

Determination 2025/022

The decision to purportedly refuse to issue a code compliance certificate for a detached dwelling and garage

1A Pak Lims Road, Renwick, Blenheim

Summary

This determination considers the authority's decision to refuse to issue a code compliance certificate for a detached dwelling and garage in relation to the compliance with clauses B2 and E2 of the cladding and timber framing, and the compliance of a channel drain with clause E2. The determination considers whether the reasons for refusal were sufficiently detailed.



Figure 1: The channel drain

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me Andrew Eames, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. K King, the owner of the property (“the owner”).
 - 1.2.2. Marlborough District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. The matter to be determined under sections 177 (1)(b) and (2)(d) of the Building Act, is the authority’s decision to purportedly refuse to issue a code compliance certificate for a 27-year-old detached dwelling and garage.
- 1.4. The issues relevant to the authority’s exercise of their powers to refuse the code compliance certificate are whether there were grounds for refusal; and whether the reasons for refusal were sufficiently detailed. I will also provide some comment for the parties on compliance with the Building Code clauses B2 and E2.

2. The building work

- 2.1. The building work comprises a single-level, 2-bedroom detached dwelling with a H1 treated timber framed structure, plaster-over-polystyrene cladding (‘the cladding system’), and includes a garage with an attached sleepout and bathroom clad in the same material.
- 2.2. At a later date, concrete paths were laid down which were poured up against the plaster cladding system.
- 2.3. A few years after that a PVC strip drain with a line of sealant and a form of metal flashing at the junction with the cladding (Figure 1) was installed abutting the base of the cladding.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

3. Background

- 3.1. A building consent (BC960513) was issued for the dwelling in 1996.
- 3.2. The authority carried out an inspection during the build for the foundations, slab, pre-line, and drains.
- 3.3. Inspection records indicate that all work, except for the sleepout in the garage, was completed by 13 August 2001.
- 3.4. At an unspecified time, the owner installed a concrete path around the dwelling to improve wheelchair access which was poured up to and over the bottom of the plaster cladding.
- 3.5. The owner engaged an agent, who prepared an On-site Evaluation for code compliance certificate report dated 10 February 2023. The report identified items requiring rectification before a code compliance certificate application could be made.
- 3.6. The agent acknowledged that several items required rectification to obtain a code compliance certificate for the dwelling, including:
 - 3.6.1. Clearance for all claddings (as a result of the concrete paths being poured against the cladding)
 - 3.6.2. Repairs and repainting of cladding
 - 3.6.3. Sealing of the rear garage door
 - 3.6.4. Modifications to gully traps, including installation of pipes, lids, and achievement of clearances to paved and unpaved grounds
 - 3.6.5. Sealing of cladding and soffit junctions
 - 3.6.6. Installation of gas bottle restraints
 - 3.6.7. Weather-tightening of the meter box
 - 3.6.8. Sealing of the acrylic liner and wall junctions for the shower in the sleepout
 - 3.6.9. Sealing of the kitchen bench top and timber upstand junction.
- 3.7. A final inspection for the building consent was conducted in April 2023. The authority noted in its letter dated 11 April 2023 that several items required action/rectification before a code compliance certificate could be issued for the garage and dwelling.

- 3.8. The authority also required the owner to engage a suitably qualified building surveyor to assess the dwelling and garage for compliance with the building code and provide a detailed report from the surveyor listing any items of concern.
- 3.9. At some point the owner installed a strip drain in an attempt to provide adequate clearance from the concrete paving to the bottom of the cladding and the level of the floor.
- 3.10. An application for a code compliance certificate was made on 24 November 2023.
- 3.11. The authority responded to the code compliance certificate application, expressing concerns regarding:
 - 3.11.1. The strip drain installed at the main entrance, which did not meet the functional requirements of E2.
 - 3.11.2. The state of the framing (bottom plate in particular) due to lack of maintenance to the cladding and the concrete paths poured around the building.
- 3.12. Before considering further an application for code compliance certificate, the authority required a qualified building surveyor to conduct an assessment.
- 3.13. An additional final inspection was conducted by the authority, resulting in a 'Further Action Required' letter dated 7 December 2023.
- 3.14. In November 2024 the owner carried out further remedial work and submitted documentation to the authority, requesting clarification on outstanding items.
- 3.15. The authority replied via email on 30 January 2024:

“As [the authority] has indicated previously, [the authority] does not accept the installation of the channel drain against the dwelling at the front complies with NZ Building Code.

Also indicated previously, MDC will refuse to issue CCC until a qualified Building Surveyor has done an assessment of both the garage and the dwelling and supplied a written report.”

4. Submissions

The owner

- 4.1. The owner submits that the authority's refusal to issue a code compliance certificate is based on two primary issues:

- 4.1.1. The authority's contention that the strip drain installed at the main entrance does not meet the functional requirements of E2; and
- 4.1.2. The authority's concerns regarding the state of the framing (bottom plate in particular) due to lack of maintenance to the cladding and concrete paths around the building.
- 4.2. The owner's agent acknowledges that the strip drain does not meet the requirements of E2/AS1 Fig 17B. However, the agent submits that the strip drain has been installed in a manner that maintains a level entry, with the drain butted up against the face of the cladding.
- 4.3. The owner's agent argues that the strip drain meets the functional requirements of E2 due to the following factors:
 - 4.3.1. The cladding extends 100mm below the finished floor level, with a metal flashing that provides additional protection.
 - 4.3.2. The junction between the strip drain and cladding has been sealed to prevent water ingress.
 - 4.3.3. An overhang provides protection from rainwater.
 - 4.3.4. The concrete paths have a suitable fall to direct surface water away from the cladding.
 - 4.3.5. The outfall connection is connected to the stormwater system.
 - 4.3.6. Overflow protection has been installed.
- 4.4. The owner also acknowledges that the claddings do not meet the required clearances under E2/AS1 Fig 65 and Table 18 due to the installation of concrete paths for wheelchair access.
- 4.5. The owner submits that the dwelling is low-risk, with soffits surrounding the claddings, no parapets, and no high-risk roof-to-wall junctions.
- 4.6. The owner conducted moisture readings and repairs, which revealed no evidence of rot or damage to the framing.
- 4.7. The owner has completed all necessary repair works.
- 4.8. A letter from the cladding installer, dated 3 December 2023, supports the owner's submission. The installer conducted moisture readings in certain areas and inspections, which revealed no evidence of damage or rot.
- 4.9. The owner submits that the dwelling has performed as expected and meets the durability requirements of B2, with the bottom plate and framing 'remaining intact' after 27 years.

The authority

- 4.10. Despite the owner's efforts, certain issues remain unresolved.
- 4.11. The authority's letter dated 7 December 2023, titled "Further Action Required," identified nine outstanding items that required rectification.
- 4.12. The authority refused to issue a code compliance certificate until all listed items had been satisfactorily addressed.
- 4.13. The authority expressed concerns that the cladding had been compromised at its base for nearly 26 years prior to the initial final inspection.
- 4.14. The authority was not confident that all non-compliant items had been identified, citing potential issues with the cladding behind the concrete path and the structure behind the cladding.
- 4.15. The authority suggested that there may be structural damage to the wall framing behind the concrete poured against the cladding.
- 4.16. At the time of inspection, the authority was not satisfied that the building performed as intended, citing a lack of evidence demonstrating compliance with the building code.
- 4.17. The authority required a qualified building surveyor to conduct an assessment of both the garage and dwelling, providing a written report before considering further the issuance of a code compliance certificate.
- 4.18. The authority remained concerned that the cladding had been compromised for an extended period, and the recent repainting did not alleviate these concerns. Furthermore, the authority questioned whether the proposed alternative solution for sealing the strip drain to the cladding would comply with Clause E2.

5. Discussion

Legislation

- 5.1. The building consent in this case was granted under the former Act, therefore section 436 of the current Act (the transitional provision) applies. Section 436(3) provides that section 43 of the former Act remains in force, but must be read as if:

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

5.2. Section 436 of the current Act, and section 43 of the former Act, are set out in full in Appendix A.

5.3. Where an authority is not satisfied that the building work complies with the applicable Building Code, then section 43(5) of the former Act provides:

(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.

5.4. Reasons for refusing to issue a code compliance certificate have been discussed in previous determinations. I hold the same view as set out in Determination 2020/005² regarding what is expected of an authority when giving reasons for a refusal, and I reiterate the following key points:

5.4.1. The requirement that an authority provide reasons in writing for refusing to issue a code compliance certificate provides an owner with notice of the work required to be done to obtain the relevant certificate. The reasons provided by the authority will concern those elements of the building work the authority does not believe comply with the Building Code.³

5.4.2. It is important that an owner is given sufficiently explicit, specific, clear, and valid reasons why compliance has not been achieved, so the owner can consider the work required to remedy the situation.

5.5. It is the version of the Building Code that was in force at the time that the building consent was issued that is relevant to the original works carried out and must be complied with, E2.3.2 and E2.3.3 stated:

E2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to *building elements*.

E2.3.3 Walls, floors, and structural elements in contact with, or in close proximity to, the ground must not absorb or transmit moisture in quantities that could cause undue dampness, damage to building elements, or both

5.6. The functional requirement for clause B2 Durability (at the time the building consent was granted) was:

B2.2 Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major

² Determination 2020/005 Regarding the refusal to issue a code compliance certificate for a 22-year-old house. (7 May 2020). See section 5.2 "The authority's regulatory actions".

³ In this case, I am considering compliance with section 436 of the current Act, rather than section 94. As such, I have specifically excluded reference to compliance of the building work with the relevant building consents.

renovation, satisfies the other functional requirements of this code throughout the life of the building.

- 5.7. Clause B2.3 sets out the periods for which building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code (see Appendix A). The durability requirements of clause B2 for the external envelope (including wall claddings) is generally a minimum of 15 years, and for timber framing to provide structural stability for the life of the building being not less than 50 years.
- 5.8. The additional works to install the strip drain itself were required to comply with the provisions in force at the time of the work. E2.3.2 and E2.3.3 remained the same as set out in paragraph 5.5 but B2.3 had been removed and instead clause B2.3.1 had been inserted, so B2.3.1 (b) is relevant:

B2.3.1 *Building elements* must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the *specified intended life of the building*, if stated, or:

(a)...

(b) 15 years if:

- (i) those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or
- (ii) failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance.

(c)...

Reasons given for refusal

- 5.9. The authority's email dated 30 January 2024 purported to refuse again to issue the code compliance certificate, citing:
- 5.9.1. Non-compliance of the channel drain with the New Zealand Building Code; and
 - 5.9.2. The requirement for a qualified Building Surveyor's report assessing both the garage and dwelling.
- 5.10. The authority did not specify the performance requirements of the building code that were allegedly not met, instead requesting a report to assess the building.
- 5.11. A valid refusal should provide a detailed explanation of the authority's concerns regarding non-compliance, enabling the owner to understand the issues and propose additional evidence or rectification.

- 5.12. The authority's request for a Building Surveyor's report is not a requirement under the Act and is too generic in identifying the authority's concerns around Building Code compliance. The authority must specify the concerns they have with the compliance of the building work or where they specifically identify a lack of information is available to establish compliance.
- 5.13. It is then the owner's prerogative to propose the format for providing evidence in supporting evidence of compliance or, where necessary, a remedial strategy. The authority would then assess this evidence and make a decision.
- 5.14. In conclusion, the reasons for the proposed refusal given by the authority were not sufficiently explicit, specific, or clear to enable the owners to understand and consider what was necessary to rectify the situation.

Grounds to refuse to issue a code compliance certificate

- 5.15. To assist the parties, I will further examine the available information to ascertain whether there were valid grounds to refuse the issuance of a Code Compliance Certificate.
- 5.16. Noted above are the relevant performance requirements of the Building Code.
- 5.17. Water egress from the time of construction or soon after, including cracks and water ingress at the base of the cladding, raises concerns regarding compliance with the building code.
- 5.18. The unknown timing of the concrete path installation up against the cladding contributed to the risk of water being drawn behind the cladding and subsequently into the framing and other building elements.
- 5.19. It is unclear that the water entry during the 15 years after the cladding install via the cracks in the cladding was of a level to reach the threshold of undue dampness which is the test (alongside damage) for a breach of clauses E2.3.2 and E2.3.3 but because of the period of years where these cracks were left without protection it does raise significant concerns that are not appropriately addressed by the limited moisture testing.
- 5.20. This situation was further compromised by the pouring of the concrete paths (timeframe uncertain) which increased the risk that moisture transmission behind the cladding would occur and drying and drainage of any moisture that did penetrate the cladding would be negatively impacted – leading to undue dampness. This raises reasonable questions regarding the performance of the timber frame structure behind the cladding with clause B2.3 (50 years durability).
- 5.21. Limited moisture testing did not reveal issues in certain tested areas, but I consider that in the evidence provided to me the moisture testing methods were not documented/analysed to any recognised standard and were not distributed

sufficiently in enough areas of the cladding/framing to provide sufficient information on the level of performance of the timber framing.

- 5.22. I then turn my mind to the remedial works, outlined in the background above, including painting and sealing damaged areas of the cladding to prevent further moisture ingress, and by installing a channel drain at the base of the cladding in an attempt to provide some clearance from the concrete paths to the bottom of the cladding.
- 5.23. Given the base of the cladding is concealed behind the strip drain it is unclear whether it will manage moisture entering this concealed space, and little information on how drainage and drying would occur where moisture is drawn up behind the cladding.
- 5.24. There is insufficient information is available regarding the specific sealant used at the junction between the cladding and the drain, its maintenance requirements, and its ongoing durability.
- 5.25. There is some uncertainty around the ability of the strip drain to remain 'dry' in-service, e.g. not hold water that would provide an increased source of moisture transmission up into and behind the cladding system.
- 5.26. This uncertainty raises further concerns regarding continued risk of undue dampness affecting the framing.
- 5.27. I consider these factors demonstrate there is insufficient evidence of compliance with clauses E2.3.2 and E2.3.3 regarding the building work to install the drain and junction with the cladding. I consider this raises concern that the works have exacerbated further the previous issues with the level of information on the timber framing achieving compliance with Clause B2.3 (50 years durability).
- 5.28. Therefore, there are grounds to refuse the issue of a code compliance certificate in relation to the level of information available on compliance with the Building Code.
- 5.29. However, due to the deficiencies identified in the refusal notice, I will reverse the refusal and direct the authority to make a new decision. This new decision should take into account the findings of this determination and identify the missing information in a sufficiently specific and explicit way without directing one means of evidence (the surveyor's report). I would recommend that the parties take some time to consider all of the information now available and ensure they are clear on where any gaps in information exist in relation to the compliance of the building work with the building code. It may be useful for the parties to agree on inspections that include more invasive investigation of selected areas of the building.
- 5.30. I also note for the authority in relation to the email of 30 January 2024 that E2/AS1 is only one means of compliance and reasons given for refusal should be in relation to the performance requirements of the Building Code.

5.31. For completeness, the reversal of the authority's decision does not automatically entail the issuance of a code compliance certificate.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I reverse the decision of the authority to refuse to issue the code compliance certificate for building consent BC960513.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 17 April 2025.

Andrew Eames

Principal Advisor Determinations

APPENDIX A:

The Building Act 2004 (current Act)

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—
 - (if) 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.

The Building Act 1991 (the former Act)

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.
- (4) ...
- (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.

The Building Code (as in force at the time)

Clause B1 – Structure

Functional requirement

B1.2 *Buildings, building elements and sitework* shall withstand the combination of loads that they are likely to experience during *construction* or *alteration* and throughout their lives.

Performance

B1.3.1 *Buildings, building elements and sitework* shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during *construction* or *alteration* and throughout their lives.

B1.3.2 *Buildings, building elements and sitework* shall have a low probability of causing loss of *amenity* through undue deformation, vibratory response, degradation, or other physical characteristics throughout their lives, or during *construction* or *alteration* when the *building* is in use.

Clause B2 – Durability

Functional requirement

B2.2 *Building materials, components and construction methods* shall be sufficiently durable to ensure that the *building*, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the *building*.

Performance

B2.3 From the time a *code compliance certificate* is issued, *building elements* shall with only normal maintenance continue to satisfy the performances of this code for the lesser of; the *specified intended life* of the *building*, if any, or:

- (a) For the structure, including *building elements* such as floors and walls which provide structural stability: the life of the *building* being not less than 50 years.
- (b) For services to which access is difficult, and for hidden fixings of the external envelope and attached structures of a *building*: the life of the *building* being not less than 50 years.
- (c) For other fixings of the *building* envelope and attached structures, the *building* envelope, lining supports and other *building elements* having moderate ease of access but which are difficult to replace: 15 years.
- (d) For linings, renewable protective coatings, fittings and other *building elements* to which there is ready access: 5 years.