



Determination 2011/065

The refusal to issue a code compliance certificate for a 12-year old house at 233 Ross Road, Whakamaramara, Tauranga (to be read in conjunction with Determination 2010/120)

Applicant: Western Bay of Plenty District Council (“the authority”)
Owners: L Davies and E Veldhuyzen

1. The matters 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.

1.2 The reason for the application

1.2.1 I have previously described certain building matters regarding this house. Those matters are described in Determination 2010/120 (“the first determination”).

1.2.2 This second determination arises because while remedial work to the house described in the first determination was suitably carried out and inspected by the authority to its satisfaction, the authority continued to refuse to issue a code compliance certificate for the repaired house because it was not satisfied that the house complied with Clause B2 Durability of the Building Code.

1.2.3 The matters to be determined² are therefore:

- whether the elements that make up the building work comply with Building Code Clause B2 Durability³, taking into account the age of the original elements of the house, and

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(2)(b) and 177(2)(d) of the Act

³ In this determination, unless otherwise stated, references to sections are to sections of the Act, references to the code are to the Building Code and references to clauses are to clauses of the Building Code.

- whether the authority was correct in its decision to refuse to issue the code compliance certificate.

1.2.4 This determination is limited to the matters defined in paragraph 1.2.3 and does not consider the completed remedial work.

2. The building work

2.1 The building is a detached single-storey house on a flat rural site, with conventional light timber framing, a concrete slab and foundations, aluminium windows, flush-finished fibre-cement wall cladding and steep-pitched profiled metal gable roofs.

3. Background

3.1 The authority issued a building consent (No. 60836) for the house on 15 October 1998 under the Building Act 1991, and the first final inspection was carried out on 5 July 2000. Following a second final inspection on 28 October 2008, the authority refused to issue a code compliance certificate for the house and the owners applied for the first determination.

3.2 The first determination

3.2.1 The first determination found that the house did not comply with certain clauses of the Building Code; and accordingly confirmed the authority's refusal to issue a code compliance certificate after identifying certain weathertightness defects.

3.2.2 In regard to the durability provisions of the Building Code, paragraph 7.5 of the first determination noted my view that a modification of the performance requirement Clause B2.3.1

...can be granted if I can be satisfied that the building complied with the durability requirements at a date earlier than the date of issue of the code compliance certificate, the date being one agreed between the parties.

3.2.3 However, because of the identified weathertightness defects, paragraph 7.6 stated:

Because of the extent of the defects in the external envelope, and the possible consequential impact on the building's timber framing and therefore its structure, I am not satisfied that there is sufficient information on which to make a decision about this matter at this time.

3.3 The authority subsequently issued a notice to fix (No. 612) based on the first determination; and the owners responded with a written proposal, dated 18 January 2011 prepared on their behalf by a property inspection company. The proposal was approved, detailed documents were prepared and the repair work was carried out under an amendment to the original building consent.

3.4 The authority inspected the work during the repairs, with a final inspection on 10 May 2011 (which passed), but would not issue a code compliance certificate for the repaired house due to the age of the original building work.

3.5 Following queries on the situation from the owners, the Department sought clarification from the authority. The authority's response on 19 May 2011 outlined

the background to the situation, noting that the ‘dwelling was effectively completed’ at the time of the first final inspection in July 2000. The authority referred to the first determination (see paragraph 3.2.3 above) and stated:

The [repair] work has now been carried out and [the authority] would appreciate resolution of paragraph 7.6 in terms of the durability...

3.6 The Department received a formal application from the authority on 20 June 2011.

4. The submissions

4.1 The authority’s submission explained that the remedial work addressed in the first determination had been carried out under an amendment to the original building consent. As that work had ‘now been completed and inspected’, the issuing of a code compliance certificate was again in question and the authority described its concerns regarding the durability of the original building work, noting:

There is a line of thought that if we are instructed by [the Department] in a Determination to issue the [code compliance certificate] we will not be liable (for another 10 years from CCC issue date) because of the provision in section 392(1)(b) of the Building Act 2004.

4.2 The authority provided copies of:

- documentation for the repair work
- inspection records for the repair work
- various other documents and information.

4.3 A draft determination was issued to the parties for comment on 23 June 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.

4.4 The applicants accepted the draft without comment.

4.5 The authority also accepted the draft but in an email to the Department dated 28 June 2011, it requested that:

... the draft be amended to include an instruction to issue the [code compliance certificate] otherwise our organisational view on risk may still complicate this.

4.6 My response to the authority’s submission

4.6.1 The authority’s reasons for refusing to issue a code compliance certificate appear to be based on its concerns about the liability it may incur as a result of issuing the code compliance certificate.

4.6.2 However, when deciding whether to issue a code compliance certificate the authority is required to consider the relevant provisions of the Act. Upon receiving an application for a code compliance certificate that complies with the requirements of section 92 of the Act, the authority is required to consider the application and determine whether or not to issue a code compliance certificate in accordance with sections 94 and 95 of the Act.

- 4.6.3 The fact that section 393 of the Act provides that the 10 year long-stop limitation period commences from the time a code compliance certificate is issued is not a good reason for the authority to refuse to issue a code compliance certificate. The authority has a range of statutory functions under the Act and, in my view, it is not for the authority to refuse to carry out its functions because there may be potential liability associated with the performance of those functions
- 4.6.4 I have considered the authority's submission and amended the determination as appropriate.

5. The durability considerations

- 5.1 It is not disputed that the remedial work has been successfully completed, and that the house as a whole is now code complaint (refer paragraphs 3.3 and 3.4). However, 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 original building work completed in 2000.
- 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 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 In this case the time elapsed since the completion of the original house in 2000 has raised concerns that various elements of the building are now well into 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.
- 5.5 It is not disputed, and I am therefore satisfied that all the building elements installed in the house, apart from the items that were rectified, complied with clause B2 at the time of the first final inspection on 5 July 2000. This date was proposed by the authority (see paragraph 3.5), and has been accepted by the owners.
- 5.6 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.

5.7 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 an 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 2000.

5.8 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.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 5 July 2000.

- (b) the building consent is hereby modified as follows:

The building consent (No. 60836) is subject to a modification to the Building Code to the effect that, Clause B2.3.1 applies from 5 July 2000 instead of from the time of issue of the code compliance certificate for all the building elements, except the items rectified as set out in paragraph 5.7 of Determination 2010/120.

- (c) the authority's decision to refuse to issue the code compliance certificate is reversed.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 June 2011.

John Gardiner
Manager Determinations