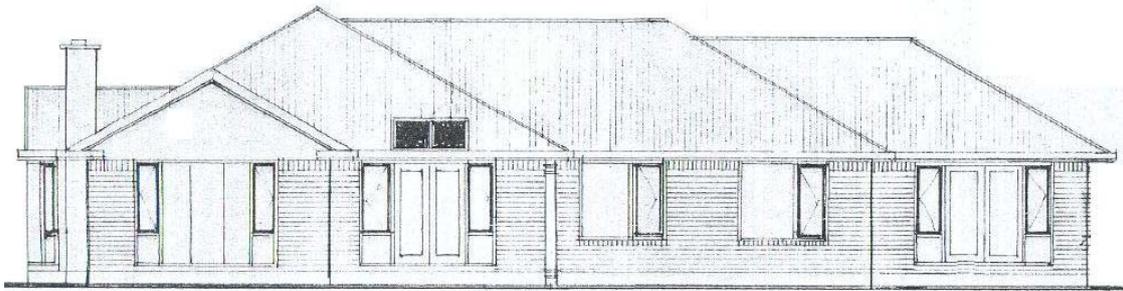


## Determination 2008/39

### The refusal to issue a code compliance certificate for a six-year-old house at 32 Birchwood Close, Prebbleton, Christchurch



#### 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, B and T Stewart (“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 a 6-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 I note that the territorial authority has raised no matters relating to other clauses of the Building Code, and this determination is therefore restricted to considering the durability requirements related to this building.

<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 making my decision, I have considered the documentation received from the applicant, and other evidence in this matter.
- 1.5 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 single-storey detached house, which is situated on a flat site. The house is of a fairly complex shape in plan and form, with concrete foundations and floor slab, light timber frame construction, brick veneer cladding, small areas of EIFS<sup>3</sup> cladding to gable ends, and a profiled metal hipped and gabled roof.

## **3. Background**

- 3.1 The territorial authority issued a building consent (No. 011077) for the house on 9 October 2001. The territorial authority carried out various inspections during construction, with the last recorded as a “post-line” on 4 January 2002.
- 3.2 According to the applicant, the house was completed and occupied in February 2002. The applicants did not become aware that the time lapse since completion could affect the issuing of the code compliance certificate until they decided to sell the house in 2007.
- 3.3 In response to the applicants’ request, the territorial authority carried out a final inspection of the building work on 25 October 2007 which identified 8 items requiring rectification or completion. A subsequent re-inspection on 31 January 2008 confirmed that all items had been completed, except for two issues of documentation that were subsequently provided to the territorial authority.
- 3.4 In a letter to the applicants dated 15 February 2008, the territorial authority outlined the durability periods required in the building code and noted that it was unable to issue a code compliance certificate because:
- ...as a result of the time lapsed, the Council cannot now be satisfied on reasonable grounds that the building work and elements will continue to satisfy the durability provisions of the Building Code for the prescribed period after the Code Compliance Certificate has been issued.
- 3.5 A lawyer acting for the applicants responded in a letter to the territorial authority dated 16 February 2008, maintaining that the Act did not support the territorial authority’s position and asking for urgent clarification of the legal basis of its refusal to issue a code compliance certificate.
- 3.6 In a letter to the applicants dated 20 February 2008, the territorial authority listed the specific inspections undertaken on the building and noted that all outstanding items were now completed. The territorial authority again refused to issue a code

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<sup>3</sup> Exterior Insulation and Finish System

compliance certificate on the grounds of the length of time that the house was occupied prior to the final inspection on 25 October 2007.

3.7 There was no other matter of non-compliance raised by the territorial authority.

3.8 The application for determination was received by the Department on 1 May 2008.

#### **4. The submissions**

4.1 In a letter to the Department dated 22 April 2008, the applicant described the history of the project and outlined the attempts to resolve all outstanding issues, noting:

We own the mentioned property and currently have an offer of sale on the house. The offer is subject to the home gaining a CCC, so as you can imagine we are rather desperate to do whatever it takes to ensure the home can obtain a CCC.

4.2 The applicant forwarded copies of:

- the consent drawings and specifications
- the inspection records
- the correspondence with the territorial authority
- various other statements, certificates and other information.

4.3 The territorial authority made a submission in the form of a letter to the Department dated 9 May 2008, setting out the processes followed in regard to the final inspections of the house and noting that the role of its inspectors is to physically inspect the building work and not to process the code compliance certificate. The territorial authority stated that its position remained as stated in its correspondence with the applicants.

4.4 The territorial authority forwarded copies of:

- the building consent
- the inspection records.

4.5 The draft determination was issued to the parties on 19 May 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.

4.6 The parties accepted the draft and agreed that building was completed in February 2002 and that compliance with Clause B2 was achieved on 1 March 2002.

#### **5. Discussion**

5.1 The territorial authority has stated that all outstanding items are completed, and that concern about compliance with Building Code Clause B2 Durability is the reason that the code compliance certificate cannot be issued.

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).

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 delay between the completion of the building work in February 2002 and the applicant’s request for a code compliance certificate 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.

5.5 The 6-year delay between the substantial completion of the house and the applicant’s request for a code compliance certificate raises the issue of when all the elements of the house complied with Clause B2. I have not been provided with any evidence that the territorial authority did not accept that those elements complied with Clause B2 when the house was completed in February 2002.

5.6 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 1 March 2002. This date has been agreed between the parties, refer paragraph 4.6.

5.7 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.

5.8 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 had been substantially completed in 2002.

5.9 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 1 March 2002.

(b) the building consent is 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 2002 instead of from the time of issue of the code compliance certificate for all the building elements as described in Determination 2008/39.

(c) following the modification set out in (b) above, the territorial authority is to 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 22 May 2008.

John Gardiner  
**Manager Determinations**