

Determination 2009/49

The refusal to issue a code compliance certificate for a 13-year-old house at 2/799 Main North Road, Christchurch

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 the owners, Mr AG and Mrs KE Buckley (“the applicants”), represented by an agent, and the other party is the Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The matter for determination is whether the authority was correct in its decision to refuse to issue a code compliance certificate for a 13-year-old house because it was not satisfied that the building work complied with Clause B2 “Durability” of the Building Code² (Schedule 1, Building Regulations 1992), considering the age of the building work.
- 1.3 I note that the authority has stated that their sole concern is the compliance with Clause B2 Durability, given the time that has elapsed since the building work was started. This determination is therefore restricted to considering the durability requirements of this building.
- 1.4 In making my decision, I have considered the documentation received from the applicant, and other evidence in this matter.

2. The building

- 2.1 The building is a two storey detached house with a relatively simple design on a flat site. The construction consists of concrete slab foundations, timber frame with solid plaster stucco cladding, a corrugated iron roof and aluminium joinery.

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. 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.

3. Background

3.1 The authority issued a building consent (No. 94001362) for the building work on 6 April 1994. Based on the inspection records, it appears that the building work was started in mid-1994.

3.2 The authority wrote to the applicants on 11 October 1999 identifying a number of issues that were required to be resolved before a code compliance certificate could be considered. The authority asked the applicants to provide a time frame for completion and explained that for durability purposes, certain building elements may require reassessment for compliance.

3.3 The authority wrote to the applicants on 14 August 2002 regarding the unfinished building work, stating:

Of particular concern is the durability requirements of the Building Act. That is when a Code Compliance Certificate is issued the [authority] accepts responsibility that the structure will last at least 50 years and the Building Envelope and other building elements having a moderate ease of access, 15 years.

The fact that a Code Compliance Certificate has not been issued for this project through lack of progress may compromise the [authority] of ever issuing a Certificate. Having drawn attention to the Building Act requirements I am prepared to allow another two months to complete the issues outlined in the previous correspondence.

3.4 The applicants contracted a property inspection company (“the property inspection company”) to inspect and report on the condition of the house and the compliance of the building work with the Building Code. The property inspection company provided a report on the 6 March 2008, which identified a number of items that required remediation.

3.5 The property inspection company re-inspected the house and provided a report on 20 March 2009, which identified the remedial work that was satisfactorily completed, and identified a number of items that required further remediation.

3.6 On 17 April 2009, the authority made a file note stating:

Previous inspections have been carried out up to the late 90s with no particular problems, however with the durability clock not starting until a Code Compliance Certificate is issued would expose the [authority] to potential liability in the future, and for this reason a [code compliance certificate] will not be considered.

3.7 The property inspection company completed a subsequent re-inspection and provided a report on 25 May 2009, which stated:

Following our visual inspection, we conclude that non-complying items highlighted in our previous report have now been satisfactorily attended to. We confirm that in our opinion the building now generally complies with the building regulations and standards in force at the time of construction.

3.8 The application for determination was received by the Department on 4 June 2009.

4. The submissions

4.1 In a letter to the Department dated 2 June 2009, the applicant’s agent explained the circumstances that led to the delay in completing the building work and that ‘the failure to obtain a code compliance certificate remains a serious impediment to the sale of the property’.

- 4.2 The application included the building consent documentation, inspection records and correspondence from the authority, and reports from the property inspection company.
- 4.3 A copy of the application was provided to the authority, which made no submission in response.
- 4.4 The Department sought clarification from the authority on the reasons that they had refused to issue a code compliance certificate. The authority confirmed that compliance with Clause B2 Durability was the only outstanding concern. In emails to the Department, dated 16 June 2009, both the authority and the applicant agreed that compliance with Clause B2 was achieved on 1 April 1996.
- 4.5 A draft determination was issued to the parties for comment on 29 June 2009. Both parties accepted the draft without comment.

5. Discussion

- 5.1 The authority has stated that compliance with Building Code Clause B2 Durability is the sole reason that the code compliance certificate cannot be issued. Therefore I accept that the authority is satisfied that all the building elements used in the construction of the house comply with all the other clauses of 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 substantial 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 April 1996, refer 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)³. I have used that advice to evaluate the durability matters raised in this determination.

5.6 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:

- (a) 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, including being able to set up a process to modify without need for a determination
- (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.

5.7 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. 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 April 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 April 1996 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2009/49.
- (c) following the modification set out in (b) above, the authority shall issue the 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 14 July 2009.

John Gardiner
Manager Determinations

³ Copies of all determinations issued by the Department can be obtained from the Department's website.