior joinery flashings were ‘tidy and effective’.
- 5.3 The expert commented on the outstanding items the authority had raised in conjunction with its issuing of the interim code compliance certificate, as follows:
- The only damage to the house identified by the expert was in relation to some minor indentations in the cladding at the corner of the garage. The expert was of the opinion that this small amount of damage did not compromise the integrity of the cladding.
  - The expert had sighted the producer statement issued by the cladding installer.

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<sup>6</sup> Registered Architects are treated under the Registered Architects Act 2005 as if they were licensed in the building work licensing class Design 3 under the Building (Designation of Building Work Licensing Classes) Order 2010.

- Smoke detectors had been installed both in the entrance hall and the bedroom service corridor.
  - The amount of ceiling insulation batts and their thickness and installation appeared satisfactory.
  - The expert had sighted the electrical compliance certificate issued by the electrician who had carried out the work on the house.
- 5.4 The expert carried out non-invasive moisture inspections on the external walls of the house and no elevated readings were recorded. Invasive moisture tests were carried out at two locations that the expert considered to be at risk; at the bottom plate on the west elevation where there is insufficient ground clearance and in the soffit below a roof-to-wall junction on the south elevation. In each instance, the moisture levels were low, and in the expert's opinion, there were no weathertight issues arising at these areas.
- 5.5 Regarding Clause B2, the expert referred to the specification that required the bottom plates of the external wall framing to be H3 treated and the remainder of the exterior wall framing to be H1 treated. It was noted that the authority had carried out all the required inspections, including a preline inspection undertaken on 10 October 2003. Based on this information, the expert was of the opinion that this inferred that the durability requirements of the Building Code had been met at those times.
- 5.6 As to Clause E2, based on the expert's visual observations and the results of the moisture tests that were carried out, the expert was of the opinion that there was no evidence of moisture ingress through the building envelope. However, the expert expressed concern regarding the raised pebble garden along the west elevation, which in some instances was in contact with the base of the cladding. The expert considered that this garden should be lowered to ensure that the correct minimum clearance was provided at the cladding base.

## **6. Discussion**

### **6.1 Establishment of compliance with the Building Code**

- 6.1.1 The transitional provision in section 436 of the current Act requires the authority to consider an application for a code compliance certificate under the former Act. Section 43(3) of the former Act (as modified by section 436(3) of the current Act) requires the authority to issue a code compliance certificate 'if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code that applied at the time the building consent was granted'.
- 6.1.2 The authority's concerns relate primarily to the age of the building work and its current compliance with Clauses B2 and E2 (refer paragraphs 3.5 and 4.3). In regard to this house, the evidence as to compliance is able to be gathered from the authority's inspection records, the issue of the interim code compliance certificate, the performance and maintenance of building including the exterior envelope over the past twelve years, and a visual assessment of remaining building elements. This methodology has been applied in previous determinations to which the authority was a party.
- 6.1.3 I note that in this instance the authority carried out an inspection prior to making its decision to refuse to issue a code compliance certificate. I have not seen the inspection record relating to that inspection, nor has the authority identified any

items it considers to be non-compliant, or that required specific evidence to be gathered by the applicant to verify the performance.

6.1.4 I consider that the moisture readings and the other evidence provided by the expert indicate that there is no evidence of moisture penetration into the exterior envelope and establishes that the current performance of the building envelope to the house is adequate. I also accept the expert's opinion that the maintenance of the building was "very good". Consequently, I am satisfied that the house at present complies with Clause E2.

6.1.5 I acknowledge the expert's concerns regarding the pebble garden at the west elevation, and I consider it would be prudent to lower the pebble path to provide adequate ground clearance in this area to ensure continued compliance with Clause E2.

## **6.2 Notice provided under section 95A**

6.2.1 The authority is of the opinion it has exercised its powers correctly in respect of the reasons for its refusal to issue the code compliance certificate under section 95A. The reasons given are primarily based on the age of the building work (as stated in its letter to the applicant dated 23 August 2012; refer paragraph 3.5).

6.2.2 As noted in paragraph 4.7, although the authority's inspection would indicate it had turned its mind to the compliance of this house, no information resulting from that inspection has been provided that considers the compliance of the building work in detail, identifies specific areas of non-compliance, or seeks verification of the performance of specific building elements: rather the authority appears to be applying a 'blanket policy' to the house in response to its age and construction.

6.2.3 For these reasons I consider the authority incorrectly exercised its powers in respect of the reasons provided to the applicant under section 95A when it refused to issue the code compliance certificate.

## **6.3 Durability concerns**

6.3.1 I accept that the age of the building work raises concerns regarding compliance with Clause B2.3.1 taking into consideration the age of the building work and the delay in seeking a code compliance certificate.

6.3.2 I continue to hold the views expressed in previous relevant determinations; that an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009<sup>7</sup>). As such I leave this matter to the parties to resolve in due course.

6.3.3 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.

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<sup>7</sup> Codewords articles are published by the Department and are available on the Department's website at [www.dbh.govt.nz/codewords-index](http://www.dbh.govt.nz/codewords-index)

## **7. What happens next?**

- 7.1 The applicant should lower the pebble garden on the west boundary, and then apply to the authority for a code compliance certificate. Based on the decisions reached in this determination, I am of the opinion that there is no reason why the authority should not then issue the certificate, subject to the durability moderation as set out in paragraph 6.3.2.

## **8. The Decision**

- 8.1 In accordance with section 188 of the Building Act 2004, I determine that
- the house complies with Clauses B2 and E2 of the Building Code that was current at the time the building consent was issued
  - the authority did not exercise its powers correctly when it refused to issue a final code compliance certificate, and this decision by the authority is reversed.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 November 2012.

John Gardiner  
**Manager Determinations**

## Appendix A: the Legislation

### A.1 The Building Act 2004

#### **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.