

## Determination 2008/36

### The refusal to issue a code compliance certificate for a 10-year-old house at 698 Waterholes Road, RD 5, Templeton



#### 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, 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, M and K Clayton (“the applicants”), and the other party is the Selwyn District Council (“the territorial authority”).
- 1.2 The matter for determination is whether the territorial authority was correct in its decision to refuse to issue a code compliance certificate for an approximately 10-year-old house because it was not satisfied that the building work complied with Clause B2 “Durability” of the Building Code<sup>2</sup> (Schedule 1, Building Regulations 1992) considering the age of the house.
- 1.3 In making my decision, I have not considered any other aspects of the Act or the Building Code but I have considered the documentation received from the parties and other evidence in this matter.

<sup>1</sup> The Building Act 2004 is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

<sup>2</sup> The Building Code is available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz).

- 1.4 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.

## **2. The building**

- 2.1 The building work consists of a two-storey detached house situated on a level site. The house is of a complex shape in plan and form, and is generally of light timber frame construction with brick-veneered external walls that have Oamaru stone quoins.

## **3. Background**

- 3.1 The territorial authority issued a building consent (No R417959) for the house in December 1997.
- 3.2 Based on the territorial authority's inspection notices, it appears the construction had commenced by January 1998. On 1 June 2001 and 13 January 2003, the territorial authority wrote to the owners, requesting advice as to progress.
- 3.3 An inspection note dated 17 December 2004 that stated "next inspection final", leads me to the conclusion that the house was substantially completed by December 2004. A further inspection was carried out and passed by the territorial authority on 19 December 2007.
- 3.4 According to the territorial authority, the applicants applied for a code compliance certificate on 1 February 2008.
- 3.5 On 28 February 2008, the territorial authority wrote to the applicants stating that over 10 years had elapsed between the time that the consent was granted and the time that a request for a code compliance certificate was made. Accordingly, the territorial authority could not be satisfied on reasonable grounds that the prescribed durability provisions for the building elements of the house could now be met. Because of that, the territorial authority could not issue a code compliance certificate.
- 3.6 The application for determination was received by the Department on 14 March 2008.

## **4. The submissions**

- 4.1 In a cover note to the Department dated 10 March 2008, the applicants gave their reasons as to why the construction of the house had taken so long. They noted that every inspection had been carried out and signed off by the territorial authority, including the final one.
- 4.2 The applicant forwarded copies of the:
- territorial authority's inspection notices
  - correspondence from the territorial authority.
- 4.3 In a letter to the Department dated 3 April 2008, the territorial authority noted that it had reminded the applicants to apply for a code compliance certificate on three separate occasions. The territorial authority did not consider that the liability

accruing from the issuing of a code compliance certificate should be extended to a 10-year old building.

- 4.4 On 15 April 2008, the territorial authority wrote again to the Department and confirmed that the only concern it had regarding the house in question was “compliance with clause B2 of the Building Code”.
- 4.5 The territorial authority forwarded copies of some of the plans.
- 4.6 A draft determination was issued to the parties on 29 April 2008. The draft was issued for comment and for the parties to agree a date when the house complied with Building Code Clause B2 Durability.
- 4.7 The parties accepted the draft and agreed that compliance with Clause B2 Durability was achieved on 14 December 1998.

## 5. Discussion

- 5.1 The territorial authority has stated that concern about compliance with Building Code Clause B2 Durability is the sole reason that the code compliance certificate cannot be issued. Therefore, I accept that the territorial authority is satisfied that all the building elements used in the construction of the house comply with all the other clauses of the Building Code.
- 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 code compliance certificate” (Clause B2.3.1).
- 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.
- 5.3 In this case, the delay between the issuing the building consent in December 1997 and the applicant’s request for a code compliance certificate on 1 February 2008 has raised concerns with the territorial 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.
- 5.4 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 14 December 1998. This date has been agreed between the parties, refer paragraph 4.7.

- 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 matters raised in this determination.
- 5.6 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:
- (a) the territorial authority has the power to grant an appropriate modification of Clause B2 in respect of all of the building elements in the building that were constructed under the building consent.
  - (b) it is reasonable to grant such a modification, with appropriate notification, because in practical terms the construction is no different from what it would have been if a code compliance certificate had been issued when the building was substantially completed in 1998.
- 5.7 I strongly recommend that the territorial authority record this determination, and any modification 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 determine that:
- (a) all the building elements installed in the building complied with clause B2 on 14 December 1998.
  - (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 14 December 1998 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2008/36.
  - (c) following the modification set out in (b) above, the territorial authority shall issue a code compliance certificate in respect of the building consent as amended.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 19 May 2008.

John Gardiner  
**Manager Determinations**