

Determination 2007/106

Refusal of a code compliance certificate for a 12-year-old house at 7A Swainston Road, St Johns, Auckland



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are Mr and Mrs Moody (“the applicants”), and the other party is the Auckland City Council (“the territorial authority”).
- 1.2 The matter for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for a 12-year-old house because it was not satisfied that the building work complied with clause B2 “Durability” of the Building Code² (First Schedule, Building Regulations 1992) is correct.
- 1.3 The question to be determined is whether a code compliance certificate is to be issued despite the fact that it is not now (at the date of this determination) possible to

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

be satisfied that certain building elements, which have 5 and 15-year durability requirements and are listed on the notice to fix (which I refer to as the “listed elements” in the course of this determination), comply with clause B2 of the Building Code considering the time that has elapsed since those elements were constructed.

- 1.4 I note that the house in question was the subject of a previous determination (2005/85) that was published in June 2005 and which related to the monolithic cladding and the refusal of the territorial authority to issue a code compliance certificate.
- 1.5 In making my decision, I have considered the submissions of the parties, the legal opinion that I have obtained, and the other evidence in this matter. I have not considered any other aspects of the Act or the Building Code.
- 1.6 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.

2. The building

- 2.1 The building work consists of a three-storey house situated on a slightly sloping site. The house has one partially cantilevered balcony and one fully cantilevered and enclosed balcony. A canopy is located over the main entry.
- 2.2 The external cladding system is face-fixed fibre-cement with a spray texture and paint finish.

3. Sequence of events

- 3.1 The territorial authority issued a building consent on 8 June 1995 under the Building Act 1991 (“the former Act”).
- 3.2 The territorial authority carried out various inspections during the construction of the building work and issued an interim Notice to Rectify on 28 November 1995. The territorial authority undertook the first of 3 final inspections on 24 February 2001. At that time no concerns appear to have been raised about compliance with the durability requirements of the Building Code Clause B2 Durability.
- 3.3 The territorial authority carried out a second final inspection on 23 August 2004 and wrote to the applicants on 30 August 2004 attaching a second Notice to Rectify of the same date.
- 3.4 The applicants applied to the Department for a determination regarding the refusal of the territorial authority to issue a code compliance certificate as it had concerns relating to the monolithic cladding of the house. The Department issued Determination 2005/85 on 15 June 2005 in which it found that the cladding did not comply with clauses B2 and E2.
- 3.5 The territorial authority wrote to the applicants on 21 July 2005 noting that it had undertaken a further inspection of the property on 15 July 2005. The territorial authority stated that as it was not satisfied that the house complied with the Building Code, it was unable to issue a code compliance certificate.

3.6 The territorial authority attached a notice to fix dated 20 July 2005, to that letter. The “particulars of contravention or non-compliance” attached to the notice listed requirements under the following headings:

1. Issues relating to cladding
2. Changes to the building consent
3. Other building related issues
4. Durability issues

The notice also set out the actions that the applicant was to undertake to remedy the contravention or items of non-compliance. The notice was subsequently replaced by a revised notice to fix, which amended an error relating to the building consent reference number.

3.7 I am advised that an assessor from the Weathertight Homes Resolution Service (“WHRS”) carried out an investigation of the property in August 2005 and concluded that moisture was entering the building and that there were numerous faults associated with the cladding.

3.8 The applicant commissioned a consulting firm (“the consultants”) to inspect the property and provide a report in relation to the notice to fix. This report and a set of appendices, including a re-cladding budget, were produced in May 2006 and subsequently forwarded to the territorial authority.

3.9 In a letter to the applicants dated 28 July 2006, the territorial authority responded to the consultants’ report, saying that the territorial authority accepted in principle the proposals regarding the cladding and other building related issues. It would also review the engineer’s report regarding the changes to the building consent. The only items remaining to be resolved were those listed under “Durability Issues” in the notice to fix.

3.10 The Department received the applicant’s application for a determination on 4 October 2006.

4. The submissions

4.1 In a covering summary to the Department dated 28 September 2006, the applicants set out the background in this matter and stated that it was not equitable for the territorial authority to raise the issue of durability in the notice to fix, as this issue had not been raised in the previously issued Notices to Rectify. The applicants requested that if the determination found that the house did meet the durability requirements, this be held valid for 3 to 5 years.

4.2 The applicants forwarded copies of:

- the consultants’ May 2006 report and attached appendices
- the correspondence from the territorial authority.

4.3 The territorial authority did not make a submission.

4.4 Copies of the submissions and other evidence were provided to each of the parties.

- 4.5 A draft determination was issued to the parties on 5 December 2006. The draft was issued for comment and for the parties to agree a date when the “listed elements” complied with the durability provisions of the Building Code.
- 4.6 The applicants accepted the draft in a letter to the Department dated 16 December 2006. The applicants submitted that the “listed elements” complied with clause B2 on 24 February 2001.
- 4.7 The territorial authority responded to the draft determination in a letter to the Department dated 12 December 2006. The territorial authority did not accept the draft determination saying its particular concern was the investigation undertaken by a WHRS assessor (refer paragraph 3.7).
- 4.8 The territorial authority believed the results of the WHRS investigation should be reviewed before any decision could be made by the Department. The territorial authority suggested the determination should be placed on hold until the owner provided the WHRS assessor’s report to the Department and to the territorial authority to review as required under section 186(1)(c) of the Act.
- 4.9 I am surprised at the territorial authority’s response. As noted in paragraph 3.8, the applicants supplied the territorial authority with a copy of the consultant’s report, and that report, in turn, referred to the WHRS assessor’s report. As noted in paragraph 3.8, the territorial authority said the only items remaining to be resolved were those listed under “Durability Issues” in the notice to fix.
- 4.10 In my view, that statement meant that the territorial authority had already accepted that the WHRS assessor’s report was not relevant to the matter for determination (being compliance with the durability provisions of the Building Code). Furthermore, in that letter, the territorial authority also accepted in principle the applicants’ proposal to reclad the building, despite the territorial authority not having received the assessor’s report. Consequently I see no reason to put the determination on hold or to consider the WHRS assessor’s report. I also note that under section 180 of the Act, only an applicant may withdraw an application for determination and no such request for withdraw was received.
- 4.11 The territorial authority’s response to the draft determination, dated 12 December 2006, made no submission with respect to a date when it believed the building elements complied with Clause B2.
- 4.13 On 19 March 2007, the territorial authority reversed its previous position and agreed that a WHRS claim does not prevent me making a determination and confirmed acceptance of the draft.
- 4.14 In a series of e-mails, the parties failed to agree a date at which they believed the building elements complied with Clause B2. A hearing was then requested by the applicant in order to establish a date.

5. The hearing

- 5.1 At the request of the applicants a hearing was held before me on 18 April 2007. I was accompanied by a Referee engaged by the Chief Executive under section 187(3) of the Act. One of the applicants and a representative of the territorial authority

attended along with three officers of the Department. The hearing was to hear submissions about the date when the building elements complied with clause B2.

- 5.2 The applicant said that the relevant date should be April 2006, as he had received a consultant's report saying that the house complied with the Building Code, including clause B2, at that time. I note that the consultant's report does not preclude the house from having achieved compliance at any earlier date. (The applicant originally submitted the date should be 24 February 2001, refer paragraph 4.6.)
- 5.3 The territorial authority produced water consumption records for the house. It believed the records showed that the house was effectively habitable in July 1996. I observe that the records show wide fluctuations over the period from about July 1996 until December 1998, which are likely to have been caused by factors such as estimated readings, seasonal variation, use of water for construction purposes and the like. The pattern of consistent consumption, which I have taken to indicate normal occupancy, starts in December 1998 and therefore the date when the building was substantially complete. I have therefore taken the view that compliance with B2 was achieved in December 1998.
- 5.4 At the end of the hearing I sought agreement from the parties that all matters resulting from the notice to fix (refer paragraph 3.6) had been resolved, the most significant of these was that the house is to be reclad. The territorial authority noted that the original light-weight roof specified in the consent had not been installed, but a heavier concrete-tile roof had been installed instead. Consequently, the territorial authority required verification that the roof structure is adequate to support the tiles. The owner acknowledged the territorial authority's concerns.
- 5.5 I was not asked to delay the determination or to consider the WHRS assessor's report (see paragraph 4.12) any further.

6. Discussion

- 6.1 It is not disputed that the parties have reached agreement on resolving all the issues listed in the notice to fix (see paragraph 5.4), with the exception of those relating to durability and which I have described as "the listed elements". These listed elements have been in place for several years. Accordingly, it is no longer possible for the territorial authority to be satisfied that they would still achieve the required durability periods measured from the date when a code compliance certificate was finally issued.
- 6.2 The relevant provision of clause B2 of the Building Code requires that building elements must, with only normal maintenance, continue to satisfy the performance requirements of the Building Code for certain periods ("durability periods") "from the time of issue of the applicable code compliance certificate" (clause B2.3.1).
- 6.3 Those durability periods 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

- 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.
- 6.4 The 5-year delay between the completion of the house and the last of the territorial authority's final inspections raises the issue of when the listed elements complied with clause B2. The territorial authority's records indicate that, by 28 July 2006, the parties had agreed that all the issues raised in the notice to fix dated 20 July 2005 had been or would be addressed, with the exception of concerns about compliance with the durability requirements of the Building Code.
- 6.5 At the hearing the territorial authority produced evidence related to water consumption as indication of practical completion. No other evidence was available to support an alternative date, and as discussed in paragraph 5.3, I conclude that the listed elements complied with Clause B2 on 1 December 1998.
- 6.6 In order to address these durability issues, I sought some clarification of general legal advice about waivers and modifications I have now received that clarification and the legal framework and procedures based on this clarification are described in previous determinations (for example, Determination 2006/85) and are used to evaluate the durability issues raised in this determination.
- 6.7 I continue to hold that view, and therefore conclude that
- (a) The territorial authority had the power to grant an appropriate modification of clause B2 in respect of the listed elements.
 - (b) It would have been reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different than it would have been if a code compliance certificate had been issued in December 1998.
- 6.8 I strongly recommend that the territorial authority record this determination and any modification resulting from it, on the property file and also on any LIM issued concerning this property.

7 The second draft determination

- 7.1 I forwarded copies a second draft of this determination to the parties on 2 May 2007. This draft modified the building consent to the effect that the listed elements complied with clause B from 1 December 1998.
- 7.2 The applicants accepted the draft subject to two non-contentious items, which I have taken into account in this final determination.
- 7.3 The territorial authority did not accept the draft and set out its reasons for non-acceptance in a letter to the Department dated 10 May 2007. The territorial authority submitted that, based on the evidence that it had provided, the appropriate date for code-compliance should be no later than 1 June 1996. It was noted that the applicants had argued that the date should be 24 February 2001, the date when a final inspection was carried out. The territorial authority submitted that completion argument based on water usage was "*specious*" and that it was "*unlikely that [the building in question] would take three and a half years to build . . .*".

- 7.4 The applicants provided comment on the territorial authority's submission in a letter dated 28 July 2007. The applicants were of the opinion that the date of issue of a code compliance certificate is seldom the same as the legal date of practical completion. The applicants noted that the earliest date for establishing code-compliance should be February 2001 when the territorial authority carried out its final inspection. This inspection had been relied upon when the house had been purchased. The territorial authority had an obligation to advise the applicants at the time of its final inspection if it intended to backdate the date prior to February 2001.
- 7.5 I have considered the submissions of the parties regarding the commencement of the clause B2 durability periods. As no new evidence has been produced by either of the parties, I am still of the opinion that compliance with B2 was achieved in December 1998. Accordingly, this date has been confirmed in this final determination.

8 The decision

- 8.1 In accordance with section 186, I hereby determine that:
- (a) all the building elements apart from the listed elements complied with clause B2 on 1 December 1998.
 - (b) the building consent is hereby modified as follows:
 - The building consent is subject to a modification to the Building Code to the effect apart from the listed elements, complied with clause B2.3.1 from 1 December 1998 instead of from the time of issue of the code compliance certificate
 - (c) Order the territorial authority, once the issues other than durability set out in the notice to fix have been rectified to its satisfaction, to issue a code compliance certificate in respect of the building consent as amended.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 17 September 2007.

John Gardiner
Manager Determinations