



Determination 2014/004

Regarding the refusal to issue a code-compliance certificate for a house at 54 Potae Avenue, Lytton West, Gisborne



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 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 building owner, Pauanui and Beulah Trusts (“the applicant”)
 - Gisborne District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a house. The authority was not satisfied that the building work complied with Clauses B2 Durability and E2 External moisture² of the Building Code (First Schedule, Building Regulations 1992).
- 1.4 The matter to be determined³ is whether the authority correctly exercised its powers of decision when it refused to issue the code compliance certificate on the basis of non-compliance with Clauses E2 and B2 of the Building Code. In making this decision I must consider whether the house complies with these clauses.
- 1.5 I have not considered any other building elements or other clauses of the Building Code in this determination.

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 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) and 177(2)(d) of the Act

1.6 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.

1.7 The relevant section of the current Act is set out in Appendix A.

2. The building work

2.1 The building work in question is a single-storey house situated on a flat urban site that is in a low wind zone and a medium exposure zone for the purposes of NZS 3604⁴. The house is timber-framed, with solid concrete foundations and ground floor, and is simple in plan.

2.2 The pitched roof is covered with profiled metal tiles and the majority of the eaves are 750mm wide. The exceptions to these are at 1800mm wide projections to the north elevation and four minor lengths where the eave coverage is reduced to 200mm. There is a tiled concrete patio to the north elevation under 1800mm eaves, with an adjacent curved garden wall.

2.3 The wall cladding is a proprietary form of monolithic cladding system known as EIFS⁵ that is fixed directly to the wall framing. The exterior joinery units are face fixed powder-coated aluminium.

2.4 The expert forwarded a timber sample taken from the south elevation wall to a testing laboratory for analysis. No treatment was detected in this sample. Given this evidence, and the date of construction in 2000, together with the lack of other evidence to the contrary, I consider that the wall framing is unlikely to be treated

3. Background

3.1 The authority issued building consent No 200563, dated 16 May 2000, for the house under the Building Act 1991 (“the former Act”).

3.2 The authority’s records indicate that it carried out inspections of the house during construction from November 2000 to January 2001.

3.3 Following an inspection of the property on 11 June 2009, the authority noted on a ‘Field Record Sheet’ in regard to the cladding:

Exterior EPS cladding will need to waiver B2 + E2 of building code as age of building + high risk of problems house has 1500mm soffits to front and 600mm to rear boundary no evidence of any issues with moisture.

3.4 In a letter to the applicant dated 29 May 2013, the authority refused to issue the code compliance certificate on the grounds that the authority considered the house did not comply with Clauses B2 and E2. The authority gave no specific detail as to the aspects of building work it considered did not comply.

3.5 The applicant engaged a property inspection company to inspect the property. Following this inspection, the company produced a report dated 15 July 2013, which described the house and some of the background to the dispute. The report also described certain amendments that had been made to the construction of the building as compared to the details set out on the consented plans.

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ Exterior Insulation and Finish System

3.6 As to the external cladding, the report noted:

- The cladding was in good condition and well maintained.
- Some of the ground clearances were inadequate.
- There was no evidence that the cladding had failed over the past 13 years in respect of Clauses B2 and E2.

3.7 The Ministry received an application for a determination on 26 August 2013.

4. The submissions

4.1 The applicant did not provide a detailed submission but supplied copies of

- some of the plans
- the building consent and consent documentation
- the authority's inspection reports
- the property inspection company's report
- correspondence with the authority.

4.2 The authority did not acknowledge the application for determination or make a formal submission in response.

4.3 A draft determination was issued to the parties for comment on 18 November 2013.

4.4 The applicant accepted the draft in a response received on 20 December 2013.

4.5 The authority responded to the draft in a letter dated 23 January 2014, 'generally' accepting the draft but requesting the following 'additional items be considered before a code compliance certificate is issued':

The consent be formally amended with as built plans that reflect the dwelling as it has been constructed ... [covering] the roof and cladding changes and any alterations that differ from the originally consented plans.

The consent to also be amended for the durability component to accurately reflect the age of the cladding material.

The ground to cladding clearances to be altered to reflect the minimum requirements at the time of construction.

4.6 In response to the authority's submission I note the following:

- Amendments to the consent are discussed in paragraphs 6.7 and 6.9.
- The Building Code requirements at the time of construction are largely unchanged, though the understanding of how buildings achieve compliance has improved over time and the Acceptable Solutions reflect this. As noted in paragraph 6.2 the cladding has complied with the Building Code that was in force at the time of construction for 13 of the 15 years required by Clause B2. As such I consider there is no requirement to alter the cladding to ground clearances prior to the issue of the code compliance certificate for the amended consent.
- Ongoing compliance of the external envelope is for the applicants to address by way of either maintenance or new building work. Whatever option the

applicants choose should take into account any impact on other building elements including those with longer durability requirements.

5. The expert's report

5.1 General

- 5.1.1 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 assist me. The expert examined the house on 1 October 2013 and produced a report completed on 29 October 2013. The expert also attached the full report from the biodeterioration consultant (refer paragraph 5.2). Copies of the expert's report were forwarded to the parties on 30 October 2013.
- 5.1.2 The report described the house in general terms and gave some of the background to the dispute. In the expert's opinion, the overall construction was of a good quality, and the house generally appeared to be well presented and maintained.
- 5.1.3 The expert noted the following discrepancies between what had been constructed when compared with the consented plans:
- The substitution of a hip roof for the north elevation Dutch gable.
 - Some wall projections had been amended, and as a consequence, the layout of some exterior joinery units had been modified.
 - The substitution of EIFS cladding instead of spray-finished fibre-cement sheets or fibre-cement weatherboards.
 - The ground clearances to the external cladding were less than indicated on the plans.

5.2 Moisture testing and destructive investigations

- 5.2.1 The expert carried out non-invasive moisture readings and a total of nine invasive moisture readings. No elevated readings were recorded, and there was no evidence of decay in the timber shavings exposed at the various invasive testing locations or visual evidence of moisture ingress.
- 5.2.2 The expert removed timber framing shavings samples from one location on the south elevation and forwarded these to a biodeterioration consultant for analysis to determine whether the wood had been subject to any preservative treatment.
- 5.2.3 The biodeterioration consultant provided the expert with a report dated 10 October 2013 that indicated the sample supplied was likely not treated with a timber preservative.

5.3 Observations

- 5.3.1 I summarise below the other observations made by the expert in regard to the external envelope of the house:
- The cladding was in good condition and appeared to have resisted moisture penetration for approximately 13 years. If the cladding was properly maintained, this performance was likely to continue.

- The exterior joinery junctions with the cladding and the penetrations through the cladding were reasonably well sealed.
- The concrete patio was finished above the base of the cladding at the north elevation.
- Soil had been built up along the curved garden wall, though this had been removed prior to the expert's visit.
- Clearance between the bottom of the cladding and concrete range from 0 to 70mm; there was little or no clearance to the base of the cladding at the garage door and the adjoining east elevation, which had only 200mm wide eaves projections.

5.3.2 The expert noted the cladding was perhaps at risk from the weather at the northeast corner, where there is a 10mm cladding clearance and 200mm eaves protection, and somewhat at risk from maintenance by hosing or washing along the north elevation where the patio tiling is finished above the bottom edge of the cladding.

6. Discussion

- 6.1 I note the expert's comments in regard to the features the expert considered to be at risk of moisture ingress. Given that there is no indication of moisture ingress after 13 years, I consider these to be adequate in the circumstances.
- 6.2 Based on the expert's report, I consider the cladding has proven to be weathertight after 13 years since installation, and subject to proper maintenance, should continue to be so for the remaining 2 years of its required durability period. Accordingly, I conclude that the building envelope complies with Clause E2 of the Building Code that was current at the time the consent was issued.
- 6.3 The building work 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 buildings to remain weather tight. I note here that the cladding is 13 years through its required 15 year durability period.
- 6.4 Based on this conclusion, and taking into account section 436 of the current Act, I am of the opinion that the authority was incorrect when it refused to issue the code compliance certificate in respect of Clauses E2 and B2.
- 6.5 I also accept that when the issue of a code compliance certificate is being considered, concerns may be raised 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. I also note that this issue has also been considered by the authority.
- 6.6 Clause B2 requires that a building continue to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the cladding to remain weathertight for a period of 15 years from the date a code compliance certificate is issued.
- 6.7 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 requirements of Clause B2.3.1 of the Building Code for

an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009⁶). I leave this matter to the parties to resolve in due course.

- 6.8 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.
- 6.9 I also note that the expert has identified changes from the consent drawings, and I leave these to the parties to resolve.

7. The Decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that at the time of substantial completion the building work complied with Clauses B2 and E2 of the Building Code that was current at the time of issue of the building consent, and had continued to comply; accordingly I reverse the authority's decision to refuse to issue a code compliance certificate, thus requiring the authority make a new decision subsequent to the owner applying for a modification of Clause B2.3.1.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 3 February 2014.

John Gardiner
Manager Determinations and Assurance

⁶ Codewords articles are published by the Ministry and are available on the Ministry's website at www.dbh.govt.nz/codewords-index

Appendix A

A.1 The relevant sections of 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.