

Determination 2007/5

Determination regarding a code compliance certificate for alterations to a house at 40 Tawera Road, Greenlane, Auckland



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 applicants are the owners, Mr and Mrs Wahlstrom acting through their legal advisors (“the applicant”), and the other party is the Auckland City Council (“the territorial authority”).
- 1.2 The matter for determination is the territorial authority’s decision not to issue a code compliance certificate because it was not satisfied that the building complied with clause B2 “Durability” of the Building Code² (First Schedule, Building Regulations 1992).
- 1.3 The question to be determined is whether the elements that make up the building work comply with clause B2, taking into account the age of the alterations.

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 submissions of the parties and the 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 alterations and additions to a single-storey detached house, built in about the 1920's, situated on a slightly sloping site. The house has been altered to accommodate an upper floor area within the existing building envelope.

3. Sequence of events

- 3.1 The territorial authority issued a building consent for the alterations and additions on 23 January 1996.
- 3.2 The territorial authority carried out various inspections of the property and undertook a final inspection of the property on 2 May 2006. Following this inspection, the territorial authority issued a "Site Instruction to Property Owner" (No 17439), also dated 2 May 2006, which set out 8 items that were required to be rectified.
- 3.3 The applicants sought a code compliance certificate from the territorial authority on the form "Application for code compliance certificate", dated 22 May 2006. The application stated that the building work was completed on "08/1996".
- 3.4 On a "Site Meeting Checklist" dated 22 May 2006, the territorial authority noted:

Completed site instruction Items 1-8 (# 17439) subject to document vetting.
- 3.5 The territorial authority wrote to the applicants on 9 June 2006, noting that due to the age of the building work, the building was outside the requirements of clause B2. Accordingly, the territorial authority could not issue a code compliance certificate for the work.
- 3.6 The applicants' legal advisors ("the legal advisors") wrote to the territorial authority on 16 June 2006 saying:

We seek . . . clarification on the following matters:

 - (i) That the work in items 1-8 in the "Site instruction to property owner 17439" has been completed satisfactorily to the standards required by the Building Code.
 - (ii) That the building work carried out under this Building Consent 10 or 11 years ago is of good quality and to the standards required by the Building Code.
- 3.7 In a letter to the territorial authority dated 20 June 2006, the legal advisors queried whether the territorial authority could provide a letter of comfort to the applicants

stating that the building complied with all the performance requirements of the Building Code, with the exception of the clause B2 provisions.

- 3.8 The territorial authority wrote to the legal advisors on 22 June 2006, stating that it was unable to issue a code compliance certificate for the building work as it was not satisfied that it would continue to meet the durability requirements of the Building Code.
- 3.9 The Department received an application for a determination on 25 September 2006.

4. The submissions

- 4.1 In a covering letter to the Department dated 22 September 2006, the legal advisors set out the background to the matters in question and stated that the applicants required either a determination decision that the building work complies with the building consent, or alternatively, a decision that a code compliance certificate be issued with a modification as to durability.
- 4.2 The applicants forwarded copies of:
 - the plans and specifications
 - some consent documentation and inspection records
 - the correspondence with the territorial authority.
- 4.3 In a letter to the Department dated 12 October 2006, the territorial authority noted what it considered to be the areas of contravention. These related to clauses B2 and E2.
- 4.4 In an email to the Department of 20 November 2006, the territorial authority stated “Councils issue is B2. E2 is not an issue”. I take this to mean that the territorial authority accepts the building complies with clause E2 and all other clauses of the code except for B2.
- 4.5 The territorial authority forwarded copies of:
 - the plans
 - the consent documentation and inspection records
 - the correspondence with the applicants.
- 4.6 Copies of the submissions and other evidence were provided to each of the parties.
- 4.7 A draft determination was forwarded to the parties on 6 December 2006. The draft was issued for comment and for the parties to agree a date when all the building elements complied with the Clause B2 Durability.

- 4.8 Both the applicants and the territorial authority accepted the draft. The legal advisors wished to have a error of fact with respect to the applicants original advice about the completion date acknowledged and I have amended the determination accordingly. With respect to the parties agreeing a date when compliance with clause B2 was achieved, both the territorial authority and the applicants agreed on 30 August 1996.

5 Discussion

- 5.1 The territorial authority has concerns about the durability, and hence the compliance with the building code, of all the elements of the building, taking into consideration the issue of the building consent in early 1996.
- 5.2 I have not received any information about the site inspections undertaken by the territorial authority during the construction period. However, the territorial authority has confirmed that it is satisfied that the building work complies with the building code with the exception of B2 Durability.
- 5.3 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 applicable code compliance certificate” (clause B2.3.1).
- 5.4 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.
- 5.5 It is not disputed, and I am therefore satisfied, that all the building elements installed in the house, complied with clause B2 on 30 August 1996. This date has been confirmed by both the applicant and the territorial authority, refer paragraph 4.8.
- 5.6 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 related 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 on a date in 1996.
- 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.

7 The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:
- (a) all the building elements installed in the alterations complied with clause B2 on 30 August 1996
 - (b) should the applicant so request, the territorial authority must modify its decision to issue the building consent to the effect that the building consent is amended as follows:

The building consent is subject to a modification to the Building Code to the effect that, clause B2.3.1 applies from 30 August 1996 instead of from the time of issue of the code compliance certificate for all of the building elements as set out in Determination 2007/5.
 - (c) following the request and 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 18 January 2007.

John Gardiner
Determinations Manager