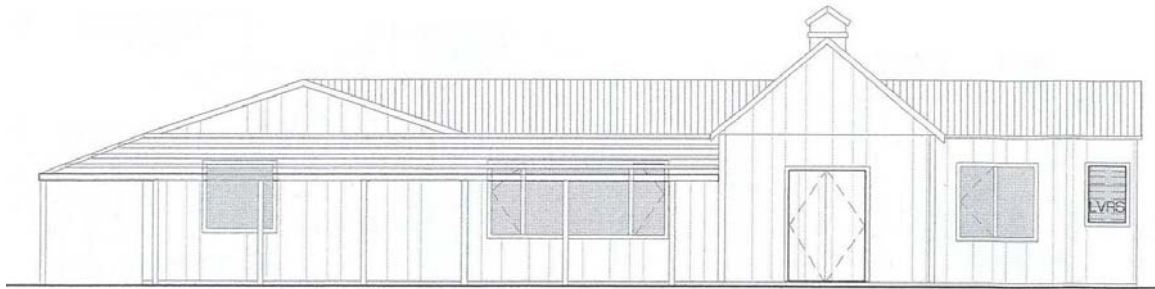


Determination 2007/11

Determination regarding a code compliance certificate for an altered building at 2 Clairmont Heights, Nelson



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, Determinations Manager, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is one of the joint-owners, Joanna van Gosliga (“the applicant”) and the other party is the Nelson City Council (“the territorial authority”).
- 1.2 The matter for determination is the territorial authority’s decision to refuse to issue a final code compliance certificate for 9 and 12-year-old alterations to a building because of the age of the two building consents and the territorial authority’s concerns that the building does not comply either with the Building Code (First Schedule, Building Regulations 1992) or the original consented plans.
- 1.3 In making my decision, I have considered the documentation received from the parties, and the other evidence in this matter.
- 1.4 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.

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

2. The building

- 2.1 The building work consists of alterations to a single-storey detached building situated on a level site. The resultant building is relatively simple in plan and form.

3. Sequence of events

- 3.1 The territorial authority issued a building consent (No. 941135) on 4 November 1994 for alterations to an existing shed. A second building consent (No. 971344) was issued on 1 December 1997 for extensive alterations to convert the building into a dwelling.
- 3.2 Some of the work carried out on the building was additional to that covered by the second consent.
- 3.3 The territorial authority carried out various inspections of the building and carried out a final inspection on 2 November 2006.
- 3.4 Following correspondence between the parties, a building consultant inspected the building on 2 June 2006 and 14 September 2006. The consultant prepared a report dated 29 September 2006 that was entitled “Report on:- Unauthorised Building Works at 2 Clairmont, Nelson”. The report described the building work and concluded that the work was “safe and sanitary” and would comply with the relevant sections of the Building Code and NZS 3604.
- 3.5 The territorial authority wrote to the building owners on 14 November 2006, stating that due to the time that had elapsed since the building work had commenced, the territorial authority had concerns regarding compliance with clause B2. The territorial authority also noted issues that required attention under both consents. Because of the matters that it had raised, the territorial authority was not in a position to issue a code compliance certificate.
- 3.6 The territorial authority has not issued a notice to fix as required by section 435.
- 3.7 An application for a determination was received by the Department on 17 November 2006.

4. The submissions

- 4.1 Neither party made a submission.
- 4.2 The applicant forwarded copies of:
- the plans
 - some building consent details
 - the correspondence with the territorial authority
 - the consultant’s report of 29 September 2006.

- 4.3 Copies of the evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.
- 4.4 A copy of the draft determination was sent to the parties on 15 December 2006. The draft was issued for comment and for the parties to agree a date when all the building elements installed in the house complied with the Clause B2 Durability.
- 4.5 After discussion and email correspondence between the parties it was agreed that:
- with respect to building consent No. 941135, compliance with B2 was achieved on 1 January 1995, and
 - with respect to building consent No. 971344, compliance with B2 was achieved on 1 January 1998.

The durability considerations

5 Discussion

- 5.1 The territorial authority has concerns about the durability, and hence the compliance with the building code, of the elements of the building, taking into consideration the length of time since the issue of the building consents in November 1994 and December 1997.
- 5.2 The relevant provision of clause B2 of the Building Code recognises 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).
- 5.3 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 It is not disputed, and I am therefore satisfied, that all the building elements installed in the house under the building consents described in paragraph 3.1, apart from the items that are to be remedied, complied with clause B2 on 1 January 1995 and 1 January 1998 as appropriate. These dates have been confirmed by both the applicant and the territorial authority, refer paragraph 4.5.
- 5.5 In order to address these durability issues, I sought some clarification of general legal advice about waivers and modifications. I have now received that clarification and the legal framework and procedures based on this clarification are described in

previous determinations (for example, Determination 2006/85) and are used to evaluate the durability issues raised in this determination.

6. Conclusion

- 6.1 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 elements of the building if the applicant applies for such a modification.
 - (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 had been issued in 1995 or 1998, as appropriate. (See paragraph 4.5).
- 6.2 I strongly recommend that the territorial authority record this determination and any modification resulting therefrom, on the property file and also on any LIM issued concerning this property.

Compliance and as-built considerations

7 Discussion

- 7.1 In addition to the B2 matter, the territorial authority has concerns that some elements of the building do not comply with other clauses of the Building Code. The territorial authority has also noted that the work carried out varies from that originally consented. These matters are described in the territorial authority's letter to the applicant dated 14 November 2006.
- 7.2 If the territorial authority is of the opinion that items of rectification are required, then it should list these on a notice to fix, as discussed in paragraph 8.2. In addition, it should also amend the appropriate consent to accommodate the differences it has noted, once it is satisfied that the amendments are code compliant.

8 The decision

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- (a) all the building elements installed under building consent No. 941135, apart from the items that are to be rectified, complied with clause B2 on 1 January 1995.
 - (b) all the building elements installed under building consent No. 971344, apart from the items that are to be rectified, complied with clause B2 on 1 January 1998.

- (c) should the applicant so request, the territorial authority must modify its decision to issue the building consents to the effect that the building consents are amended as follows:

(In respect of building consent No. 941135)

The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 1 January 1995 instead of from the time of issue of the code compliance certificate for all of the building elements, except those elements that have been rectified.

(In respect of building consent No. 971344)

The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 1 January 1998 instead of from the time of issue of the code compliance certificate for all of the building elements, except those elements that have been rectified.

- (d) once the defects identified by the territorial authority have been fixed to its satisfaction, and following the request and modification set out in (c) above, the territorial authority is to issue code compliance certificates in respect of the building consents as amended. The territorial authority may wish to amend the consents in respect of unconsented work as indicated in paragraph 7.2.

8.2 I note that the territorial authority has not issued a notice to fix as required by section 435. The territorial authority should now issue a notice to fix (under either or both building consents as appropriate) to bring the building into compliance with the Building Code, identifying any defects that have not yet been rectified, but not specifying how those defects are to be fixed. That is a matter for the applicants to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.

8.3 I would suggest that the parties adopt the following process to meet the requirements of paragraph 8.2. Initially, the territorial authority should issue the notice to fix, listing all the items that the territorial authority considers to be non-compliant. The owner should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 26 January 2007.

John Gardiner
Determinations Manager