



Determination 2013/028

Regarding the refusal to issue a code compliance certificate for 10-year-old alterations to a house at 317 Tai Tapu Road, Christchurch

1. The matters 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 and Assurance, 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:

- the owner of the house, Gunby Perham Family Trust, (“the applicant”) acting through one of the trustees as an agent
- Selwyn District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for 10-year-old alterations to the house. The matter to be determined² is whether the authority correctly exercised its power of decision when it refused to issue the code compliance certificate.

1.4 In accordance with section 95A of the current Act the authority provided the owners with four reasons for its refusal (refer paragraph 3.7). In order to determine the matter I have considered each of those reasons as follows:

- Whether the delay between the practical completion of the building work in 2003 and the application for a code compliance certificate in 2013 is grounds for refusal (items 1 and 2 of the authority’s refusal). I consider this in paragraph 5.2.
- Whether the lack of inspections carried out by the authority during construction is grounds for refusal (item 3 of the authority’s refusal). I consider this in paragraph 5.3.
- Whether insulation installed without consent first being obtained or an amendment to the consent sought, and the compliance of that building work, is grounds for refusal (item 4 of the authority’s refusal). I consider this in paragraph 5.4.

¹ The Building Act, Building Code, compliance documents, past determinations and guidance documents issued by the Ministry are all available at www.dbh.govt.nz or by contacting the Ministry on 0800 242 243.

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

1.5 In making my decision I have considered the submissions and the other evidence in this matter. The legislation referred to in this determination is set out in Appendix A.

2. The building work

2.1 The building work comprises alterations to an existing 1970s single-storey detached house.

2.2 Construction appears to be of light timber frame, with perimeter concrete foundations and timber piles, split stone veneer cladding to most elevations, with a monolithic cladding to part of the north elevation, pitched corrugated steel roofing, and a mix of timber and aluminium joinery. Eaves protection is provided to most exterior walls.

2.3 The alterations were largely carried out within the existing footprint of the house, with the exception of the addition of a concrete patio and pergola to the north and west elevations, and included:

- extending the kitchen into a former study area at the northern end
- some external joinery removed and others replaced
- fitting of new bracing panels
- the alteration of internal walls, including renovation of an existing bathroom, and installation of an ensuite
- the installation of a log burner
- a new floor installed to the lounge.

2.4 The consultant's report (refer paragraph 3.8) notes the owner 'confirmed onsite the timber for the [alterations] was all treated and that building paper was installed to the inside face of the [split stone veneer]'. It appears the majority of the exterior wall framing is original (Rimu).

3. Background

3.1 On 15 May 2002 the authority issued the building consent (No. 020489) under the Building Act 1991 ("the former Act") for the alterations. The consent conditions included a specified list of inspections required.

3.2 The following inspections were carried out by the authority during construction:

- 17 May 2002 Verandah foundation – okay to proceed
- 29 May 2002 Verandah slab – okay to pour
- 5 June 2002 Sanitary and stormwater drainage – "passed"

Construction continued without further inspections being carried out.

3.3 The application for a code compliance certificate (dated 20 March 2013) describes the building work as having been completed by 31 May 2003; the applicant's records indicate the authority was given advice of completion of the building work by way of

a form signed and dated 15 August 2003 that was to be faxed 'on completion of the 3rd bedroom'. The authority has submitted that it did not receive the fax, and that based on an invoice for completed electrical work it considers the building work was substantially completed in December 2002.

- 3.4 On 17 September 2011, following significant seismic activity in the area, an assessment of the house was carried out by the Earthquake Commission ("EQC"). That assessment noted cracking to both cladding types which EQC considered required gap filling and painting only, and some internal cosmetic damage was also noted.
- 3.5 The authority carried out an inspection on 20 March 2013; the inspection record notes in summary:
- All building work to BC plan, maintenance (*sic*) has been completed on regular time lines. Exterior (*sic*) work is in sound condition. No outstanding issues at time of inspection, however a review of documentation has yet to be completed.
- 3.6 The authority's file note dated 27 March 2013 provides an outline of the timeline of events and notes the missed inspections. In regards to an inspection for the subfloor fixing that was included in the consent conditions the note records 'Probably not required – original plans show piles under load bearing walls – raised floor is internal timber on existing concrete floor'. The file note also records that the authority was advised that insulation had been installed to all exterior walls, noting that this was carried out without consent or inspections.
- 3.7 In a letter to the applicant dated 27 March 2013, the authority said:
- ... the application for issue of a code compliance certificate is refused for the following reasons:
1. [The authority's] records indicate that the building was practically completed in 2003. Because of the time that has elapsed, the [authority] cannot now be satisfied on reasonable grounds that the building work and elements will continue to satisfy the durability provisions of the Building Code for the prescribed period after the Code Compliance Certificate has been issued. ...
 2. Section 393 of the Building Act states that civil proceeding[s] relating to building work may not be brought against a person (or BCA) after 10 years or more from the date of the act or omission on which the proceedings are based. For the purposes of this section, the 10-year period for the [authority] commences from the issuing of the Code Compliance Certificate, not when the building work was substantially completed. ...
 3. The building consent listed the various inspections that were to be undertaken by the [authority] to enable the [authority] to be satisfied that the work complies with the building code. The only inspections carried out by the [authority] during the construction period were for the verandah foundation and slab, and the drainage work. The following required inspections were not carried out by the [authority]:
 - C7 – Closing in of any plumbing work.
 - C8 – Preline moisture test and structural framing
 - C9 – Closing in of any bracing elements.
 - C10 – Covering up insulation
 - C11 – Gib bracing panel nailing check before stopping work is carried out.

C12 – Brick veneer at mid-height.

4. It is also noted on your application that insulation has been installed in all the exterior walls. This additional work was not part of the building consent work and no amendments to the building consent were received by the [authority] to approve this work. Given, as stated above, that this work was also not inspected the [authority] cannot be satisfied that compliance with the New Zealand Building Code Clauses; B2, E2, E3 and H1 has been achieved.

3.8 In response to the refusal the applicant engaged a chartered professional engineer (“the engineer”) to carry out an assessment of the alterations. The engineer reported on the condition of the property with respect to ‘durability, structure and services to the renovations’. The report, dated 4 April 2013, commented that the building work had been carried out to a ‘high standard, with a quality finish’ and that the house was ‘in excellent condition’.

3.9 The report commented on building elements relevant to the missed inspections and noted no items that the engineer considered non-compliant with the Building Code. The report referred to some cosmetic damage, which the engineer attributed to earthquake activity.

3.10 The Ministry received an application for determination on 10 April 2013.

4. Submissions

4.1 With the application for determination the applicant provided a brief outline of events and included copies of:

- the building consent and approved documentation (the approved plans appear to contain no elevations or sections of the work; specifications were included in the form of notes on the plans)
- some inspection records
- some invoices relating to the alterations
- the completed ‘advice of completion of building work’ form
- the EQC assessment
- the application for a code compliance certificate
- the authority’s file note (refer paragraph 3.6)
- the authority’s letter of refusal
- the engineers’ report

4.2 A draft determination was issued to the parties for comment on 19 April 2013.

4.3 On 24 April 2013 the Ministry received a submission from the authority (dated 18 April 2013) in response to the application. The authority provided detail on the alterations and background, and I have amended the determination to include that information. The authority reiterated its view expressed in its letter of 27 March 2013, noting that it had not received an application for a certificate of acceptance for the insulation, and that:

... the roof cladding has been replaced ... It is assumed that this reroof was exempt building work and not part of the building consent and would therefore be excluded from the CCC should the Ministry determine that a [code compliance certificate] be issued.

4.4 The applicant accepted the draft determination in a response received on 2 May 2013.

4.5 The Ministry received a submission on 6 May 2013 from the authority in response to the draft. The authority did not accept the draft determination and submitted that:

In respect of compliance generally

- the ‘property is located in a low lying flood zone with a high ground water table’ and the untreated wall framing would be exposed to subfloor moisture.
- the authority cannot observe building elements that have been covered up and that may not be compliant; the notation on the inspection record does not mean that there was no non-compliant building work
- the engineer’s report is limited to structural issues and in other respects relies on the comments from the owner
- the authority is of the view that there has been insufficient evidence provided to establish compliance; there is no verification by other means (such as a producer statements or photographs) for the building work that was not inspected,
- information received as part of the determination ‘has reinforced the authority’s view that its original decision not to issue was the correct one’

In respect of the modification of Clause B2 Durability

- based on an invoice from the electrical subcontractor ‘it would appear that substantial completion occurred before 20 December 2002 ...’
- the authority had not received an application to amend the consent in respect of Clause B2.3 1
- the authority said:

[It] would not be able to agree on a date for a modification, in respect of the insulation, as it has no knowledge of this product, when or how it was installed, and if it has ever complied with Clause B2.

[It] would not be able to agree on a date for a modification, in respect of the untreated timber framing as it has never complied with Clause B2

In respect of the thermal insulation:

- the authority said:

There was no insulation specified in the building consent and none required as the new walls only comprised several square meters (*sic*) and these new areas of wall had a greater insulation value than the windows they replaced.

The inspection condition was included in case any insulation was installed.

... the insulation to the walls [is] work required a building consent. Therefore, a certificate of acceptance should be applied for this work.

... it is not know what precautions were taken to protect the existing PVC cables [from the insulation]

The [engineer's] report [refer paragraph 3.8] states that the building paper was installed to the inside face of the [split stone veneer]. This incorrect installation will result in the insulation being exposed to subfloor moisture and the possibility of the cavity being bridged.

In respect of the Ministry's jurisdiction under the Act:

- The authority did not accept that the Ministry could form a view on all the items listed in its letter dated 27 March 2013 as its reasons for refusing the code compliance certificate saying:
 - ... the interpretation of the Act's provisions is outside the Ministry's jurisdiction it is suggested that all reference to this matter is removed from the final determination.

The authority noted some typographical errors that have been corrected.

4.6 The applicant provided a further submission by email on 7 May in response to the authority's submission. The applicant noted (in summary) that:

- the authority's submission raises new issues not previously communicated to the applicant
- in respect of the low lying flood zone and high ground water table; the property 'has never been flooded' and flood waters would need to be 7m before reaching the house ... the subfloor space is 1m at its shallowest, and there are plenty of air vents ...'
- the applicant had made no application to amend the consent to modify the durability periods as the authority had indicated its decision was 'final' and the only course of action was to seek a determination
- the existing timber framing was Rimu, and was only altered where doors and windows were changed; any new timber was treated.
- 'batts' were installed as wall insulation as each room was relined. The house was large eaves and the stone veneer was painted. The documentation provided for the determination information included a statement from the plumber.

4.7 In response to an email request from the Ministry dated 14 May 2013, the applicant advised that that the building paper to the exterior walls was installed to the outer face of the timber framing. The authority also confirmed that its view of the separation of PVC cables and insulation arose from its assumption that the retrofitted insulation was likely to be expanded polystyrene.

5. Discussion: the grounds for refusal

5.1 General

5.1.1 This building consent was issued in 2002 under the Building Act 1991. Under the transitional provisions of the current Act, section 436(3)(b)(i) requires the authority to issue a code compliance certificate if it 'is satisfied that the building work

concerned complies with the building code that applied at the time the building consent was granted’.

5.1.2 Section 95A of the Building Act requires an authority to give reasons if the it refuses to issue a code compliance certificate: in this case it requires an authority to identify the reasons it believes compliance with the Building Code that was in force at the time of issue of the building consent, has not been achieved. It is important that an owner be given clear reasons should an application for a code compliance certificate be refused. The owner can either then take the appropriate action, or apply for a determination if those reasons are disputed.

5.1.3 I consider the 4 items given by the authority as reasons for refusing the code compliance certificate below:

5.2 The delay in seeking a code compliance certificate (items 1 and 2)

5.2.1 The authority included in its reasons for refusal the delay between the practical completion of the building work in 2003 and the application for a code compliance certificate in 2012 and the authority’s perception of its liability in respect of that delay (items 1 and 2 of the refusal).

5.2.2 I also note that it is an owner’s responsibility to seek a code compliance certificate on completion of work undertaken under a building consent.

5.2.3 In respect of the first reason given by the authority in its refusal: I consider that the period of delay between the issue of a building consent and the request for a final inspection or code compliance certificate does not prevent the authority making a decision with respect to compliance, and is not a ground under section 43 of the former Act for refusing to issue a code compliance certificate.

5.2.4 I also note that the authority is aware of its ability to amend the building consent so that the durability periods in Clause B2.3.1 commence from when the work was substantially complete, and not from the date a code compliance certificate is issued. This matter has been canvassed in many previous determinations involving the authority, most recently Determination 2012/063³. The authority contends that it had received no application to amend the durability periods. While that is correct, the authority also did not advise the applicant that such a course of action was available. I leave the modification of Clause B2.3 1, and the agreement of a suitable date, to the parties.

5.2.5 In respect of the second reason given by the authority in its refusal: section 393 provides that, in respect of the issue of a code compliance certificate, the 10 year long-stop limitation period commences from the time the code compliance certificate is issued (section 393(2) and (3)(a) of the Act).

5.2.6 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. Those provisions do

³ Determination 2012/063: Regarding the refusal to issue a code compliance certificate for a 15-year-old house

not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions.

- 5.2.7 I conclude, I consider the authority incorrectly exercised its power of decision in refusing to issue a code compliance certificate for the reasons set out in its letter of 27 March 2013 in respect of items 1 and 2.

5.3 The lack of inspections (item 3)

- 5.3.1 In item 3 of its March 2013 letter, the authority's listed a number of inspections that had not been carried out during construction. The inspections of work at particular stages during construction is important to verify the compliance of completed work, in particular work that will subsequently be covered by later construction. Where inspections are not completed compliance of the hidden elements will need to be verified by other means. It is noted that the lack of inspection by an authority does not mean that work concerned is not compliant and, of itself, is not grounds for refusing a code compliance certificate.

- 5.3.2 The Building Code is a performance-based document. The authority observed no matters of non-compliance after more than 10 years of in-service performance. The authority's site inspection report that indicated that 'no outstanding [issues] identified at time of inspection'.

- 5.3.3 This view is supported by the engineer who is also of the opinion that the building 'performed exceptionally well' during the recent Canterbury earthquake events, noting the acceleration the building would have experienced during the September 2010 event. This advice supports the position that the split stone veneer is properly fixed, and that the house is adequately braced (relevant to 'missed inspections' for half-height veneer and nailing to bracing panels). The engineer was also of the opinion that the building was 'in excellent condition'.

- 5.3.4 I do not accept the authority's contention that it is unable to rely on its own site assessment of the work to determine compliance. Any such assessment must take account of the nature and risk associated with the work, its level of maintenance, and the proven performance (or otherwise) of the building elements in the period since completion. Any subsequent documentation review by the authority must take account of the performance of the onsite work.

- 5.3.5 I am of the opinion that missed inspections do not provide evidence of non-compliance.

5.4 The wall insulation (item 4)

- 5.4.1 The authority's position is that insulation has been installed in the exterior walls but that this was 'additional work ... not part of the building consent and no amendments to the building consent were received ... to approve this work', and that given the installation of the insulation was not inspected the authority 'cannot be satisfied' compliance has been achieved with clauses B2, E2, E3 and H1.

- 5.4.2 I accept that that fibreglass insulation was installed to the existing walls. I consider that both the type of insulation (and the location of the building paper as this was also at issue) was able to be readily verified. I also note that, given the attributes of this particular building and the cavity construction, the risks associated with the insulation being installed incorrectly are low.
- 5.4.3 The provisions of section 112 of the Act apply to the existing walls; in this case and with respect to Clause H1, the building as a whole is required to continue to comply with the Building Code to the same extent as before the alteration. However, I do not accept the authority's position (refer paragraph 4.5) that insulation was not required to new walls as the new walls had a greater insulation value than the windows they replaced. The new walls are new building elements that are required to comply fully with the requirements of the Building Code. The approved consent should have required the new walls to have thermal insulation.
- 5.4.4 The authority has also submitted that the inclusion of the inspection of insulation as a consent condition was 'in case any insulation was installed'. I do not consider this is reasonable. In my view the consent conditions must be relevant to the consented work, and not based on what might be installed. If the authority believed this was likely to take place, then the installation of insulation should have been clarified with the applicant before the consent was issued.
- 5.4.5 The installation of wall insulation is building work that would require consent. As the additional insulation was installed at the same time as the consented work, and the additional work is consistent with the consented work, and indeed was required with respect to the sections of new wall, I am of the view that an amendment of the original consent is the appropriate way to formalise this work.
- 5.4.6 In my view the wall insulation as installed satisfies the requirements of the Act and the Building Code.

5.5 Other matters

Subfloor moisture and possible impact on durability

- 5.5.1 I acknowledge the apparent lack of clarity about the location of the building paper to the split stone veneer cladding. While it is possible that excessive subfloor moisture may be transported up into the cavity of a cladding, the authority has presented this as a possibility without first verifying the situation onsite, or having the applicant do so. I accept the applicant's submission with respect to the site, the condition of the subfloor space, and the location of the building paper. I do not consider the matters raised by the authority with respect to subfloor moisture represent a failure of Clause B2.

The re-roofing

- 5.5.2 I accept the authority's view that the full replacement of the roof to the house is work undertaken separately from the approved consent. I consider the new roofing is comparable with the original roofing material and therefore it may be considered exempt from the need for a building consent under Schedule 1(a) of the Act. I note that exempt building work is still required to comply with the Building Code.

The Chief Executive's jurisdiction

- 5.5.3 The authority contends that I am unable to form a view on all the items listed in its letter dated 27 March 2013 (refer paragraph 3.7).
- 5.5.4 Section 177(1)(b) of the Act provides for a determination to be made in respect of:
the exercise, failure or refusal to exercise by an authority in subsection (2), (3), or (4) of a power of decision to which this paragraph applies by virtue of that subsection.
- Subsection 177(2) says (my emphasis):
Subsection (1)(b) applies to any power of decision of a building consent authority in respect of all or any of the following:
(d) a code compliance certificate:
- 5.5.5 The authority's letter clearly gives 4 reasons for refusing to issue the code compliance certificate. I am of the view that the Act gives me the ability to make a decision in respect of all 4 reasons.

5.6 Conclusion

- 5.6.1 In terms of the grounds for refusal provided by the authority in its letter of 27 March 2013, I consider that neither the delay in applying for a code compliance certificate, nor the lack of inspections, are in themselves grounds for refusal of a code compliance certificate. In regards to the installation of the insulation without consent or an amendment to the consent I note that the building is a simple low-risk structure and I consider that the successful inspection by the authority, the report by the engineer, and submissions made by the applicant provide reasonable grounds on which to be satisfied that the consented work is code compliant. I therefore consider the authority was incorrect to refuse to issue the code compliance certificate for the reasons stated in its letter to the applicants dated 27 March 2013.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in refusing to issue a code compliance certificate on the grounds set out in its letter of 27 March 2013, and I therefore reverse the authority's decision to refuse to issue a code compliance certificate.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 May 2013.

John Gardiner
Manager Determinations and Assurance

APPENDIX A: The relevant legislation

A.1 Relevant sections of the Building Act 2004

95A Refusal to issue code compliance certificate

If a building consent authority refuses to issue a code compliance certificate, the building consent authority must give the applicant written notice of—

- (a) the refusal; and
- (b) the reasons for the refusal

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.

A.1 Relevant sections of the Building Act 1991

43. Code compliance certificate---

(1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.

(2) Where applicable, the owner shall include with that advice either---

(a) Any building certificates issued by building certifiers under section 56 of this Act to the effect that any items of the building work comply with specified provisions of the building code; or

(b) A code compliance certificate issued by a building certifier under this section and section 56 (3) of this Act to the effect that all of the building work complies with each of the relevant provisions of the building code.

(3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, 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; or

(b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

...

(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.

(7) Where a territorial authority is notified by a building certifier pursuant to section 56 (4) of this Act that the certifier considers that particular building work does not comply with the building code, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.