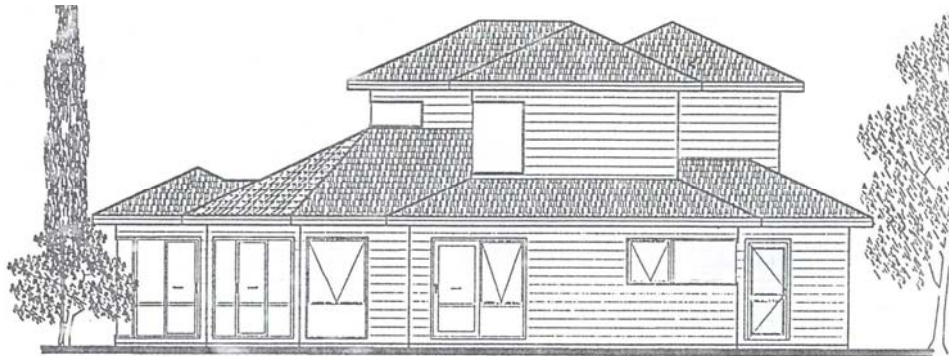


Determination 2007/51

Refusal of a code compliance certificate because of concerns over durability for a 7-year-old house at 69A Robinson Avenue, Rotorua



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 Schuler (“the applicants”), and the other party is the Rotorua District 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 7-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 be satisfied that the building elements contained in the building (“the building elements”) comply with clause B2 of the Building Code considering the time that has elapsed since those elements were constructed.

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.

- 1.4 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.
- 1.5 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 two-storey house situated on a level site.

3. Sequence of events

- 3.1 The territorial authority issued a building consent (No. 97/0880) on 6 June 1997 under the former Building Act 1991.
- 3.2 The territorial authority carried out various inspections during the construction of the building work from 6 June 1997 to the first ‘final’ inspection completed on 21 November 1997. The final inspection noted:
- . . . work all completed but require common drain agreement to be registered on title. Solicitor to contact when done.
- 3.3 The territorial authority’s ‘field inspection card’ records that a letter about the lapsing of the consent was sent to the applicants in June 1998, and, as no response had been received, the final reminder letter was sent on 29 September 1998. I have not seen either letter. It appears no response was received to the 29 September 1998 letter and the territorial authority informed the applicants on 18 December 1998 that the building consent had lapsed.
- 3.4 Despite the building consent having lapsed another ‘final’ inspection was carried out on 10 June 1999 and the territorial authority issued an interim code compliance certificate dated 11 June 1999, which was subject only to:
- Common drain agreement still to [be] registered by solicitor.
- 3.5 The Department received the application for a determination on 8 March 2007.

4. The submissions

- 4.1 In a covering summary to the Department dated 7 March 2007, the applicants set out the background to this matter.
- 4.2 The applicants forwarded copies of:
- the consent documentation
 - the territorial authority’s ‘field inspection card’ containing a summary of all inspections
 - the document, dated 18 December 1998, noting that the consent had lapsed.
- 4.3 In a letter to the Department dated 4 April 2007, the territorial authority said:
- Council believes the house complies with B2 . . .
- The issue that is for determination is whether or not the Code Compliance Certificate should be backdated to 21.11.97 when the building work was completed.

It would appear that all building work was satisfactorily completed on or about 21.11.97 when a final inspection was carried out . . .

. . . a final Code Compliance Certificate was not issued because of an uncompleted agreement regarding a common drain.

- 4.4 The territorial authority forwarded copies of:
- the interim code compliance certificate
 - the territorial authority's inspection records.
- 4.5 Copies of the submissions and other evidence were provided to each of the parties.
- 4.6 A copy of a draft determination was forwarded to the parties on 27 April 2007. The draft was issued for comment and for the parties to agree a date when the building elements installed in the house complied with the Building Code Clause B2 Durability.
- 4.7 Both parties accepted the draft determination and agreed that compliance with B2 Durability was achieved on 11 June 1999.

5. Discussion

- 5.1 The territorial authority lapsed the building consent on 18 December 1998. It is not known what initiated the second final inspection and the issuing of the interim code compliance certificate on 11 June 1999, and I have insufficient information to form a view whether it was reasonable to lapse the consent or not. However, given the issuing of the interim code compliance certificate on 11 June 1999, I am of the opinion that the decision to lapse the building consent should be reversed.
- 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 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.
- 5.4 The delay between the completion of the house and the request for a final code compliance certificate raises the question of when the building elements complied with clause B2. The territorial authority seems to accept that the building work was code-compliant in November 1997 when the first ‘final’ inspection, which it successfully passed, was completed. The interim code compliance certificate was issued on 11 June 1999. Although it could be argued that the date of the first final inspection could be taken as the date when compliance with B2 was achieved, both

the territorial authority and the applicant have agreed that compliance was achieved on 11 June 1999, refer paragraph 4.7.

5.5 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.

5.6 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 all the building elements
- (b) It would have been 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 in June 1999.

5.7 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 hereby determine that the decision of the territorial authority to lapse the building consent be reversed.

6.2 I also determine that:

- (a) all the building elements installed in the house complied with clause B2 on 11 June 1999.
- (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 11 June 1999 instead of from the date of issue of the code compliance certificate for all building elements.
- (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 22 May 2007.

John Gardiner
Manager Determinations