



Determination 2010/016

Refusal of a code compliance certificate for a 10-year-old house at 17 Pinegrove Road, Darfield

1. The matters 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.
- 1.2 The parties to this determination are:
- the current owners of the house, S J and K Glassey (“the applicants”)
 - the Selwyn District Council, (“the authority”), carrying out its duties as a territorial authority and a building consent authority.
- 1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate (“CCC”) for a 10 year-old building because of concerns regarding its extended civil liability exposure, and the durability of the building elements.
- 1.4 I consider that the matter for determination in terms of sections 177(b)(i) and 188² is whether the decision not to issue a CCC was correct.
- 1.5 In making my decision, I have considered all the evidence that has been forwarded to me regarding this matter.

2. The building work

- 2.1 The building work relates to alterations, repairs and extensions to a relocated single storey house in a rural location.

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² 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.

3. Background

- 3.1 The authority issued building consent No R419207 to the previous owners for the building work on 27 October 1998 under the Building Act 1991, with construction generally taking place during 1999.
- 3.2 The authority issued an interim CCC to the previous owners dated 28 June 2000. The certificate indicated that further work was required to be completed before the authority could consider issuing of a final CCC.
- 3.3 The authority carried out further inspections of the house following the issue of the interim CCC. During one such inspection the authority requested the applicant to verify the adequacy of alterations to the dwelling in terms of Building Code Clause B1 Structure. This confirmation was subsequently provided.
- 3.4 The authority carried out further inspections of the house on 22 June 2006, and noted at that time that alterations had been undertaken following the issue of the interim CCC. These alterations involved the removal of some internal partitions which contributed lateral bracing to the original design. According to the inspection record, the authority requested the owner to verify the sufficiency of the altered dwelling in terms of Clause B1 of the Building Code.
- 3.5 The applicants applied to the authority for a CCC on 19 September 2009.
- 3.6 On 9 November 2009 the authority wrote to the applicants stating that it was unable to issue the CCC because of the time that had elapsed between the date the building consent was issued and the date of the CCC application. The authority advised it was unable to meet its statutory obligations under section 94. The authority explained the effects of issuing a CCC after such a delay. It also noted it could not now be satisfied that the building work and elements would continue to satisfy the durability provisions of the Building Code after a CCC was issued. Finally, the authority referred to the PIM requirement that the water supply had to be of a satisfactory standard and that this would require an approved test result.
- 3.7 The applicants obtained a laboratory report from Environment Canterbury regarding a water sample obtained from a kitchen tap on the premises. The report, which was dated 14 December 2009, stated that the sample complied with the “Drinking Water Standards for New Zealand 2005 (Revised 2008)” for the analytical parameters analysed.
- 3.8 The Department received an application for a determination on 26 January 2010.

4. The submissions

- 4.1 The applicants did not make a formal submission but forwarded copies of:
- some drawings and consent information
 - the interim CCC
 - some of the inspection records
 - the correspondence with the authority and certain consultants
 - the laboratory report of 14 December 2009.
- 4.2 The authority forwarded a submission dated 29 January 2010 to the Department. The authority set out the requirements of the Act relating to the matter at issue, and

in particular those relating to durability. It also noted that the water test results were dated after the CCC application was refused.

- 4.3 In order to address the issues arising from the durability concerns, the authority suggested:

That the Department consider the option of withdrawing the Interim [CCC] dated 28/06/2000 so that this could be replaced with a final [CCC] with the same date. This is based on the fact that the building was practically completed in June 1999, before the Interim [CCC] was issued.

- 4.4 Copies of a draft determination were issued to the parties on 3 February 2010. 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 applicant accepted the draft without comment. The authority did not accept the draft. The authority submitted that acceptance of previous determinations that dealt with modifications of Clause B2 should not be taken to mean that the authority agreed with them. The authority quoted a passage from the High Court judgement in *Morresy v Palmerston North City Council*³ to support its view and said that:

The suggestion by the [authority] to effectively replace the Interim [CCC] in this case was believed to be a pragmatic solution that would remove all doubts associated with the process for the owner and satisfy the territorial authority concern regarding future civil proceedings.

My response to the authority's submission is made in paragraph 5.2. The authority also noted typographical errors in the draft which have been corrected.

- 4.6 The parties agreed that the house complied with Clause B2 Durability on 28 June 2000.

5. Discussion

5.1 Durability

- 5.1.1 The authority has concerns about the durability, and hence the compliance with the Building Code, of certain elements of the building, taking into consideration the age of the building work completed in 1999.
- 5.1.2 The relevant provision of Clause B2 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 applicable code compliance certificate" (Clause B2.3.1).
- 5.1.3 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

³ High Court, Palmerston North, Wild J, 12 December 2007, CIV-2007-454-000463.

failure of those elements would go undetected during both normal use and maintenance.

- 5.1.4 In this case, the delay between the completion of the building work in 1999 and the applicants' request for a CCC in 2009 has raised concerns that various elements of the building are now well through or beyond their required durability periods, and would consequently no longer comply with Clause B2 if a CCC were to be issued effective from today's date.
- 5.1.5 It is not disputed, and I am therefore satisfied, that all the building elements complied with Clause B2 on 28 June 2000. This date has been agreed between the parties, refer paragraph 4.6.
- 5.1.6 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 issues raised in this determination.
- 5.1.7 I continue to hold that view, and therefore conclude that:
- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements
 - (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a final CCC for the building work had been issued in 2000.
- 5.1.8 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

5.2 The authority's response to the draft determination

- 5.2.1 I do not accept the authority's suggestion that a CCC could simply be substituted for the interim CCC issued on 28 June 2000. In my view, backdating a CCC will not have the effect the authority desires of altering the commencement date for the durability provisions or the relevant limitation period. For the purposes of determining the time from which the relevant durability or limitation period commences under Clause B2.3.1 or section 91 of the former Act, I do not consider that it is possible to interpret the words in those provisions 'the time of issue of the ... certificate' or 'the date of issue of the ... certificate' as including a date the authority places on the certificate that may in fact be many years prior to the actual date the certificate is issued.
- 5.2.2 The passage the authority quoted from *Morresy* was only a passing comment as *Morresy* concerned the correct forum for an appeal against a determination, not whether a waiver could be made after a building consent has been issued. The comments in *Morresy* have been superseded by the subsequent appeal to the District Court⁴ where the Judge held that:

One of [counsel's] main arguments is that a waiver cannot be granted retrospectively, i.e. after the building consent. I disagree with [counsel's] submissions. I immediately

⁴ Palmerston North CC v Morresy, Judge Callaghan, DC Palmerston North CIV-2007-454-000463 [11 August 2008] at paragraphs 63-64 and 78-79

accept that a territorial authority should not normally be asked to ratify building work that does not comply with the building code after the event. But there will always be issues that will arise that must allow a territorial authority to reconsider the original building consent. In deciding whether to grant a waiver, the reasons for the application will clearly be a factor for consideration, for example whether it arose from a mistake, or perhaps a more sinister reason such as an intentional departure from the building consent and/or building code. ...

Obviously [a building consent] can only be amended after it is issued. ... Therefore this must allow for a waiver or modification to be applied for subsequent to the issue of the original building consent. An amendment to the building consent must be able to incorporate a waiver or modification of the building code.

- 5.2.3 The authority has also stated it is obliged to consider the application for the CCC under section 94 of the Act. In my view this is incorrect as the transitional provisions of the Act apply. Section 436 requires an authority to consider whether the work complied with the Building Code that applied at the time the consent was issued in accordance with section 43 of the former Act.

6. The decision

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 28 June 2000

- (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 28 June 2000 instead of from the time of issue of the code compliance certificate for all the building elements.

- (c) following the modification set out in (b) above, the authority shall issue the CCC 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 1 March 2010.

John Gardiner
Manager Determinations