



Determination 2011/052

The refusal to issue a code compliance certificate for an 11-year-old house and office at 263 Matahui Rd, Katikati, due to lack of progress during construction

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the current 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.

1.2 The parties to the determination are:

- the building owner, D R and J R Fowler (“the applicants”)
- the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for an 11-year-old house and office because the authority was of the opinion that reasonable progress had not been made in respect of the time taken to construct the building. The authority has also raised the issue of when the durability periods for the building work should commence.

1.4 The matters to be determined² are whether:

- the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate
- the elements that make up the building work comply with Clause B2 Durability³ of the Building Code (First Schedule, Building Regulations 1992, which was current at the time that the building consent was issued) taking into account the age of the building work.

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(1)(a), 177(1)(b), and 177 (2)(d) of the current Act

³ 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.

1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

2. The building work and background

2.1 The building work consists of a four bedroom dwelling and detached office. A building consent (No 62554) was issued by the authority for the building work on 18 November 1999 under the Building Act 1991 (“the former Act”).

2.2 The authority carried out various inspections between 1999 and 2001, which included footing, pre-slab inspection, pre-line, block fill and drainage, all of which were passed.

2.3 The authority carried out a final inspection on 27 July 2007, which failed. Three areas of non-compliance were identified and recorded on the site notice issued at that time. The areas of non-compliance were

- smoke alarms required in dwelling and office
- producer statements required for waterproofing behind shower wall tiles and for the installation of the roofing membrane
- confirmation that safety glass had been installed where required.

2.4 The applicants wrote to the authority on 14 August 2007 and advised it that smoke alarms had been installed as required. Also included in the letter was a

- letter confirming that safety glass had been installed where required
- producer statement for the waterproofing behind the shower wall tiles
- workmanship certificate and guarantee in respect of the roofing membrane.

2.5 In a letter to the applicant dated 30 August 2007, the authority stated that, as the final inspection was not requested until eight years after the building consent was issued, it could not issue a code compliance certificate. The authority said that:

The building consent was issued in November 1999, but the final inspection was not requested until July 2007, nearly 8 years later.

Section 436 of the ... Act is the transitional provision that refers back to building consents issued under the previous Act and the effect of this is to confirm that the “reasonable progress” provision applies.

It is difficult to accept that reasonable progress has been made here given the time between inspections noted above.

[I note here that the reference to section 436 of the current Act should read section 433]

2.6 The authority confirmed that, as far as it could ascertain, the work carried out complied with the requirements of the Building Code that were in effect when the building consent was issued.

2.7 The Department received an application for determination on 18 April 2011.

3. The submissions

- 3.1 With the application, the applicants provided a submission and copies of
- the building consent and related documents including building inspection report and field inspection notes
 - correspondence from the authority to the applicants
 - correspondence from the applicants to the authority, including a letter advising that the house was completed in March 2001.
- 3.2 The authority acknowledged the application and made a submission stating March 2001 would be reasonable as the date of commencement for the durability period for the building work.
- 3.3 A draft determination was issued to the parties on 5 May 2011. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.
- 3.4 Both parties accepted the draft and agreed that compliance with Clause B2 was achieved on 1 March 2001.

4. Discussion

The progress of the work

- 4.1 Based on the final inspection carried out by the authority and the authority's letter to the applicant dated 30 August 2007, I consider the authority is satisfied on reasonable grounds that the completed building work complies with the Building Code.
- 4.2 Under section 41(1)(b) of the former Act, the 'reasonable progress' provision concerns the failure to make reasonable progress on building work within 12 months after work commences, or within such further period as the territorial authority in its absolute discretion may allow. However these reasonable progress provisions are not relevant to any delay between the issue of a building consent and when a final inspection is requested.
- 4.3 The question of reasonable progress was considered by me in Determination 2010/057, and I consider that my opinions set out in that decision are applicable to the current situation. Accordingly, in my view, the provisions of section 41(1)(b) of the former Act 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 wishes to take action under the reasonable progress provisions, it would need to do so 12 months after the issue of a building consent. I note previous determinations, including Determination 2010/057, have involved the same authority.
- 4.4 Accordingly, I consider that 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 former Act for refusing to issue a code compliance certificate.

The matter of durability

- 4.5 The authority has concerns regarding the durability, and hence the compliance with the Building Code, of certain elements of the house taking into consideration the age of the building work completed in 2001.
- 4.6 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).
- 4.7 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.
- 4.8 In this case the delay between the completion of the building work in 2001 and the applicant’s request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond 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. Based on the authority’s submission (refer to paragraph 3.2), it appears that the authority accepts that those elements complied with Clause B2 in March 2001.
- 4.9 It is not disputed, and I am therefore satisfied that all the building elements installed in the house and office complied with clause B2 on 1 March 2011. This date has been agreed between the parties (refer paragraph 3.4).
- 4.10 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.
- 4.11 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 if requested by the owner
 - (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 in 2001.

- 4.12 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that building work complies with the Building Code and that the authority incorrectly exercised its power in refusing to issue the code compliance certificate. Accordingly, I reverse the authority's decision to refuse to issue a code compliance certificate.

- 5.2 I also determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 1 March 2001
- (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 March 2001 instead of from the time of issue of the code compliance certificate for all the building elements as described in Determination 2011/052.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 2 June 2011.

John Gardiner
Manager Determinations