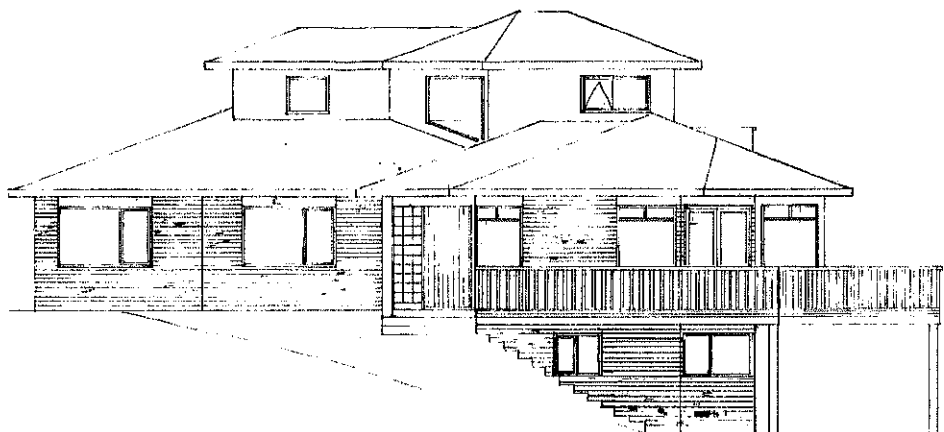




Determination 2007/125

Refusal of a code compliance certificate for an 11-year-old house at 28 Rangitukehu Street, Ohope



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 applicant is the owner of the building, Mr K Sullivan (“the applicant”) and the other party is the Whakatane District Council (“the territorial authority”).
- 1.2 The matter for determination is the territorial authority’s decision to refuse to issue a code compliance certificate for an 11-year-old house because of the age of the building consent.
- 1.3 In making my decision, I have considered the submissions of the parties and the other evidence in this matter
- 1.4 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.

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



2. The building

- 2.1 The building work consists of a moderately complex three-storey detached house situated on a sloping site. The house is of timber-framed construction with a mix of a concrete slab and suspended timber flooring. The roof consists of corrugated steel sheets on timber-trusses. The wall cladding is a mix of cavity brick veneer, Macrocarpa weatherboards, and what is described as 'light weight cladding' on the upper floor and some lower level areas. The building has aluminium joinery throughout.

3. Sequence of events

- 3.1 The applicant applied to the territorial authority for a building consent on 22 December 1995 and a consent was subsequently issued under the Building Act 1991. I have not seen a copy of the building consent. The territorial authority carried out various inspections during the construction of the building and it appears the work was substantially completed some time in 1996.
- 3.2 The territorial authority wrote to the applicant on 15 January 1999, and again on 24 February 2000, requesting that the applicant advise the territorial authority of the progress on the building work with a view to a final inspection taking place (I have not seen a copy of either of those letters).
- 3.3 It appears the applicant wrote to the territorial authority requesting a final inspection in June 2000, and the final inspection was carried out on 17 June 2000. I have not seen a copy of the letters or the results of the final inspection.
- 3.4 On 21 November 2000 the applicant wrote to the territorial authority disputing the fees charged for extra inspections. In response the territorial authority wrote to the applicant on 28 November 2000 to discuss the fees and the two letters described in paragraph 3.2 above. In regards to issuing a code compliance certificate, the territorial authority stated that "*Upon receipt of all outstanding money owed, the Code Compliance Certificate will be issued.*" The territorial authority did not raise any concerns about the code compliance of the building.
- 3.5 On 20 November 2004 the territorial authority wrote to the applicant noting settlement of all outstanding debt but declining to issue a code compliance certificate "*due to the length of time that has lapsed since the . . . building work was completed*". The territorial authority noted that the applicant's situation was not unique and that provisions in the Act also recognised this issue. The territorial authority advised the applicant that he could seek a determination from the Department's antecedent (the Building Industry Authority).
- 3.6 On 3 September 2007 the territorial authority wrote to the applicant to advise that a certificate of acceptance was unable to be issued as the Act does not allow the issuing of a certificate of acceptance for building work already subject to a building consent. The letter reiterated that the territorial authority would not issue a code compliance certificate due to the time that had lapsed since the consent was issued.
- 3.7 On 27 September 2007 the applicant wrote to the territorial authority outlining the sequence of events, as outlined above, and requesting that a code compliance certificate be issued with a back-dated durability date corresponding to the final inspection. I have not seen a response to this letter.

3.8 The Department received the application for determination on 15 October 2007.

4. The submissions

4.1 In its submission the applicant wrote a covering letter outlining the sequence of events.

4.2 The applicant forwarded copies of:

- the plans
- various correspondence between the territorial authority and the applicant
- a territorial authority 'record of events and time spent on application after consent issue'

4.3 Copies of the applicant's documentation were provided to the territorial authority.

4.4 In an email to the Department dated 16 October 2007, the territorial authority confirmed its agreement of discussions it had had with the applicant that compliance with Building Code clause B2 Durability was achieved in October 1996. The applicant also confirmed his agreement of this date in an email to the Department dated 26 October 2007.

5. Discussion

5.1 The territorial authority has concerns about the durability, and hence the compliance with the building code, of the building elements, taking into consideration the completion of the building some time in 1996. I note that a final inspection did not take place until June 2000.

5.2 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).

5.3 These 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.

5.4 In this case the 4-year delay between the commencement of the building work and the final inspection required for a code compliance certificate to be issued has raised concerns with the territorial authority that various elements of the building are now well through their required durability periods and would consequently no longer comply with clause B2 if a code compliance certificate was to be issued affective from today's date.

- 5.5 It is not disputed, and I am therefore satisfied that all the building elements complied with clause B2 on 1 October 1996. This date has been agreed between the parties, refer paragraph 4.4.
- 5.6 In order to address these durability issues when they were raised in previous determinations, I sought some clarification of general legal advice about waivers and modifications. I received that clarification and the legal framework and procedures based on the clarification are described in previous determinations² (for example, Determination 2006/85) and are used to evaluate the durability issues raised in this determination.
- 5.7 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) The territorial authority has the power to grant an appropriate modification of clause B2 in respect of all of the elements of the building.
 - (b) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if a code compliance certificate had been issued at some time in 1996.
- 5.8 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.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine that:
- (a) all the building elements installed in the building complied with clause B2 on 1 October 1996.
 - (b) the building consent is hereby modified as follows:
 - The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 1 October 1996 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2007/125.
 - (c) following the modification set out in (b) above, the territorial authority is 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 2 November 2007.



John Gardiner
Manager Determinations

² Copies of all determinations issued by the Department can be obtained from the Department's website.