

Determination 2008/56

Refusal by a territorial authority to issue a code compliance certificate for a nine-year-old garage at 34 North Terrace, Darfield



1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“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, R Lloyd (“the applicant”), 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 9-year-old garage because it was not satisfied that the building work complied with Clause B2 “Durability” of the Building Code² (First Schedule, Building Regulations 1992) considering the age of the garage.

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

- 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.
- 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 proprietary garage building, which is situated on a flat site. The garage is of very simple shape in plan and form, with concrete foundations and floor slab, light timber frame construction, metal weatherboards, aluminium windows and a profiled metal gabled roof.

3. Background

- 3.1 The territorial authority issued a building consent (No. R418495) for the garage on 13 May 1998, under the Building Act 1991. An inspection of the slab and foundations was carried out on 10 August 1998. The garage was completed during 1998, but the applicant did not seek a code compliance certificate until 2007.
- 3.2 In response to the applicant's request, the territorial authority carried out a final inspection of the building work on 2 October 2007 which noted outstanding documentation, which was subsequently provided.
- 3.3 In a letter to the applicant dated 12 November 2007, 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.
- 3.4 The applicant made a second application for a code compliance certificate, which the territorial authority again refused in a letter to the applicant dated 13 February 2008, noting:
- Unfortunately we are unable to alter our original decisions as the reasons for not issuing still remain the same.
- 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 May 2008.

4. The submissions

4.1 Within the application, the applicant noted that the matter for determination was the territorial authority's decision to refuse to issue a code compliance certificate:

...as council is not satisfied that durability provisions of the building code will continue to be met after time elapsed...

4.2 The applicant forwarded copies of:

- the consent documentation
- the final inspection record
- 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 27 May 2008, briefly describing the history of the project and stating:

The Council has concerns for the period of time between the inspections from 1998 and 2007 (9 years in between), where durability would be an issue as expressed by the Council's opinion in the letter 12 November 2007 addressed to [the applicant].

4.4 The territorial authority forwarded copies of:

- the inspection records
- the letter to the applicant dated 12 November 2007.

4.5 The draft determination was issued to the parties on 10 June 2008. The draft was issued for comment and for the parties to agree a date when the garage complied with Building Code Clause B2 Durability.

4.6 The parties accepted the draft and agreed that compliance with Clause B2 was achieved on 1 January 1999.

5. Discussion

5.1 The territorial authority has stated that all outstanding items are completed, and that its concern about compliance with Building Code 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 1998 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 9-year delay between the substantial completion of the garage and the applicant's request for a code compliance certificate raises the issue of when all the elements of the garage 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 garage was completed in 1998.
- 5.6 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 1 January 1999. 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 1998.
- 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 January 1999.

(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 January 1999 instead of from the time of issue of the code compliance certificate for all the building elements as described in Determination 2008/56.

(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 30 June 2008.

John Gardiner
Manager Determinations