



Determination 2010/057

The refusal to issue a code compliance certificate for a garage at 682 Pyes Pa Road, Tauranga



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 & Mrs Scorer (“the applicants”), and the other party is the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for a 7-year old garage because reasonable progress had not been made in respect of the time taken to construct the building.
- 1.3 The matters to be determined² are therefore:
- 1.3.1 **Matter 1: The code compliance of the building work and the refusal to issue the code compliance certificate**
Whether the authority was correct to refuse to issue a code compliance certificate.
- 1.3.2 **Matter 2: The durability considerations**
Whether the elements that make up the building work comply with the Building Code Clause B2 Durability taking into account the age of the house.
- 1.4 In making my decision, I have considered the submissions of the parties, and the 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 Under sections 177(b)(i) of the Act

2. The building work

- 2.1 A building consent (consent number 69808) was issued by the authority for the erection of a proprietary steel-framed kitset garage on 7 October 2003. The building consent documentation included a Producer Statement for design from a professional engineer.
- 2.2 The garage is 7.5 metres wide and 15 metres long with a pitched roof and is constructed on a concrete slab. The roof and walls are clad in pre-finished painted profiled steel. The interior is unlined. Other than a roller garage door, side door, one opening window and translucent roof panels there are no other construction features of note.
- 2.3 The foundation inspection was completed on 28 October 2003. The authority undertook a final inspection on 29 January 2010. This inspection was passed with no matters of non-compliance being noted. The applicants were also notified at the time of the inspection that a code compliance certificate was unlikely to be issued due to the age of the building consent.
- 2.4 The applicants received a letter from the authority on 16 February 2010 advising them that, the authority was satisfied on reasonable grounds that the building work complied with the requirements of the Building Code in force at the time of its approval. However, the authority further advised that the Building Act 1991 requires reasonable progress to be made on building projects and the amount of time that had elapsed between issue of the building consent and the request for a final inspection meant that reasonable progress had not been made and on that basis the authority refused to issue the code compliance certificate.
- 2.5 The Department received an application for determination on 26 May 2010.

3. The submissions

- 3.1 The applicant made a submission that included copies of the building consent documentation, and the letter dated 16 February 2010, from the authority to the applicants, stating the authority was satisfied on reasonable grounds the building work complied with the Building Code, however, it was unable to issue a code compliance certificate.
- 3.2 At the time the draft determination was issued to the parties, the authority had not acknowledged the application or made a submission.
- 3.3 A draft determination was issued to the parties for comment on 16 June 2010. The applicants accepted the draft without comment. The authority accepted the draft but, in a letter to the Department dated 18 June 2010, requested that the determination also consider the durability requirements of Clause B2, given the age of the building work. The authority suggested a date of 21 December 2003, as the date on which the building work complied with Clause B2 Durability, given the likely date of completion of the building work.
- 3.4 While I consider the authority has the ability to manage this aspect itself and has, upon application from the owner, the power to amend the original building consent, in this case, I sought the agreement of the applicants and the authority as to when the building work complied with Clause B2 durability, and I have amended the determination accordingly.

- 3.5 In an email to the Department dated 29 June 2010, the applicants agreed that the building work complied with Clause B2 Durability on 21 December 2003.

Matter 1: The code compliance of the building work and the refusal to issue the code compliance certificate

4. Discussion

- 4.1 Based on the letter from the authority to the applicant dated 16 February 2010, I consider the authority is satisfied on reasonable grounds the building work complies with the Building Code. It is unclear when the building work was carried out, though I have taken this to mean the authority does not have concerns about whether the durability provisions of the Building Code have been met.
- 4.2 Under section 41(1)(b) of the Building Act 1991, the ‘reasonable progress’ provision concerns the failure to make reasonable progress on building work within 12 months after work commences. The reasonable progress provision is not relevant to any delay between the issue of a building consent and when the date a final inspection was requested.
- 4.3 In my view the provisions of section 41(1)(b) of the Building Act 1991 are to be applied when reasonable progress is not being made, not at some point after this when the building work has been completed. Therefore, if an authority was to take action under the reasonable progress provisions, it would need to do so 12 months after the issue of a building consent.
- 4.4 The period of delay between the issue of a building consent and the request for a final inspection is not a ground under section 43(5) of the Building Act 1991 for refusing to issue a code compliance certificate.

Matter 2: The durability considerations

5. Discussion

- 5.1 The delay between the completion of the building work in 2003 and the applicant’s request for a code compliance certificate 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.
- 5.2 The relevant provision of Clause B2 of the Building Code requires the 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 It is not disputed, therefore I am satisfied, that all the building elements complied with Clause B2 on 29 September 2004. This date has been agreed by the parties (refer to paragraphs 3.3 and 3.5).
- 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 issues raised in this determination.
- 5.6 I continue to hold that view, and therefore conclude that:
- a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements.
 - b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a code compliance certificate for the building work had been issued towards the end of 2003.
- 5.7 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and on any LIM issued concerning this property.

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

- 5.8 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 certificate 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.

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

5.9 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
- (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.

5.10 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 5.8 applies equally to section 67 of the Act.

5.11 I have taken regard of the approach taken by the Court and accordingly I continue to hold the views expressed in previous relevant determinations that, an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39 – August 2009⁴).

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I determine that building work complies with the Building Code, and accordingly I reverse the authority's decision to refuse to issue a code compliance certificate.

6.2 I also determine that:

- a) All the building elements installed in the house, apart from the items that are to be rectified, complied with Clause B2 on 21 December 2003
- 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 21 December 2003 instead of from the time of issue of the code compliance certificate for all the building elements as set out in Determination 2010/057.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 June 2010.

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