



## Determination 2012/031

# Refusal to issue a code compliance certificate for a 14-year-old house at 117 Haukore Street, Hairini, Tauranga

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, Tony Marshall, Manager Determinations (Acting), 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:
- R Brathwaite, the owner of the house (“the applicant”)
  - Tauranga City Council (“the authority”), carrying out its duties as a territorial authority and a building consent authority.
- 1.3 This determination arises from the authority’s refusal to issue a code compliance certificate for a house on the grounds that the house is over 10-years old and it does not comply with certain clauses<sup>2</sup> of the Building Code (Schedule 1 of the Building Regulations 1992).
- 1.4 The matters to be determined<sup>3</sup> are therefore whether:
- the house complies with the Building Code current at the time the building consent was issued
  - the authority correctly exercised its power when it refused to issue a code compliance certificate for the house.
- 1.5 In making my decision, I have considered the submissions of the parties and the other evidence in this matter.
- 1.6 Relevant sections of the Act are set out in Appendix A.

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

<sup>2</sup> In this determination, unless otherwise stated, references to clauses are to clauses of the Building Code.

<sup>3</sup> Under section 177(1)(a), 177(1)(b) and 177(2)(d) of the Act

## 2. The building work and background

- 2.1 The building work in question consists of a two-storey house with an attached garage (“the house”).
- 2.2 The authority issued a building consent for the house in February 1996 under the Building Act 1991 (“the former Act”). I have not seen a copy of the consent.
- 2.3 In July 1997, the authority approved a building consent for a timber retaining wall to be constructed by the owner of an adjoining property on the common boundary with the applicant’s property.
- 2.4 Construction of the house took place between 1997 and 1998, with the building work being inspected by a firm of building certifiers between 18 March 1997 and 24 March 1998. All inspections were passed by the building certifiers, with the exception of that undertaken on 24 March 1998. This inspection had the notation:
- Fail. Handrail to stairs. South boundary retaining wall.
- 2.5 Prior to the final inspections, the building certifiers issued an undated letter advising the applicant to call for a final inspection so that a code compliance certificate could be issued.
- 2.6 According to the applicant, after the two outstanding matters were resolved a further inspection was made by the building certifiers and approval for a code compliance certificate was also obtained.
- 2.7 On 2 November 2011, a Chartered Professional Engineer (“the engineer”) wrote to the applicant stating that, as requested, he had completed an inspection of the house in respect of the two outstanding items set out in the building certifier’s final inspection. The engineer confirmed that:
- the handrail that served the stairs had been installed
  - the retaining wall was located on the neighbouring property and should not be considered as part of the building consent issued for the house. The designer of the retaining wall had confirmed that the applicant’s house was not sufficiently close enough to the retaining wall to surcharge or influence it
  - based on his own assessment, the engineer agreed with the designer’s opinions regarding the retaining wall.
- 2.8 In a telephone call to the authority on 8 November 2011, the applicant requested that the authority provide reasons why it would not issue a code compliance certificate for the house.
- 2.9 In a letter to the applicant dated 8 November 2011, the authority set out the background to the dispute and stated that it would accept a letter provided by a Chartered Professional Engineer confirming that all outstanding work had been completed. The authority would acknowledge this letter and provide a subsequent letter accepting and recording it on the property file on a “without prejudice basis”.
- 2.10 The authority also noted that as the building work was started in 1997, the authority’s liability period based on the 10-year “long stop” provisions set out in the Act ceased in 2007. The authority concluded that ‘also it was never mandatory for an applicant to obtain a CCC on completion of the building work’.

- 2.11 On 13 November 2011, the applicant wrote to the authority seeking to clarify the records held by the authority in regard to the house.
- 2.12 The Department received an application for a determination in respect of the house on 29 March 2012.

### **3. The submissions**

- 3.1 In a covering letter forwarded with the application, the applicant outlined the background to the dispute and expressed concerns regarding the authority's record keeping procedures.
- 3.2 The applicant provided copies of:
- some plans of the house
  - the calculations and plans undertaken by the designer of the retaining wall
  - the building certifiers' inspection records
  - the engineer's letter dated 2 November 2011
  - the correspondence with the authority and the building certifiers with written annotations added by the applicant.
- 3.3 The authority did not provide a submission.
- 3.4 A draft determination was issued to the parties for comment on 12 April 2012. 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 further comment and agreed that compliance with B2 was achieved on 24 March 1998.

### **4. Discussion**

- 4.1 Based on the conclusions reached by the engineer (refer to paragraph 2.7) and the acceptance of the authority in its letter to the applicant of 8 November 2011 (refer to paragraph 2.9), I am prepared to accept that the house complies with the requirements of the Building Code. This decision is also based on the grounds that apart from the issues arising from the stair handrail and the retaining wall, the authority has not raised any other code-compliance issues.
- 4.2 I also accept that the retaining wall in question does not form part of the building consent issued for the house and that, as "other property" the house does not impose a risk to that wall.
- 4.3 With regard to the retaining wall, I note that the foundations for the house were inspected in March 1997 and the plans for the retaining wall were approved on 1 July 1997. As the retaining wall was consented after the house construction was commenced, the onus is for the wall to support the house and its adjoining ground. It is not up to the applicant to prove that the house is not affected by the wall, which appears to be what the authority required.
- 4.4 The authority has also raised the issue that as the house is over 10 years old, the authority's liability under the Building Act "long stop" provision in section 393 of the Act ceased in 2007. The inference the authority appears to seek to draw from this is that the authority's responsibility for issuing a code compliance certificate has also

- ceased. In addition, the authority notes that it is not mandatory for an applicant to obtain a code compliance certificate on completion of the building work.
- 4.5 While it may not be mandatory for the applicant to obtain a code compliance certificate, I note that it is the choice of the applicant whether an application for a code compliance certificate is made. The transitional provision in section 436 of the Act requires the authority to consider such an application under the former Act. Section 43(3) of the former Act (as modified by section 436(3) of the Act) requires the authority to issue a code compliance certificate ‘if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code that applied at the time the building consent was granted’.
- 4.6 It is not for the authority to refuse to carry out this function just because the Act does not make it mandatory that the applicant have a code compliance certificate. Where the authority receives an application for a code compliance certificate it has a statutory obligation to consider that request in accordance with the requirements of the Act.
- 4.7 I also do not agree with the authority’s opinion regarding the effect of the 10-year “long stop” provision. The authority is incorrect in its assertion that the authority’s potential liability under the Act ceased in 2007. Section 393 of the Act provides that, in respect of the issue of a code compliance certificate, the 10 year long-stop limitation period commences from the time the code compliance certificate is issued (section 393(2) and (3)(a) of the Act).
- 4.8 While the authority remains potentially liable for the issue of any code compliance certificate the authority is required to consider the relevant provisions of the Act when deciding whether to issue a code compliance certificate. As noted above, those provisions do not provide for the authority to refuse to issue a code compliance certificate because there may be potential liability associated with the performance of that function.
- 4.9 While I have reached these conclusions, I accept that the authority may have 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 consent issued in March 1996.
- 4.10 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.
- 4.11 As in this case, a delay between the completion of building work in 1998 and an owner’s request for a code compliance certificate may well raise concerns that various elements of the building are now well through or beyond their required

durability periods. These would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective in the near future.

- 4.12 It is not disputed, and I am therefore satisfied, that all the building elements in the house complied with Clause B2 on 24 March 1998 (refer paragraph 3.5).
- 4.13 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.
- 4.14 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, with the exception of the stair handrail, 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 1998.
- 4.15 I 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 determine that:
- the house now complies with the Building Code that was current at the time the building consent was issued
  - the decision of the authority to refuse to issue a code compliance certificate is reversed
  - the building consent for the house is hereby modified as follows:
    - The building consent is subject to a modification to the Building Code to the effect that, with the exception of the stair handrail, Clause B2.3.1 applies from 24 March 1998 instead of from the time of issue of the code compliance certificate for all of the building elements.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 April 2012.

Tony Marshall  
**Manager Determinations (Acting)**

## Appendix A: The legislation

### A.1 The Building Act 2004

The relevant provisions of the current Building Act are:

#### **393 Limitation defences**

- (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
  - (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
  - (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
- (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
- (3) For the purposes of subsection (2), the date of the act or omission is,—
  - (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
  - (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

#### **436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
  - (a) remains in force as if this Act had not been passed; but
  - (b) must be read as if—
    - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
    - (ii) section 43(4) were omitted.