

## Determination 2006/87

### **Durability issues associated with a building at 64 Kate Sheppard Avenue, Torbay, North Shore City (to be read in conjunction with determination 2006/56)**

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<b>Applicant:</b>	Mr Tony Hardyman (“the applicant”)
<b>Territorial authority:</b>	North Shore City Council (“the territorial authority”)
<b>Site Address:</b>	64 Kate Sheppard Avenue, Torbay, North Shore City

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#### **1 The matter to be determined**

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.
- 1.2 The dispute for determination is whether certain building elements, which have 5 and 15 year durability requirements, comply with clause B2 of the Building Code.

#### **2 The first determination**

- 2.1 This determination relates to an earlier determination concerning the same house, Determination 2006/56, dated 20 June 2006 (“the first determination”).
- 2.2 The first determination concerned two issues identified by the territorial authority that, in the territorial authority’s view, prevented it from issuing a code compliance certificate for the building. These issues were whether:
  1. the cladding system as installed on the building complies with clause E2 of the Building Code; and
  2. other building elements, which have 5 or 15 year, or the life of the building, being not less than 50 years, durability requirements, comply with clause B2 of the Building Code.

### **3 Issue 1: The cladding**

- 3.1 In the first determination, I found that the cladding system did not comply with clause E2 and so I confirmed the territorial authority's decision to refuse to issue a code compliance certificate for the building. I also identified a number of matters to be remedied to make the cladding system meet the weathertightness and durability requirements of the Building Code.

### **4 Issue 2: The additional durability requirements**

#### **4.1 Background**

- 4.1.1 I did not address the second issue in the first determination because I had received some general legal advice about waivers and modifications of which I wished to seek clarification before making a determination on this issue.
- 4.1.2 I have now received that clarification and so make this determination on the second issue. This determination should be read in conjunction with the first determination.

#### **4.2 Discussion**

- 4.2.1 As previously described, the territorial authority has concerns about the compliance with clause B2 of certain elements of the building. These building elements included all items other than those relating to the cladding. These elements have 5 or 15 year, or the life of the building, being not less than 50 years, durability requirements under clause B2.
- 4.2.2 The territorial authority's concerns are due to the fact that the building was substantially completed in 1998, some years before it was inspected by the territorial authority on 28 February 2002 (a 'final' inspection) and 31 March 2005 (a "specific weathertightness" inspection).
- 4.2.3 The relevant provision of clause B2 of the Building Code recognises that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods "from the time of issue of the applicable code compliance certificate" (clause B2.3.1 and 'limits on application' marginal note).
- 4.2.4 Under clause B2.3.1, the periods for which building work must remain durable are:
- 5 years if the building elements are easy to access and replace, and failure of those elements would be easily detected during the normal use of the building;
  - 15 years if building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use of the building, but would be easily detected during normal maintenance; and
  - the life of the building, being not less than 50 years, if the building elements provide structural stability to the building, or are difficult to access or replace, or failure of those elements would go undetected during both normal use and maintenance.

- 4.2.5 From the evidence provided by the territorial authority about the building, I am satisfied that:
- the building elements concerned would have met the required durability provisions of clause B2 at the time of substantial completion of the building (i.e. when the building was ready for occupation in 1998); and
  - the territorial authority has correctly established compliance with all other Building Code clauses (with the exception of the cladding system matters addressed in the first determination).
- 4.2.6 On this basis, the territorial authority (under sections 45(5) and 67 of the Building Act 2004) may amend the building consent to incorporate a modification to clause B2. The modification should be to the ‘limits on application’ marginal note to clause B2.3.1, to the effect that the required durability periods for the building elements concerned apply from the date of substantial completion of the building, not from the date of issue of the code compliance certificate. For the purposes of this determination “substantial completion” of the house is achieved when the house was completed and ready for occupation as determined by the territorial authority.
- 4.2.7 Once the outstanding matters from the first determination are addressed to the territorial authority’s satisfaction, the territorial authority may then issue a code compliance certificate against the amended consent.
- 4.2.8 The modification of clause B2 should be documented in the territorial authority’s records of the property to ensure that potential purchasers and subsequent owners are aware of the modification. It would be appropriate for the territorial authority to note the modification on the Land Information Memorandum, and to place a copy of the determinations on the property file for the building.
- 4.2.9 In coming to this view, I have had to consider section 436 of the Building Act 2004. Section 436 sets out the transitional provision for issuing code compliance certificates for building work consented under the Building Act 1991. This section is relevant to the territorial authority’s decision not to issue a code compliance certificate for the building in this determination.
- 4.2.10 The relevant parts of section 436 state:
- (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.

- 4.2.11 Section 43 of the 1991 Act provided for the issue of code compliance certificates. Under section 43(3)(a), a territorial authority could issue a code compliance certificate if it were satisfied that the building work complied with the Building Code in force at the time the application for a code compliance certificate was made. Under section 43(3)(b), the territorial authority could consider compliance against any waiver or modification to the Building Code in determining whether to issue a code compliance certificate.
- 4.2.12 There are two possible interpretations of section 436:
- a code compliance certificate may be issued only if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted; or
  - a code compliance certificate may be issued if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted, but allowing for any waivers and modifications to the Building Code incorporated in the building consent.
- 4.2.13 The first interpretation is premised on section 436(3)(b)(i) replacing section 43(3) of the 1991 Act. It relies on the use of the word “only” in section 436(3)(b)(i) as excluding the possibility of the territorial authority considering anything other than compliance against the Building Code in force at the time the building consent was granted, meaning that a territorial authority would not be able to consider any waivers or modifications to the Building Code that were incorporated in the building consent.
- 4.2.14 In comparison, the second interpretation is that section 436(3)(b)(i) does not replace section 43 of the 1991 Act, but that it must be read alongside section 43(3) as much as possible. Under this interpretation, section 436(3)(b)(i) should be read as modifying section 43(3) only in respect of the new element it adds to the code compliance certificate test; it merely changes the version of the Building Code that compliance should be measured against, from the version in force at the time the application for a code compliance certificate was made, to the version in force at the time the building consent was granted.
- 4.2.15 The effect of the first interpretation would be that owners who have been granted waivers or modifications to the Building Code (whether under the 1991 Act or through an amendment to a consent under the 2004 Act) would never be able to obtain a code compliance certificate. Essentially, these owners, who may have relied in good faith on waivers or modifications legitimately granted to them, would be left in perpetual limbo.
- 4.2.16 This would be most undesirable. It would be the reverse of the usual situation under both the 1991 and 2004 Acts and, in my view, does not fit with the purpose and scheme of the Building Act 2004. As far as possible, an owner should obtain a code compliance certificate for all work requiring a building consent and for which a consent was granted. A grant of a waiver or modification should not stop this.
- 4.2.17 Furthermore, there is nothing in the transitional provisions of the 2004 Act that supports such a result; for cases where waivers or modifications have been granted,

the Act does not provide for any outcome other than to obtain a code compliance certificate. In comparison, section 437(1)(b) provides for an owner to obtain a certificate of acceptance if they are unable to obtain a code compliance certificate because the building certifier no longer exists.

- 4.2.18 For the reasons set out above, I prefer the second interpretation relating to section 436(3)(b)(i).

## **5 The decision**

- 5.1 Despite the evidence referred to in paragraph 4.2.5, I have not received sufficient subsequent evidence that the building elements will meet the current requirements of clause B2 if a code compliance certificate was issued at this time. Therefore, I find that I am unable to be satisfied on reasonable grounds, due to the absence of evidence, that the particular building elements, which have 5 or 15 year, or the life of the building being not less than 50 years, durability requirements, comply with clause B2 of the Building Code. Accordingly, I confirm the territorial authority's decision to refuse to issue a code compliance certificate for the building.
- 5.2 The owner should now exercise the option of applying to the territorial authority for a waiver or a modification to the original building consent as set out in paragraph 4.2.6, which should address the B2 issues raised by the territorial authority (the appropriate documentation for such an application may be available from the territorial authority).
- 5.3 In my opinion, a territorial authority shall, on receiving such a request from the owner, consider any waivers or modifications it has granted when deciding whether to issue a code compliance certificate for building work consented under the 1991 Act. Under section 436, a territorial authority should measure compliance against the Building Code, as amended by any waivers or modifications, which was in force at the time the building consent was granted.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 11 September 2006.

John Gardiner  
**Determinations Manager**