



Determination 2009/89

The refusal to issue a code compliance certificate for a 13-year-old house at 130A Broderick Road, Johnsonville, Wellington

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, Mr P Burghout (“the applicant”), and the other party is the Wellington City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The matter arises from the authority’s decision to refuse to issue a code compliance certificate for a 13-year-old house. The authority was not satisfied that the building work complied with Clause B2 “Durability” of the Building Code (First Schedule, Building Regulations 1992), considering the age of the building work.
- 1.3 In order to determine, in terms of section 177(b)(i) of the Act², whether the decision of the authority to refuse to issue the code compliance certificate was correct, I must also consider, in terms of section 177(a), whether the house complies with Clause B2 of the Building Code.
- 1.4 I note that the authority has raised a number of items that require completion or maintenance work. Based on information provided by the parties, it appears there is no dispute that there is outstanding work to be completed. The only outstanding matter in dispute pertains to the durability requirements of certain elements of the building work. This determination is therefore restricted to considering the durability requirements of the building work.
- 1.5 In making my decision, I have considered the documentation received from the applicant, the submissions from the authority, and other evidence in this matter.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² 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 is a three storey dwelling on a concrete block foundation. The construction is a light timber frame, clad with plywood sheet cladding to the lower storey and fibre-cement weatherboard cladding to the upper two storeys. The house has aluminium joinery and a corrugated iron roof.

3. Background

- 3.1 The building consent was issued in early 1996 (building consent number 16011) under the Building Act 1991 (“the former Act”) and the house was substantially completed in May 1996.
- 3.2 On 6 July 2009, the authority wrote to the applicant, referring to an inspection carried out on 3 July 2009. The authority raised a number of matters that needed to be addressed and items of work that required completion in order for a code compliance certificate to be considered. The authority also required from the manufacturers of the aluminium joinery and roofing iron:
- ...a written statement commenting on the status of the [aluminium joinery and corrugated roofing iron] ... and the 15 year durability requirement from the time the [code compliance certificate] is issued...
- 3.3 In a response to the authority, the applicant agreed to complete the outstanding items, however, explained that it would not be possible to provide 15 year durability statements as required for the aluminium joinery and the roofing given that the work was completed 13 years ago.
- 3.4 The application for determination was received by the Department on 11 August 2009.

4. The submissions

- 4.1 The applicant provided a copy of the authority’s 6 July 2009 letter and the applicant’s response to the authority dated 20 July 2009 (refer paragraph 3.2 and 3.3).
- 4.2 In a submission dated 25 August 2009, the authority submitted that it was unable to issue a code compliance certificate because of concerns with Clause B2 of the Building Code. The authority stated it required that the applicant ‘provide a manufacturers warranty for the durability of both the roofing and aluminium joinery for a period of 15 years’. The authority confirmed to the Department that its concerns with the roof and joinery were only pertaining to Clause B2, due to the age of the building work, and that it had no concerns about whether the items complied with Clause E2.
- 4.3 A draft determination was issued to the parties on 4 September 2009. The draft was issued for comment and for the parties to confirm the date when the house first complied with Clause B2.
- 4.4 In response to the draft determination, the authority submitted that compliance with B2 was achieved on 1 May 1996. The applicant submitted that compliance with B2 was achieved sometime around 2 June 1996, being the date the applicant moved into the house. There is very little difference between the two dates, and applicant has agreed to ‘any “effective durability date” around that time’. I have accepted 1 May

1996 as the more conservative of the two dates for inclusion in the final determination.

- 4.5 In response to the draft determination, the authority did not accept that it has the power to grant a modification to the Building Code requirements of an existing building consent, ‘unless instructed to do so as a retrospective modification through a formal directive from the Department, resulting from a determination.’ I have addressed the contention of the authority in paragraph 6.

5. Discussion

- 5.1 The authority raised a number of issues in its letter to the applicant of 6 July 2009 that needed to be addressed and items of work that required completion (refer to paragraph 3.2). I note the items all concern minor building elements or require minor work to be completed and that the applicant has agreed to address those items. I note that there are no concerns with the building’s current performance or the building’s weathertightness, and minor work will bring the building into compliance with the Building Code.

- 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 code compliance certificate’ (Clause B2.3.1).

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.

- 5.3 In this case, the delay between the completion of the building work in 1996 and the applicant’s request for a code compliance certificate in 2009 has raised concerns with the 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.

- 5.4 It is not disputed and I am therefore satisfied, that all the building elements complied with Clause B2 on 1 May 1996, refer to paragraph 4.4.

- 5.5 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 matters raised in this determination.

- 5.6 I note that the authority does not accept that it has the power to grant a modification to the Building Code requirements of an existing building consent, as discussed in paragraph 4.5. I have addressed the contention of the authority in the further discussion in paragraph 6.
- 5.7 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) following a request from an owner, the authority has the power to grant an appropriate modification of Clause B2 in respect of all of the building elements in the building that were constructed under the building consent.
 - (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 for the house had been issued in 1996.
- 5.8 I strongly recommend that the authority record this determination, and any modification resulting from it, on the property file and also on any LIM issued concerning this property.

6. Further discussion about an authority's power to grant waivers and modifications

- 6.1 I note that in a 2008 District Court case³, which considered whether a waiver to the Building Code can be granted after the issue of the original building consent, the Court, referring to the former Act, observed that:

[78] [Section] 34(4) is capable of being read alone. All that it says is that a building consent can be granted subject to a waiver or modification. It does not say that such waiver or modification cannot be sought and/or granted after the original building consent is granted. Indeed [section] 33(4) provides that a building consent can be amended. Obviously it can only be amended after it is issued. It says:

(4) An application for an amendment to a building consent shall be made in the same manner as the original application.

[79] Therefore this must allow for a waiver or modification to be applied for subsequent to the issue of the original building consent. An amendment to the building consent must be able to incorporate a waiver or modification of the Building Code.

[80] The code compliance certificate³ can only be issued if the work complies with the Building Code, or if there is such a departure from the Building Code that it complies with any previously approved waiver or modification of the Building Code contained in the building consent. The fact that building work for which a building consent has been issued does not comply with the Building Code will be a factor in determining whether or not an amendment in terms of [section] 33(4) (whether by waiver or otherwise) to the building consent will be granted.

- 6.2 Section 433 of the Act states:

433 Transitional provision for building consents granted under former Act

(1) A building consent that was granted under section 34 of the former Act before the commencement of this section must, on that commencement, be treated as if it were a building consent granted under section 49.

(2) However,-

(a) section 93 does not apply; and

³ (Palmerston North CC v Morresey, Judge Callaghan, DC Palmerston North CIV-2007-454-000463 [11 August 2008])

- (b) accordingly, a building consent authority is not required to issue a code compliance certificate for the building work concerned within the period specified in that section.

- 6.3 I note that the wording of section 67 of the Act is, in effect, similar to that of section 34(4) of the former Act. I therefore take the view that the decision of the District Court as set out in paragraph 6.1 applies equally to section 67 of the Act.
- 6.4 I do not accept the argument put forward by the authority that a territorial authority does not have the power to grant a modification to the Building Code requirements of an existing building consent without a determination. I have taken regard of the approach taken by the Court and accordingly I continue to hold the views expressed in previous relevant determinations (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39 – August 2009⁴).

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I determine that the authority was correct to refuse to issue a code compliance certificate, due to the outstanding work as identified in the authority's letter of 6 July 2009.
- 7.2 I also determine that:
- (a) all the building elements installed in the building complied with clause B2 on 1 May 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 May 1996 instead of from the time of issue of the code compliance certificate for all of the building elements.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 October 2009.

John Gardiner
Manager Determinations

⁴ Codewords articles are published by the Department and are available on the Department's website at www.dbh.govt.nz/codewords-index