

## Determination 2007/137

### The durability of the building elements installed in 12-year-old additions to a house at 1 Hugh Place, Hamilton

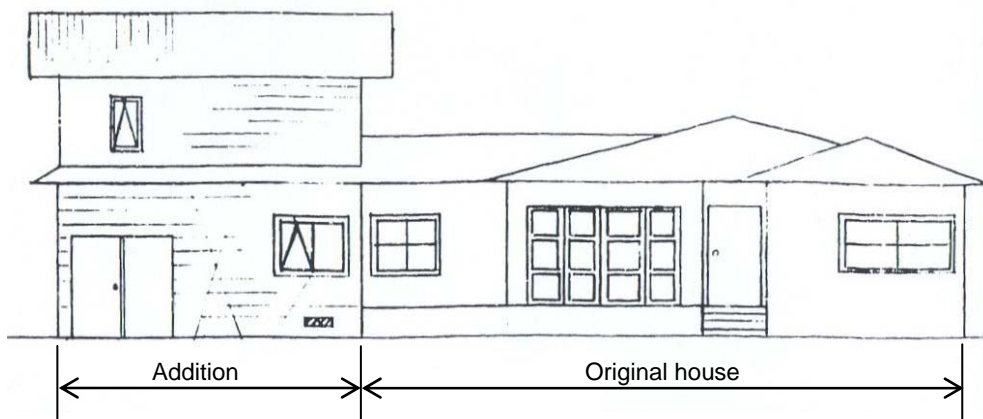


Figure 1: Northeast elevation

#### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“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, C Hodgson (“the applicant”) acting through a firm of solicitors, and the other party is the Hamilton City Council (“the territorial authority”).
- 1.2 The matter for determination is whether the territorial authority is correct in its decision to refuse to issue a code compliance certificate for an approximately 12-year-old addition to a house because it was not satisfied that the building work complied with Clause B2 “Durability” of the Building Code<sup>2</sup> (First Schedule, Building Regulations 1992).
- 1.3 In making my decision, I have considered the documentation received from the applicants, and other evidence in this matter.

<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

<sup>2</sup> The Building Code is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

- 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.

## **2. The building**

- 2.1 The addition to the original single storey building consisted of a two-storey timber-framed structure on a concrete floor slab. The addition is clad with fibre-cement weatherboards and a corrugated steel roof. It has aluminium window and door joinery. The addition is simple in plan and form.

## **3. Background**

- 3.1 The territorial authority issued a building consent for the addition to the house on 12 May 1994. I have received no information about any inspections the territorial authority carried out during the building process.
- 3.2 In a letter to the then owner (“the previous owner”), dated 10 March 1999, the territorial authority noted that advice of completion of building work had not been received, a final inspection had not been carried out, and that this was required for the issuing of a code compliance certificate.
- 3.3 In a letter to the previous owner, dated 15 April 1999, the territorial authority advised that a completion inspection had taken place on 14 April 1999 and listed a number of items that were not satisfactory and needed fixing before a code compliance certificate could be issued. I conclude from later correspondence from the territorial authority (refer paragraph 3.6) that these items have been fixed and are no longer an issue that this determination needs to address.
- 3.4 In a letter to the previous owner, dated 31 October 2005, the territorial authority noted that it could not issue a code compliance certificate because of the length of time that had passed since the building consent was granted. The territorial authority could not therefore be satisfied on reasonable grounds that the building work and elements will continue to satisfy the durability requirements of the Building Code. A list of items to be rectified, dated 14 September 2005, was attached, which also included a note concerning the age of the consent, and advice that the territorial authority might choose not to issue a code compliance certificate.
- 3.5 On 9 November 2005 the territorial authority issued a notice to fix listing the details of contravention or non compliance as “*Elements of the structure may not meet the durability requirements – B2.2 Building Regulations 1992*” and referring to the letter of 31 October 2005.
- 3.6 On 23 November 2005 the territorial authority wrote to the owner clarifying that items listed on previous checklists, dated 14 September 2005 and 21 October 2005, had been completed and reiterating that a code compliance certificate would not be issued due to the matter of durability.
- 3.7 The applicant’s solicitor wrote to the territorial authority on 12 February 2007 seeking clarification as to the durability requirements and rectification required for a code compliance certificate to be issued, and confirmation of whether a certificate of acceptance could be issued should the applicant apply.

- 3.8 In response to this request the territorial authority replied in a letter dated 5 March 2007 stating that:
- the building is over 10 years old... therefore a number of expected lifetimes of components are compromised for durability in terms of the time that has elapsed since construction
  - that the council is not able to contemplate a certificate of acceptance for this project as it is a residential dwelling and section 96 (1)(d) does not apply
- 3.9 The circumstances under which a territorial authority may issue a certificate of acceptance are set out in section 96 of the Act. None of those circumstances applies in this case. Specifically, the building work to alter the house:
- was carried out under a building consent
  - was not “urgent work” under section 42
  - was not work to which subsections (3) and (4) of section 91 apply
  - was not work on premises to which section 362A applies.
- 3.10 The application for determination was received by the Department on 15 October 2007.

#### **4. The submissions**

- 4.1 In the application, the applicant’s solicitor set out the background to the dispute and forwarded copies of the:
- plans for the proposed additions
  - some consent and inspection documentation
  - documentation relating to the title of the property
  - correspondence from the territorial authority described in paragraphs 3.2 to 3.8.
- 4.2 The draft determination was sent to the parties on 23 October 2007. The draft was issued for comment and for the parties to agree a date when all the building elements in the additions complied with Building Code Clause B2 Durability. The parties accepted the draft determination and agreed that compliance with Clause B2 was achieved on 1 June 1995.

#### **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 work in about 1995. I note that the final inspection did not take place until 14 April 1999. It appears that durability is the territorial authority’s only concern with respect to the code compliance of the building.
- 5.2 The relevant provision of Cause 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 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 delay between the commencement of the building work and the applicant's request for a code compliance certificate 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 were to be issued effective 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 June 1995. This date has been agreed between the parties, refer paragraph 4.2.

5.6 In order to address these durability issues when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice 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 building elements in the addition to the building.
- (b) it is reasonable to grant such a modification, with appropriate notification, because in practical terms the construction is no different from what it would have been if a code compliance certificate had been issued in about 1995 when the building was substantially complete.

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 June 1995.

- (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 June 1995 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2007/137.

- (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 12 December 2007.

John Gardiner  
**Manager Determinations**