

Determination 2007/75

Refusal of a code compliance certificate because of concerns over durability for two 10 year old houses at 111 and 111A The Drive, Epsom, 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, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant in the case of 111 The Drive is R Patel, and in the case of 111A The Drive, J C Xie. Their applications were submitted through the same lawyer. For the purposes of this determination I have regarded the lawyer as their agent (“the agent”). The other party is the Auckland City Council (“the territorial authority”).
- 1.2 The matter for determination is whether the territorial authority’s decision to decline to issue a code compliance certificate for the two 10-year-old houses because it was not satisfied that the building work complied with clause B2 “Durability” of the Building Code² (First Schedule, Building Regulations 1992) is correct.
- 1.3 The question to be determined is whether a code compliance certificate is to be issued despite the fact that it is not now (at the date of this determination) possible to be satisfied that certain building elements contained in the buildings as listed in the notices to fix (“the listed elements”) comply with clause B2 of the Building Code considering the time that has elapsed since those elements were constructed.

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, the legal opinion that I have obtained, and the other evidence in this matter. I have not considered any other aspects of the Act or the Building Code.
- 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 two two-storey houses situated on a level site. The houses are constructed with concrete slab foundations, concrete-tiled roofs on timber-trussed roof framing, timber-framed walls, and particle-board on timber joists to the upper floor. Brick veneer cladding is used on the ground floor with fibre-cement sheet with a textured finish to the upper floor. The two houses have almost identical elevations.

3. Background

- 3.1 The territorial authority issued one building consent (No. BLD39970218001) on 15 April 1997 for the construction of the two houses.
- 3.2 The territorial authority carried out various inspections during the construction of the building work including final inspections. On 8 October 1997, an interim code compliance certificate was issued for 111A The Drive. The certificate contained no conditions or exclusions. It appears, that due to an oversight on the part of the developer, no application was made for a code compliance certificate for 111 The Drive.
- 3.3 According to the applicants, both houses were completed in 1998.
- 3.4 A “Final Checklist” for 111 The Drive, dated 7 August 2002, showed all aspects of the building as a “pass” apart from one minor item.
- 3.5 On 26 May 2005 the territorial authority issued two notices to fix, one in respect of each house. The notices to fix listed a number of matters of contravention related to Building Code Clauses B2, E2, E3, F2, F4, and F7.
- 3.6 I have not been supplied with any specific information about how the applicants responded to these notices, although the agent has supplied a letter from a consultant acting for the developer, dated 16 November 2005, that responds in detail to the matters in the notices to fix. I have also received no information that indicates when any agreed remedial work was completed.
- 3.7 On 23 August 2006 the territorial authority issued two further notices to fix in respect of each house. The notices to fix list only one contravention with respect to B2 being:

Council has not been able to satisfy itself that the durability requirements of the building code can be met.

The Building Code requires that building work will continue to be “fit for purpose” into the future. The minimum length of time that building work must continue to perform according to expectations is either 5, 15 or 50 years . . .

The 5, 15 or 50 years is timed from the date that the Code Compliance Certificate is issued and not from the date of construction.

- 3.8 The Department received the application for a determination on 8 November 2006.
- 3.9 The final submission allowing me to make a determination was not received until May 2007.

4. The submissions

- 4.1 In response to a request dated 9 November 2006 from the Department, seeking further information, the agent wrote to the Department on 15 December 2006, although the letter was not received until 20 February 2007. In his letter the agent set out the background to this matter. The agent indicated that he hoped the determination might result in the issue of a code compliance certificate, possibly including a waiver in respect of clause B2. The agent drew attention to the “limited scope of the August 2006 notices to fix” as indicating that the only remaining barrier to the issuing of a code compliance certificate was the matter of durability. The agent provided copies of:
- the notice to fix No 2540 dated 23 August 2006 for 111The Drive.
 - the notice to fix No 2541 dated 23 August 2006 for 111A The Drive.
 - a letter to the territorial authority from the developer’s consultant, dated 16 November 2005, which the agent said was “relevant only to the extent that it deals with the issue of durability”.
- 4.2 The territorial authority provided its submission, on a CD containing information on the property, under cover of a letter dated 20 May 2007.
- 4.3 Copies of the submissions and other evidence were provided to each of the parties.
- 4.4 A copy of the draft determination was issued to the parties on 11 June 2007. The draft was issued for comment and for the parties to agree a date when the elements in the building complied with Building Code Clause B2 Durability.
- 4.5 Both parties accepted the draft. The territorial authority submitted that 111 The Drive complied with B2 in August 1998, and 111A The Drive complied with B2 in April 1998. The agent for the owners confirmed his acceptance of these dates.
- 4.6 I have taken the latter of these two dates, being 1 August 1998, as the more conservative of the two dates proposed.

5. Discussion

- 5.1 The notices to fix, dated 26 May 2005, refer to non-compliance with clause B2, E2, E3, F2, F4, and F7 of the Building Code.
- 5.2 The notices to fix, dated 23 August 2006, refer only to non-compliance with clause B2 of the Building Code. I consider that to be clear evidence that the territorial authority currently has no concerns regarding the compliance of the houses with any other aspect of the Code.
- 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 Those 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 I am satisfied that all the building elements installed in the houses, apart from items that were rectified as described in the notices to fix (refer paragraph 3.5), complied with clause B2 on 1 August 1998. The establishment of this date is discussed in paragraphs 4.6.

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.

5.7 I continue to hold that view, and therefore conclude that

- (a) the territorial authority had the power to grant an appropriate modification of clause B2 in respect of all the building elements
- (b) it would have been reasonable to grant such a modification, with appropriate notification, because in practical terms the buildings, with the exception of those elements that have been fixed since the issue of the notices to fix dated 26 May 2005, are no different from what they would have been if a code compliance certificate had been issued in 1997, 2002, or some other year.

5.8 I strongly recommend that the territorial authority record this determination and any modification resulting from it, on the two property files and also on any LIM issued concerning these properties.

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 1 August 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 1 August 1998 instead of from the date of issue of the code compliance certificate for all the building elements except those elements that have been altered or modified following the issue of the notices to fix dated 26 May 2005.

- (c) following the 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 9 July 2007.

John Gardiner
Manager Determinations