



Determination 2009/7

The issuing of a code compliance certificate for a 10-year-old house at 38 Ayrshire Drive, Hamilton



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, Mr J Rogers (“the applicant”), and the other party is the Hamilton City Council (“the authority”) carrying out its duties and functions as a territorial authority or a building consent authority.
- 1.2 The matter for determination is whether the 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 Code² (Schedule 1, Building Regulations 1992), considering the age of the building work.
- 1.3 I note that the authority has raised no matters relating to other clauses of the Building Code, other than the issue of compliance with Clause E2 “External Moisture” that I address in paragraph 4.2, and this determination is therefore restricted to considering the durability requirements related to this building.

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.

- 1.4 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 is a single storey detached house with a relatively simple design. The structure has brick veneer cladding, a truss framed roof with colour steel pressed tiles, aluminium joinery, and insulation in the walls and ceiling.

3. Background

- 3.1 The building work was completed in 1998 and the authority issued an interim code compliance certificate shortly after the work was completed.
- 3.2 Following the issue of the interim code compliance certificate, the applicant was required to complete some minor remediation work in order to achieve code compliance. In an email from the applicant to the authority dated 14 January 2009, which was later forwarded to the Department, the applicant explains the work was completed, but he failed to complete the process of applying for a code compliance certificate.
- 3.3 The authority refused to issue a code compliance certificate on the grounds that it could not be certain that the building work complied with Clause B2 “Durability” and Clause E2 “External Moisture”, due to the age of the building work.
- 3.4 The applicant commissioned an independent building consultancy (“the consultants”) to provide a report about the compliance of the house with the Building Code. The house was inspected on 11 December 2008 and a report was provided to the applicant.
- 3.5 The application for determination was received by the Department on 18 December 2008, and included a copy of the consultants report.

4. The submissions

- 4.1 In a letter to the Department dated 11 December 2008, the applicant stated that the authority refused to issue a code compliance certificate, because it had concerns about compliance with Clauses B2 “Durability” and E2 “External Moisture”, due to the age of the building work.
- 4.2 In emails between the Department, the applicant, and the authority, dating from December 2008 to January 2009, the authority agreed to accept that the building work complies with Clause E2 “External Moisture”. This is on the basis that the building is a low risk house with brick cladding and the assessment by the consultants found no evidence of moisture. The consultants took numerous non-invasive and semi-invasive pin-probe readings in carrying out the assessment.
- 4.3 A draft determination was issued to the parties on 9 February 2009. The draft was issued for comment and for the parties to confirm the date when the house first complied with Clause B2.
- 4.4 In response to the draft determination all parties agreed that compliance with B2 was achieved on 31 December 1998.

5. Discussion

5.1 The authority has stated that its concern about compliance with Building Code Clause B2 Durability is now the sole reason that the code compliance certificate cannot be issued. Therefore I accept that the 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 completion of the building work in 1998 and the applicant’s request for a code compliance certificate in 2008 has raised concerns with the 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 31 December 1998, refer paragraph 4.4.

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 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 building is no different from what it would have been if a code compliance certificate for the house had been issued in 1998.

5.7 I strongly recommend that the 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 31 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 31 December 1998 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2009/7.
- (c) following the modification set out in (b) above, the authority shall issue the 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 13 February 2009.

John Gardiner
Manager Determinations