



## Determination 2011/044

### Regarding the refusal to issue a code compliance certificate due to the time lapsed since the issue of the building consent for a house at 261 McPhail Road, Tauranga

#### 1. The matters 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, B Draffin (“the applicant”), and the other party is the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate because the building consent was more than two years old at the time the applicant applied for a code compliance certificate (refer paragraph 3.6).
- 1.3 The matter to be determined<sup>2</sup> is whether the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate.
- 1.4 In making my decision, I have considered the submission of the applicant, and the other evidence in this matter. I also note that the relevant provisions of the Act are set out in Appendix A.

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<sup>1</sup> The Building Act 2004, the Building Code the Compliance Documents, past determinations, and guidance documents issued by the Department are available from the Department’s website at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0888 242 243.

<sup>2</sup> Under sections 177(1)(b), 177(2)(d), and 188 of the current Act

## **2. The building work**

- 2.1 The house is a conventional single level house with attached garage that is situated in a rural area. The house is clad with bevel-back weatherboards and has aluminium joinery with timber facings. The 30° pitch gable roof is clad in pre-painted corrugated steel; a 10° pitch lean-to verandah is located on the east and south elevations.
- 2.2 Drawings call for structural timber framing, parapets and exterior handrails to be treated to H3.1, and decks and exposed timber to H3.2. I note that the drawings provided by the applicant are dated 16 March 2006, and are not stamped as approved by the authority.

## **3. Background**

- 3.1 The authority issued a building consent (No. 74535) for the house on 12 April 2006 under the Building Act 2004.
- 3.2 The applicant submitted that:  
After starting the building process in 2006 we found that we could not complete this project in the 2 year period we then applied for an extension that was approved in 2008 that would take us to March 2010.
- 3.3 In a letter dated 4 March 2008 to the applicant, the authority granted the extension noting in its letter that the applicant had 12 months to complete the project, any further extension would not be granted and that there were 'failed inspections to be resolved prior to the issue of the code compliance certificate'.
- 3.4 It appears that the authority undertook inspections during construction of the house and carried out a final inspection on 10 March 2010, at which time there were items yet to be completed. I have not seen a copy of the inspection records.
- 3.5 A further final inspection was undertaken on 2 March 2011 and notes that:  
Recheck of inspection dated 10 March 2010 all items now completed. No CCC issue due to age of consent dated 12 April 2006 however all building works comply with the Building Code at various stages of construction.
- 3.6 The applicant made an application for a code compliance certificate on 9 April 2009. The authority's "Code compliance certificate assessment form" dated 10 March 2010 notes 'No CCC due to age of consent'. I have not seen correspondence from the authority to the applicant in which the authority provides the reasons for which it refuses to issue the code compliance certificate; neither has the authority made a submission on the matter. I therefore consider the notation on the assessment form to be the reason for the authority's refusal.

## **4. Submissions**

- 4.1 The applicant's covering letter with the application for a determination provided a brief background to the matter. The applicant also submitted a copy of the final inspection record dated 2 March 2011, and six sheets of drawings (refer paragraph 2.2).
- 4.2 A draft determination was issued to the parties for comment on 4 April 2011. The authority accepted the draft without comment in a response received on 15 April 2011.
- 4.3 The applicant accepted the draft in a response received on 27 April 2011, and enclosed a copy of correspondence from the authority granting the extension, and a copy of the application for a code compliance certificate with the authority's assessment form.

## **5. Discussion**

### **5.1 Lapse of a building consent**

- 5.1.1 I note that section 52 of the Act provides for the lapse of a building consent when building work to which it relates does not commence within 12 months after the date of issue of the building consent (or any further period that the authority may allow). From the description of the background to the events provided by the applicant it appears that work had been undertaken during that period and therefore section 52 does not apply. The authority has not disputed this view.

### **5.2 The issue of code compliance certificates**

- 5.2.1 Section 92(2)(a) of the Act requires an owner to apply to a building consent authority for a code compliance certificate "as soon as practicable" after all building work has been carried out under a building consent.
- 5.2.2 The time in which a building consent authority is to decide whether to issue the code compliance certificate is set out in section 93. Under that section a building consent authority must decide whether to issue a code compliance certificate for building work either:
- (a) within 20 working days of receiving the application for a code compliance certificate under section 92 (or further period agreed); or
  - (b) if there has been no application, within 20 working days after the second anniversary of the granting of the consent (or further period agreed).
- 5.2.3 Where an application for a code compliance certificate is received under section 92 of the Act, a building consent authority must follow the assessment and decision-making process described in section 94. Under section 94(1) of the Act, a building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds that the building work complies with the building consent.

5.3 There is no statutory timeframe within which a code compliance certificate has to be issued, but there is a timeframe within which a decision is to be made by a building consent authority in relation to code compliance certificates. Even though the two year period may have elapsed, this does not prevent a code compliance certificate from being issued.

#### **5.4 The application of the Act in this instance**

5.4.1 It appears that the owner contacted the authority within or at the conclusion of the two year period described in section 93(2)(b) and requested an extension of the date under section 93(1)(b). The authority agreed to the extension.

5.4.2 From the evidence provided to me it appears that the building work was completed at some time between 10 March 2010 and 2 March 2011. I take the fact that a final inspection was sought and undertaken to indicate that the applicant was in the process of seeking a code compliance certificate.

5.4.3 Though I have not received copies of correspondence between the parties in which the authority refused to issue a code compliance certificate, I take the notation on the final inspection and the code compliance certificate assessment form (refer paragraphs 3.5 and 3.6) to indicate that the authority refused the application on the grounds that the building consent was more than two years old.

5.4.4 It appears that the authority has incorrectly interpreted section 93 of the Act, and holds the view that a building consent lapses if more than two years has passed since it was issued, and the expiry of this period provides grounds on which to refuse to issue a code compliance certificate.

5.4.5 In my view this is incorrect. When an application is received by an authority, regardless of whether it is outside of the two year period described above, when deciding whether to issue, or refuse to issue, a code compliance certificate the authority must consider matters as prescribed by section 94 of the Act; including whether the building work complies with the building consent. The authority has undertaken such an assessment and concluded that the work is code compliant.

#### **5.5 Conclusion**

5.5.1 There is no requirement in the Act that code compliance certificates must be issued within two years of the granting of the building consent; likewise there is no restriction on an authority from issuing a code compliance certificate after the two year anniversary of the granting of the consent.

5.5.2 The Act requires authorities to issue a code compliance certificate if they are satisfied on reasonable grounds that the building work complies with the consent. The decision to issue or refuse a code compliance certificate is triggered either by:

- (a) an application by the owner for a CCC, or
- (b) if there is no application, two years elapsing from the date of the granting of the consent.

5.5.3 Accordingly, I determine that in this instance the authority is not prevented from issuing the code compliance certificate in accordance with section 93 of the Act and was therefore incorrect to refuse to issue the code compliance certificate on the grounds that the consent was more than two years old.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I determine that the authority incorrectly exercised its power in refusing to issue the code compliance certificate. Accordingly, I reverse the authority's decision to refuse to issue the code compliance certificate.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 16 May 2011.

John Gardiner  
**Manager Determinations**

## APPENDIX A: THE RELEVANT LEGISLATION

A.1 The relevant sections of the Building Act are:

### **52 Lapse of building consent**

A building consent lapses and is of no effect if the building work to which it relates does not commence within—

- (a) 12 months after the date of issue of the building consent; or
- (b) any further period that the building consent authority may allow.

### **92 Application for code compliance certificate**

- (1) An owner must apply to a building consent authority for a code compliance certificate after all building work to be carried out under a building consent granted to that owner is completed.
- (2) The application must be made—
  - (a) as soon as practicable after the building work is completed; and
  - (b) ...

### **93 Time in which building consent authority must decide whether to issue code compliance certificate**

- (1) A building consent authority must decide whether to issue a code compliance certificate for building work to which a building consent relates within—
  - (a) 20 working days after the date specified in subsection (2); or
  - (b) any further period after the date specified in subsection (2) that may be agreed between the owner and the building consent authority concerned.
- (2) The date referred to in subsection (1)(a) and (b) is—
  - (a) the date on which an application for a code compliance certificate is made under section 92; or
  - (b) if no application is made, the expiry of—
    - (i) 2 years after the date on which the building consent for the building work was granted; or
    - (ii) any further period that may be agreed between the owner and the building consent authority concerned.
- (3) Subsection (1) applies whether or not an application for a code compliance certificate is made under section 92.
  - (1) Matters for consideration by building consent authority in deciding issue of code compliance certificate

### **94 A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—**

- (a) that the building work complies with the building consent; and
- (b) that,—
  - ...