



Determination 2011/072

Regarding the refusal to issue a code compliance certificate for an 8-year old house and garage at 52 Walter Henry Drive, Tauranga, due to lack of progress between inspections

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 owners, Mr D and Mrs C Robertson (“the applicants”) acting through an agent
- 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 8-year old house and garage because the authority was of the opinion that reasonable progress had not been made between the issuing of the building consent in 2003, the ‘final inspection’ undertaken in 2007, and the request in 2011 for a re-inspection of items identified as outstanding in the final inspection.

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

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.

current at the time that the building consent was issued) taking into account the age of the building work.

- 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 three bedroom dwelling and detached garage. The first floor attic space of the dwelling has been designed to be furnished as an additional room accessed by stairs to be completed at a later date. A building consent (No 68848) was issued by the authority for the building work on 24 April 2003 under the Building Act 1991 (“the former Act”).
- 2.2 The authority carried out five inspections between 2003 and 2007. Although I have not seen evidence that the initial four inspections were completed by the authority prior to the final inspection (Inspection 5) on 12 July 2007, I note that the building consent states that inspections were required for the footing, timber flooring, pre-line construction work, plumbing, drainage, and septic tank and effluent trench work. I therefore conclude that these inspections were all completed and passed.
- 2.3 The authority carried out a final inspection on 12 July 2007 (that failed), and a second final inspection on 24 March 2011 (that passed). A note on the second final inspection record stated that ‘[d]ue to the age of consent no CCC will be issued.’
- 2.4 In a letter to the applicant dated 5 May 2011, 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 Act 1991 required that reasonable progress be made on building projects and although this building consent was issued on 24 April 2003, it was only on 24 March 2011 that a request was made for re-inspection to ensure all the items identified in the final inspection which was conducted on 12 July 2007 have been attended to.
- Section 433 of the Building Act 2004 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, and this is why Council declines to issue the Code Compliance Certificate.
- 2.5 The authority confirmed that it was
- ... satisfied on reasonable grounds that the building work associated with the above building consent [No. 68848] generally complies with the requirements of the Building Code in force at the time of its approval.
- 2.6 The Department received an application for a determination on 5 June 2011.

3. The submissions

- 3.1 With the application, the applicants provided a copy of
- the authority's letter to the applicants dated 5 May 2011.
- 3.2 On 22 June 2011, the Department received a letter from the agent for the applicants along with copies of
- the building consent and related documents, including a list of the required inspections, the final inspection report, and the site notice for the March 2011 inspection
 - the authority's letter to the applicants dated 5 May 2011.
- 3.3 The authority did not acknowledge the application and made no submission in response to it.
- 3.4 A draft determination was issued to the parties for comment on 8 July 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.
- 3.5 Both parties accepted the draft without comment and agreed that compliance with Clause B2 was achieved on 20 December 2003.

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 5 May 2011, 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 issuing of a building consent and the date when a final inspection is requested.
- 4.3 This 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 issuing of a building consent. I note also that Determination 2010/057 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 not in this instance stated that it is concerned about the durability of the building work. In this case, however, I note that there is cause for concern 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.

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 and the applicant’s request for a code compliance certificate in 2011 raises concerns 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.

4.9 It is not disputed, and I am therefore satisfied that all the building elements installed in the house complied with clause B2 on 20 December 2003. This date has been agreed by the parties (refer paragraph 3.5).

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 at the date of substantial completion.

4.12 I strongly suggest 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.

5. The decision

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

- (c) all the building elements installed under this building consent complied with Clause B2 on 20 December 2003.
- (d) 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 20 December 2003 instead of from the time of issue of the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 21 July 2011.

John Gardiner
Manager Determinations