

## Determination 2008/48

### The refusal to issue a code compliance certificate for a ten-year-old house at 100B Motuhara Road, Plimmerton, Wellington



#### 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 applicant is the owner, Mr W Piper (“the applicant”), and the other party is the Porirua City 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 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 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.

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<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 2-storey detached house, which is situated on an excavated sloping site. The house is of a fairly complex shape in plan and form, and is generally of light timber frame construction with concrete foundations, concrete block retaining walls, EIFS<sup>3</sup> wall cladding, and pressed metal tile hipped roofs. Two decks, with enclosed floors and balustrades, extend from the upper level of the west elevation.

## **3. Background**

- 3.1 The territorial authority issued a building consent (No. ABA 960116) for the house on 20 December 1996 with construction taking place during 1997. I have received no copies of the building consent or inspection records, but it appears that a number of items were outstanding on completion of the house.
- 3.2 According to the applicant, the house was completed by October 1997. I am not aware of any correspondence between the parties until the applicant sought a final inspection in 2005.
- 3.3 The territorial authority carried out a final inspection of the building work on 22 April 2005, and noted two outstanding items. A subsequent re-inspection on 7 July 2005 confirmed that the building work was “all completed and compliant”.
- 3.4 In a letter to the applicant dated 3 August 2005, the territorial authority noted that all outstanding items were now completed, but it was unable to issue a code compliance certificate:  
  
...due to this consent being granted and issued on the 20/12/96. Our concern is that the “durability” of the exterior claddings and fixings has already been exposed for almost ten years and we are not prepared to extend this time frame for another ten years by issuing of the Code of compliance.
- 3.5 There was no other matter of non-compliance raised by the territorial authority.
- 3.6 The application for determination was received by the Department on 14 April 2008.

## **4. The submissions**

- 4.1 In a letter to the Department dated 11 April 2008, the applicant noted:  
  
After many requests to the [territorial authority] for final inspections and a CCC, all refused. However I finally persuaded them to do a final inspection, which passed apart from few minor details, which were rectified and the house was re-inspected and passed.

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

The applicant explained that he had only recently become aware that the durability requirements of the code could be addressed by relating the periods to the effective completion of the house in October 1997.

4.2 The applicant forwarded copies of:

- the drawings
- the final inspection records
- the letter from the territorial authority dated 3 August 2005.

4.3 The territorial authority made no submission.

4.4 The draft determination was issued to the parties on 13 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.

4.5 The parties accepted the draft and agreed that compliance with Clause B2 was achieved on 1 November 1997.

## **5. Discussion**

5.1 The territorial authority has stated that all outstanding items are completed, and its concern about compliance with Clause B2 Durability is the sole 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 October 1997 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 8-year delay between the substantial completion of the house, and the applicant’s request for a code compliance certificate in 2005, 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 October 1997.

- 5.6 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 1 November 1997. This date has been agreed between the parties, refer paragraph 4.5.
- 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 was substantially completed in 1997.
- 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 November 1997.
  - (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 November 1997 instead of from the time of issue of the code compliance certificate for all the building elements as described in Determination 2008/48.
  - (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 6 June 2008.

John Gardiner  
**Manager Determinations**