



Determination 2017/037

Regarding the refusal to issue code compliance certificates for a 13-year-old house with brick and weatherboard claddings, and a swimming pool at 17 Jefferson Heights, Hamilton



Summary

This determination considers the authority's decision to refuse to issue the code compliance certificates for the 13-year-old house and the swimming pool. The determination discusses the authority's refusal to inspect the building work and whether there was sufficient evidence of compliance in order to issue the code compliance certificates.

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 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 owners of the house, J and K Gibbons ("the applicant")
 - Hamilton City Council ("the authority"), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from the decisions of the authority to require a weathertightness report by an approved assessor before inspecting the building work, due to the building's age, and to request retroactively a producer statement for the swimming pool (built under a separate consent). I take this as a decision by the authority to refuse to issue code compliance certificates for the 13-year-old house and swimming pool because it was not satisfied that the building work complies with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The authority's concerns regarding the compliance of the building work for the two

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

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

consents appear to relate to the age and weathertightness risk of the house, and the bearing capacity of the soil under the swimming pool.

1.4 The matter to be determined³ is therefore whether the authority was correct in exercising its powers of decision in refusing to issue the code compliance certificates. In deciding this matter, I must consider:

- Whether the house complies with the relevant Clauses of the Building Code that was in force at the time the building consent was issued. This includes the compliance of the external building envelope of the house with Clause B2 Durability and Clause E2.
- Whether the swimming pool complies with the relevant Clauses of the Building Code that was in force at the time the building consent was issued.
- Whether producer statements are required for either building consent, and in failing to supply the statements, can a code compliance certificate be refused.
- The authority's exercise of its powers and its apparent refusal to issue a code compliance certificate.

1.5 I also note that the applicants will be able to apply to the authority for a modification of durability provisions to allow the durability periods specified in Clause B2.3.1 to commence from the date of substantial completion in 2004. I leave this matter to the parties to resolve after other matters are satisfactorily addressed.

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

2. The building work

2.1 The building work considered in this determination is a three storey (in part) house with a swimming pool, situated in a medium wind zone for the purposes of NZS3604⁴. The drawings show the basement level contains the garage, storage and workshop area. The ground floor contains the lounge, dining room, kitchen, family room, rumpus room, bathroom, laundry, toilet, three bedrooms, and deck. The first floor contains the master bedroom, study, ensuite and an enclosed membrane deck.

2.2 The building is supported on reinforced concrete blockwork walls to the basement level, timber framing to the ground and upper floor, and has concrete floors to the basement and ground only. The courtyard to the swimming pool is constructed as a concrete patio. The swimming pool has a reinforced concrete slab foundation with reinforced concrete blockwork retaining walls.

2.3 The building is primarily clad with brick veneer with a drained and ventilated cavity that extends to soffit height on all elevations, and some areas of direct fixed fibre cement weatherboards. The building has a 25° truss roof with trapezoidal metal cladding and generally a 600mm soffit overhang except to the west elevation where there is no overhang to a bay window.

2.4 The specification called for the timber to be 'Treated H1 to NZMP 3640'. This treatment level of the timber is only to prevent attack by insects. The expert noted that around 2002 – 2003 authorities were requiring 'treated' timber to be used, and in

³ Under sections 177(1)(b) and (2)(d) of the current Act

⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

December 2003 NZS 3602 was amended to include treatment for fungal attacks. I agree with the expert that it is reasonable to conclude that treated timber has been used, but not to the level to treat fungal decay, although this level would have complied with NZS3602 at the time of construction in 2003.

- 2.5 The swimming pool is constructed of all-cells-filled 200mm concrete block with a concrete floor and foundation and is built into the slope adjacent to and northwest of the house. The swimming pool is 1.6m deep and approximately 8.8 x 4.0m in plan excluding the steps recessed into one wall of the swimming pool.

3. Background

3.1 The house

- 3.1.1 The authority issued building consent No. 2003/6682 to the original owner on 1 October 2003, under the Building Act 1991 (“the former Act”). The consent conditions listed the inspections required during construction, which included a pre-line, a post line and a brick veneer cladding inspection.
- 3.1.2 The authority carried out various inspections from February 2004 to September 2004, with external cladding inspections in September 2004. A final inspection was carried out on 21 March 2012. I note there is no reason given for the delay in the final inspection. The building did not pass the final inspection, with the smoke alarm installation failed and the following comments noted:

Provide Producer Statements for Engineer Waterproofing, As Laid Drainage Plan Seal in Gas Infinity Boxes
Fit Handrails to stairs with more than 4 risers

- 3.1.3 I note that the previous owners do not appear to have requested another final inspection.

3.2 The swimming pool

- 3.2.1 The authority issued building consent No. 2004/8679 for the swimming pool and driveway crossing to the original owner on 16 February 2004, under the former Act. The authority carried out three inspections to the swimming pool, including a foundation inspection, and all were passed on 10 May 2004. The vehicle crossing was inspected in March 2005 and passed.
- 3.2.2 The authority refused to issue a code compliance certificate to the original owners for the swimming pool in a letter dated 13 March 2012. The code compliance certificate was not issued because:
- [The authority] is not satisfied that the following provisions of the Building Code have been complied with because of the age of the building. In particular:
1. Durability
 2. Structure
- 3.2.3 The letter referred to the inspection notes for the March 2012 inspection that noted the following areas to be addressed:

Doors into pool area have catches which can hold open the doors – removed 19-6-12

The height of the latch to the gate is less than 1500mm from the top of the stair.

The top of the wall to the ‘downhill’ side of the gate is less than 900mm above the bottom rail of the gate.

Producer statement from engineer establishing compliance with NZBC sect B1 not provided.

[code compliance certificate] application not received.

Non return valve/backflow protection not fitted to water supply.

(Note) backwash per consent to stormwater

Backflow protection fitted to 'boundary' supply

Pool fencing not per consent but complies 26/11/12 [final comment signed by the inspector]

- 3.2.4 A re-inspection of the swimming pool fencing was carried out by the authority on 20 April 2012, with similar results including the requirement for the producer statement from the engineer to be supplied to establish compliance with Clause B1.
- 3.2.5 In a letter dated 5 September 2012 the authority wrote to the original owners, stating the swimming pool was non-compliant based on the inspection of the swimming pool carried out on 29 August 2012.
- 3.2.6 The authority issued a notice to fix on 2 November 2012, after carrying out a further inspection on 19 October 2012. An inspection on 26 November 2012 confirmed that the swimming pool fencing was compliant.

3.3 Applying for the code compliance certificates

- 3.3.1 The applicant purchased the house in May 2014 aware that the code compliance certificates had not been issued for the two building consents.
- 3.3.2 After a meeting between the parties the authority sent the applicant an email, dated 6 July 2016, presenting an overview of steps to follow in order to obtain a code compliance certificate. The email noted that if the applicant submitted an application for a code compliance certificate it 'may be declined due to NZ Building Code clause B2...some, or all may not have met their minimum life spans, especially related to Building Code clause E2 – weathertightness'. The email listed the steps to applying for a code compliance certificate as follows:
- Step 1: Go to <http://www.buildingsurveyors.co.nz/> and get a weathertightness report (including [Clause E3 Internal moisture]). This must be done by someone on this website, as they are accredited by [the Ministry]^[5] ... Once completed this report is required to be submitted to the [authority] ... to review, prior to a decision whether [the authority] will inspect the site works under this consent.
- If this is accepted the Building team will then ... arrange the Final Inspections ...
- Step 2: If the final inspections are booked, you need to ensure that all failed item points outstanding from the previous inspections have been addressed ...
- Step 3: Once the points have been addressed and both Final Inspections have passed. A copy of the completed [code compliance certificate] Application Form...are submitted to the Building Inspector.
- Step 4: If [the authority] are in a position to issue the [code compliance certificate], then there will be a B2.3.1 Modification form to be completed...
- 3.3.3 The applicant responded to the email on the same day, asking if the authority had any recommendations for surveyors, as none appeared to be accredited in the area.

⁵ This is not correct. Registered Building Surveyors are registered as such by the New Zealand Institute of Building Surveyors.

- 3.3.4 The applicant sent a further email dated 7 July 2016 to the authority stating the following (in summary):
- The applicant was aware of the failed final inspection, and the minor items identified on the final inspection have since been rectified.
 - The applicant queried the requirement for a weathertightness report when the final inspection did not identify any issues with the exterior cladding, and believed that the construction and materials were not high risk.
 - The applicant had contacted two accredited practitioners to undertake the weathertightness report, and both were unable to undertake the work due to existing commitments. The practitioners drew the applicant's attention to a recent determination⁶ that notes 'specific mention of the authority's regulatory actions and deems that the request for a [weathertightness report] before undertaking any inspection has failed to satisfy the requirements of Section 95A.'
 - The applicant is of the view that it is unreasonable to assume there are weathertightness issues. No inspections or identification of issues related to Clause B2 and E2 have been provided by the authority.
- 3.3.5 On 8 July 2016 the authority replied to the applicant (in summary):
- The authority has a policy of requiring a weathertightness report from an accredited expert because they have 'specialised equipment and time'.
 - A weathertightness report is required to be submitted to the authority prior to 'any possible site inspections'.
 - If the authority is not satisfied that the house is weathertight, then it would 'issue a section 95[A] letter'.
- 3.3.6 The applicant responded to the authority in an email dated 12 July 2016 noting the following (in summary):
- The applicant queried why weathertightness was seen as an issue, when a final inspection had been carried out in 2012 and no issues relating to exterior claddings were identified.
 - The applicant was concerned about providing a weathertightness report, only for the authority to still refuse to issue code compliance certificates because it required producer statements.
 - The applicant was experiencing issues regarding the cost and difficulty of hiring an accredited building surveyor.
- 3.3.7 The applicant contacted the authority many times between July to October 2016 to progress the matter without success, the last email response from the authority was dated 27 July 2016.
- 3.4 The Ministry received an application for a determination on 31 October 2016.

⁶ Determination 2016/006 Regarding the refusal to issue a code compliance certificate for a 20-year-old house with brick and weatherboard claddings at 33 West Ridge Drive, Western Heights, Hamilton (Ministry of Business, Innovation and Employment) 15 February 2016

4. The submissions

4.1 The applicant provided a letter with the application (in summary):

- All non-compliant items in the final inspections had been rectified.
- The authority requiring a producer statement for the pool foundation was raised verbally. The applicant stated that a producer statement was not requested in the original building consent conditions, and the engineer involved would not issue one now. The authority told the applicant a code compliance certificate could not be issued without evidence of 'adequate compliance of the foundations'.
- The authority was not 'acting appropriately' in refusing the code compliance certificates due to the age of the work, or requesting producer statements without identifying the items that are not considered compliant.

4.2 The applicant supplied copies of:

- correspondence between the authority and the applicant

The house

- building consent No. 2003/6682, the approved plans and specification, manufacturer's information
- revised bracing calculations and superseded calculations
- structural calculations for the dwelling and retaining walls, and the investigation of the soil's bearing capacity, which was also carried out by the structural engineer
- producer statement - Design (PS1) from the structural engineer, and letter confirming Construction Monitoring Level 2 (CM2)
- inspection records, electrical certificate of compliance, as laid drainage plans, gasfitting certification certificate, etc
- letter dated 12 August 2016 from the structural engineers, (operating under a different name) confirming that they inspected the house during construction to CM2 and the visible structure has been 'built in accordance with the original design engineer's intent'.

The swimming pool

- building consent No. 2004/8679
- structural calculations and specification for the swimming pool
- inspection records for the swimming pool
- notice to fix and related correspondence
- producer statement - Design (PS1) from the structural engineer for the 'masonry pool and footings'.

4.3 The authority acknowledged the determination application in a letter dated 1 December 2016 and provided the following submission (in summary):

- It has the right to decline a code compliance certificate where the building is ‘large, complex and has a number of risk elements’, its inspectors are ‘not qualified weathertightness experts’.
- The authority has met with the applicant, the process required to obtain a code compliance certificate is clear
- The applicant’s request to consider the matters raised at a 13-year-old final inspection is not reasonable.
- The previous owner had not applied for the code compliance certificates nor requested any follow up inspections
- In ‘almost every’ determination the Ministry had commissioned a weathertightness expert to carry out an investigation of the building work
- It had ‘every reason’ to request a weathertightness report in order to be ‘satisfied on reasonable grounds that a building meets the weathertightness and durability provisions of the building code.’

4.4 On 7 December 2016 the applicant responded to the authority’s submission as follows (in summary):

- The code compliance certificates had not been applied for because the authority had advised that they would be declined.
- The applicant accepts that the authority had advised that compliance with Building Code Clause B2, E2, and E3 could not be confirmed. However, the authority has not identified specific elements and only provided ‘generalised comment’ of areas of concern that have occurred on other buildings.
- The authority had refused to inspect the building until a weathertightness report was provided. Numerous unsuccessful attempts had been made to engage a weathertightness expert, and the authority has advised that reports from alternative practitioners would not be accepted.
- The authority’s ‘blanket approach’ where it assumes there are weathertightness issues is ‘both questionable and unreasonable’. A visual inspection should be carried out, and then if there were issues identified, the relevant experts could be engaged. A final inspection was requested by the previous owner and carried out by the authority in 2012, no weathertightness issues identified

4.5 A draft determination was issued to the parties for comment on 23 March 2017.

4.6 The applicant accepted the draft determination on 3 April 2017, with non-contentious amendments submitted.

4.7 The authority responded on 12 April 2017 saying it accepted the decision in paragraphs 7.2 and 7.3, but not the decision in paragraph 7.1. The authority said (in summary) that:

- Final inspections were not carried out because the previous owner not applied for a code compliance certificate.
- The building is ‘quite complex’ and has potential weathertightness risks identified by the Ministry’s expert. The authority has ‘no ability’ to ‘undertake the investigation for weathertightness’. ‘The expert took invasive moisture readings [but] the authority could not’.

- The authority ‘is not placed legally’ to carry out any inspections until the application for code compliance certificate has been submitted.
- It was acceptable to request a weathertightness report to identify ‘potential or actual weathertight and durability issues’. It was reasonable to expect any required remedial work to be completed before the authority undertook any final inspections.

4.8 I have taken the parties’ submissions into account and altered the determination as appropriate.

5. The expert’s report

5.1 General

5.1.1 As mentioned in paragraph 1.6, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Building Surveyors. The expert inspected the house on 20 January 2017, providing a report dated 17 February 2017, which was sent out to the parties on the same day.

5.1.2 The expert stated that from his inspection of the visible building elements, he was satisfied that the building has been constructed generally in accordance with the approved plans.

5.2 Moisture testing

5.2.1 The expert carried out non-invasive tests internally and externally, focusing on ‘high risk’ locations. The readings produced were within the ‘normal range’ and there was no evidence to suggest that there might be excessive moisture within the structural cavities.

5.2.2 The expert took invasive moisture readings in locations that were considered high risk for the brick veneer and fibre-cement weatherboards. The following results were obtained:

- 10% in the external soffit framing on west elevation
- 10% - 13% in the bottom plates to the west elevation
- 9 % in the bottom joinery liner to the west elevation
- 11% in the bottom plate of the south elevation
- 16% to the retaining wall strapping on the south elevation
- 11% - 15% in the bottom plates on the east elevation
- 16% in the retaining wall strapping to the east elevation
- 12% and 13% to the upper floor bottom plates in the north elevation
- 11% - 15% in the bottom plates within the vicinity of the showers

5.2.3 The expert included an explanation of the moisture content readings for low to high bands⁷ with the readings falling within the low range, which is between 0% - 18%. It is generally considered that this moisture content level will not support timber decay.

⁷ *Weathertightness: Guide to the Diagnosis of Leaky Buildings* (May 2011), Department of Building and Housing

5.3 The wall claddings

5.3.1 The expert made the following observations during the course of the investigation (in summary):

- The ground clearance generally satisfied the levels set out in E2/AS1⁸ except for the following situations:
 - the paved area adjacent the laundry, but the expert was satisfied that the clearance is adequate as there is ‘no opportunity for water to pond’ and the invasive moisture reading was low.
 - the area of stones adjacent the rumpus room. The expert noted the benefit gained from the presence of the metal flashings at the base of the cladding and considered the clearance could be easily adjusted.
- Noted that the upper area of the building has flow paths that will prevent ponding of water, with a sump that would collect any surface water.
- The majority of the building is clad with brick veneer over a drained and ventilated cavity which was in a good condition.
- Review of the documentation showed that the tie spacings were adequate to provide restraint for the brick veneer. Although, no apparent movement control joints have been installed, as noted in the manufacturer’s specification, there was no evidence of cracking or excessive movement.
- The brick veneer and fibre-cement weatherboard cladding junctions have adequate timber covering beads, but only one junction has been adequately sealed between the timber bead and the brickwork.
- Both claddings have been well maintained and are in good condition, with no premature deterioration or stress cracks observed.
- The service penetrations through the brick veneer were adequate. The penetrations through the fibre-cement weatherboards appear to be appropriately sealed, and no sign of failure was observed.
- While some aspects of the weatherboard cladding installation has not followed the manufacturer’s instructions, there is no evidence to suggest that failure has occurred.
- The timber is likely to have been treated (see paragraph 2.4).

5.4 Windows and Doors

- Head flashings extending to the edge of the scribes can be seen above all windows installed to the weatherboard cladding. However, in some cases there is a large gap between the top of the jam scribe and head flashing which requires sealing.
- A sill flashing has been omitted to one window to the weatherboard cladding, however, based on the moisture content readings taken, the expert was confident that the sill junction was performing satisfactorily.

⁸ Acceptable Solution E2/AS1: External Moisture

5.5 Balconies and balustrade walls

- There is sufficient fall to the membrane to the enclosed deck, and an overflow drain has been provided.
- While the threshold height from the deck at the door sill does not meet the dimensions given in E2/AS1, no evidence of failure of this junction was evident. (Although I note that the threshold distance of 60mm was consented as part of the amended documentation.)
- The glazed balustrade is supported by aluminium box sections appropriately fixed to the inside vertical face of the balustrade.
- The wall to balustrade junction is connected with a bracket fixed onto the weatherboards. The top of the upstand is capped with a sloping cap flashing which has been installed prior to fitting the fibre-cement weatherboards.

5.6 Roof cladding

- the roof cladding is in 'sound condition' with all penetrations well flashed and sealed
- adequate overlap to the gutter, with 50mm overhang shown
- the apron flashings to the fibre-cement cladding and gutter junctions are 'appropriately detailed'
- there is 20-40mm clearance between the bottom of the weatherboard cladding and the roofing
- the membrane apron flashings at the gutter end are installed appropriately, resulting in the water flowing directed away from the cladding and into the gutter.

5.7 Construction quality

5.7.1 The expert considered the quality of the construction finish for the building. The cladding, internally and externally, he observed has been 'well installed and aligned' with no visual evidence of inadequate fixing. The flashings and wall junctions have been adequately sealed, with no evidence of failure. Overall, the building has been constructed and finished with good quality materials, general workmanship is good and it has been 'very well maintained'.

5.8 Conclusions

- 5.8.1 The expert has concluded that he observed compliance with Building Code Clauses B2 and E2.
- 5.8.2 The expert identified that there are aspects of the claddings that have not been installed to satisfy E2/AS1 or the manufacturer's installation manuals. However, the claddings are in 'excellent condition' and the moisture content readings showed no signs of failure. The expert believed that consideration of in-service history is important to establish that the cladding has been performing as required by the Building Code since 2004.
- 5.8.3 Therefore, the expert stated that the claddings have been constructed to provide adequate resistance to prevent the penetration and accumulation of moisture, and is compliant with the performance requirements of Clause E2. However, the expert

noted the following areas of work that require attention to ensure the ongoing performance of the claddings:

- provide adequate ground levels around the rumpus room
- seal the junctions between the weatherboards and brick veneer
- seal any gaps between the underside of the head flashings and jamb scribe.

6. Discussion

6.1 General

- 6.1.1 The building consent was issued under the former Act, and accordingly the transitional provisions of the current Act apply when considering the issue of a code compliance certificate for work completed under this consent. Section 436(3)(b)(i) of the transitional provisions of the current Act requires the authority to issue a code compliance certificate only if it 'is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted'.
- 6.1.2 In order to determine whether the authority correctly exercised its power of decision in refusing to issue the code compliance certificates for the building and swimming pool, I must therefore consider whether the building work complies with the provisions of the Building Code that applied when the consent was issued.

6.2 The compliance of the house (Clause E2 External Moisture and B2 Durability)

- 6.2.1 The three storey building is complex in design with two cladding systems including one that is direct fixed, an enclosed membrane deck and no eaves to the bay window, which increases its weathertightness risk profile. However, there are factors that mitigate the risk, including the brick veneer over a drained and ventilated cavity, 600mm eaves generally, a simple gable roof, and a building that has been well maintained.
- 6.2.2 Taking into account the expert's report, the claddings generally appear to have been constructed in accordance with the manufacturer's instructions, and where there are differences, it does not appear to have led to undue moisture ingress contravening Clause E2.
- 6.2.3 The fibre-cement weatherboards and brick veneer claddings are over 13 years old. The expert's moisture content readings were all within the low band providing evidence that the cladding had prevented moisture ingress, and there was no failure in relation to its construction, or to the age of the building. The expert's investigation has concluded that there is no evidence of moisture ingress into the timber framing, and moisture content readings were within low levels that will not support timber decay.
- 6.2.4 This provides me with reasonable grounds to conclude that the current performance of the building envelope is adequate because it is preventing water penetration at present, and there is no evidence of past failure. Consequently, I am satisfied that the building currently complies with Clause E2.
- 6.2.5 However, the house is required to comply with the durability requirements of Clause B2, which requires a building to satisfy all the objectives of the Building Code throughout its effective life. The durability requirements of Clause B2 include a

requirement for wall claddings to remain weathertight for a minimum of 15 years and for timber framing to remain structurally adequate for a minimum of 50 years.

6.2.6 I consider the matters described in paragraph 5.8.3 need to be addressed in order to ensure the claddings' ongoing compliance with Clause B2.

6.2.7 Although a modification of durability provisions will mean that wall claddings have already met the minimum life required by the Building Code, the expected life of the building as a whole is considerably longer. Careful maintenance is therefore needed to ensure that claddings continue to protect the underlying framing for its minimum required life of 50 years for the structure.

6.3 The compliance of the swimming pool

6.3.1 The swimming pool structure is required to comply with the performance requirements of Clause B1. The authority passed the foundations to the swimming pool on 10 May 2004. I note that a question mark was written on the checkbox for '100kPa bearing capacity' with a comment that the engineers were to inspect. However, there appears to have been no follow up by the authority to confirm the bearing capacity, and the final inspection in March 2012 states that a producer statement is required from the engineer to establish compliance with Clause B1.

6.3.2 There has been no evidence put to me that shows that the swimming pool is not compliant, and the lack of a PS4 to verify bearing capacity cannot be taken to mean the swimming pool is not compliant. The Building Code is performance-based. The swimming pool has been in use for some 13 years and any problem arising from inadequate ground capacity would have become evident during this period. In the absence of any advice to the contrary, and based on the successful inspection by the authority in May 2004, I am of the opinion that the swimming pool complies with Clause B1. I consider the requirements for producer statement for this swimming pool in paragraph 6.4.3.

6.4 The requirement for producer statements

6.4.1 The applicant requested that the determination consider whether the code compliance certificates could be withheld because the authority required the following producer statements to cover:

- the 'Engineering Waterproofing' requested for the dwelling
- the bearing capacity of the soil to establish the compliance of the retaining wall foundation to Clause B1 requested for the swimming pool.

6.4.2 In the consent conditions to the building consent No. 2003/6682 I note that it states that a 'Producer statements for product warranty and workmanship warranty must be provided before the issue of the Code of Compliance Certificate' for the roofing membrane. It is unclear if the required producer statement for the membrane deck is the same as the 'Producer Statements for Engineering Waterproofing' that was listed on the final inspection record. However, as I have said in previous determinations⁹:

A producer statement is not a product warranty or guarantee of compliance; it is a professional opinion on compliance. The authority remains solely responsible for deciding it is satisfied on reasonable grounds that any building work complies with the Act.

⁹ Determination 2013/053 Regarding the refusal to issue a code compliance certificate due to the lack of a producer statement for drainage work to a house at 126 Abbot Street, Invercargill (Ministry of Business, Innovation and Employment) 17 September 2013

6.4.3 The authority has verbally requested a producer statement from the engineer to confirm the bearing capacity under the swimming pool foundations, consent No. 2004/8679. I note that there is no condition listed on the swimming pool consent stating this requirement. As I have said in previous determinations¹⁰:

There is no basis in the Building Act for an authority to require a producer statement as a condition for establishing compliance, and for issuing a code compliance certificate, particularly if it had not made the receipt of one a condition of the consent.

6.4.4 The authority should not solely rely on producer statements to demonstrate code compliance. It is my view that the receipt of a producer statement does not lessen the authority's liability in establishing compliance with the Building Code. There are other means of establishing compliance available to it, including technical information, the history of use of the materials, and proven in-service history for the membrane roofing. I also note that a soil investigation was carried out by the engineer in 2003 for the house which indicated that below the topsoil the clay had sufficient strength capacity. As the swimming pool is located close to the house, this statement could also have been used as evidence that the soil bearing capacity under the swimming pool foundations was adequate.

6.4.5 Therefore, I am of the view that the authority cannot enforce the requirement for a producer statement for building consent No. 2003/6682, and it was incorrect to request a producer statement to confirm the bearing capacity for building consent No. 2004/8679.

6.5 The authority's regulatory actions

6.5.1 Section 94 in the Act it states what the authority must consider when deciding to issue a code compliance certificate:

1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—

(a) that the building work complies with the building consent;

6.5.2 If the authority refuses to issue a code compliance certificate, the Act states in section 95A:

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.

6.5.3 I reiterate the view¹¹ that the authority has failed to satisfy the requirements of section 95A, as it did not make any assessment and/or decision in relation to the compliance of the consented work.

6.5.4 I consider that the authority verbally refused to issue the code compliance certificates by informing the applicant that if they were to 'submit the [code compliance certificate] application form...this may be declined', combined with further confirmation that a weathertightness report was required before considering an application for code compliance, and any 'possible inspections'. The authority did not inspect the building work in order to observe how it had performed over the past

⁸ Determination 2011/026 The refusal to issue a code compliance certificate due to the lack of inspections or a producer statement for shower waterproofing in a house at 520 Minden Road, Tauranga (Department of Building and Housing) 1 April 2011

¹¹ Determination 2016/006 Regarding the refusal to issue a code compliance certificate for a 20-year-old house with brick and weatherboard claddings at 33 West Ridge Drive, Western Heights, Hamilton (Ministry of Business, Innovation and Employment) 15 February 2016

13 years, which would have allowed it to identify any issues of non-compliance. I consider that the authority requiring a weathertightness report to be completed before a code compliance application can be made, or before the authority carries out any site inspections, is not reasonable.

- 6.5.5 The authority has not provided me with any evidence of why it considers the dwelling or swimming pool is not compliant with the Building Code. It is important that if an owner is declined a code compliance certificate, they be given clear and appropriate reasons for the refusal. From this the owners can either act upon them, or apply for a determination should they dispute the refusal. I conclude that the authority did not properly exercise its powers in respect of its refusal or purported refusal to issue a code compliance certificate for the building.
- 6.5.6 The authority has said that it is unable to carry out weathertightness assessments. I note that much of the assessment work undertaken by the expert was by visual inspection, which other authorities can and do perform; I am also aware that other authorities undertake non-invasive moisture testing. There would appear to be no reason why the authority is unable to carry out such assessments, and I consider it unreasonable that the authority carries out no site assessment in order to acquaint itself with nature of the building work before it makes any decision regarding compliance under section 95A. In this instance, I do not consider the building's weathertightness risk profile is such that any compliance assessment would be beyond the authority's capability.

6.6 Conclusions

- 6.6.1 Given the expert's report, I consider that once the minor matters described in paragraph 5.8.3 have been rectified, the external envelope will meet the performance requirements of Clause B2, and a code compliance certificate can be issued by the authority once the durability modification is resolved.
- 6.6.2 I consider there was information available to the authority indicating the soil had sufficient strength capacity, and based upon the in-service history of the swimming pool, with no evident problems arising in the 13 years, I am satisfied that the swimming pool meets the requirements of Clause B1 and a code compliance certificate can be issued by the authority once the durability modification is resolved.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority did not exercise its powers correctly when it refused to issue the code compliance certificates without providing its reasons in writing as required under section 95A of the Act.
- 7.2 I determine that the house complies with Clause E2 External moisture, but does not comply with Clause B2 Durability for the reasons set out in paragraph 5.8.3, and accordingly I confirm the authority's decision to refuse to issue code compliance certificate for the building consent No. 2003/6682.
- 7.3 I determine that the swimming pool complies with Clause B1 Structure of the Building Code, and accordingly I reverse the authority's decision to refuse to issue code compliance certificate for the building consent No. 2004/8679.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 31 May 2017.

John Gardiner
Manager Determinations and Assurance