

Determination 2008/40

Refusal to issue a code compliance certificate for a farm shed because the building consent was more than two years old at 58 Levi Road, RD 5, Christchurch

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 applicants are the owners, Mr and Mrs Lamers (“the applicants”), and the other party is the Selwyn District Council (“the territorial authority”).
- 1.2 The matter for determination is whether the territorial authority (acting as a building consent authority) was correct in its decision to refuse to issue a code compliance certificate (“CCC”) for a farm shed (“the shed”) because the building consent was more than two years old and the territorial authority was therefore prevented from issuing the CCC according to section 93 of the Act.
- 1.3 In making my decision, I have considered the documentation received from the parties, and 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.

2. The building

- 2.1 The building is a 2-bay farm shed of simple proprietary design. It is 7 metres wide, 9 metres deep with a mono-pitch roof ranging from 3.6 to 4.2 metres in height. It is supported on timber poles set in concrete and has timber girts, rafters, and purlins. The shed is clad with corrugated steel. It has steel roller doors to the front of the two bays.

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

3. Background

- 3.1 The building consent (No. 050476) for the shed was granted on 3 June 2005. A siting and post-hole inspection was undertaken on 24 June 2005. I have received no information to confirm when the shed was completed.
- 3.2 On 4 May 2007 the territorial authority sent a letter to the applicants advising that a request for a CCC had not been received and that the two-year period in which the territorial authority was required to decide whether to issue the CCC was about to expire. The letter provided three options to the applicants, being:
- Confirm that a CCC would not be sought.
 - Complete the application form requesting a CCC.
 - Request an extension to the expiry date in writing. If so, state what work has been done and any work that would be outstanding, the new expiry date sought, and reasons why the work was not done in the 2-year period and why the extension should be granted.
- 3.3 An inspection was undertaken on 24 June 2005 for the siting and piling and all work passed as complying with the building consent. A final inspection was completed on 22 January 2008. The inspection notice shows the shed passed the inspection but an “electrical cert.” was required.
- 3.4 The applicants applied for a CCC in a letter to the territorial authority dated 23 January 2008. The electrical certificate was received by territorial authority on 28 January 2008.
- 3.5 The territorial authority wrote to the applicants in a letter dated 11 February 2008 saying:
- Section 93 . . . requires a building consent authority to issue a [CCC] within two years of the granting of the building consent. As your [CCC] application was received outside of this two-year period, the [territorial authority] is unable to issue a [CCC] for this building consent.
- 3.6 The application for determination was received by the Department on 26 February 2008. In a letter accompanying the application the applicants advised that the shed has taken over two years to complete due, in part, to the death of the original builder.

4. The submissions

- 4.1 In the application, the applicants forwarded copies of the:
- building consent and associated documentation
 - plans for the shed
 - territorial authority inspection documentation
 - letter from the territorial authority to the applicants dated 11 February 2008.
- 4.2 Before the application for determination was formally accepted by the Department, Departmental staff sent an informal opinion to the territorial authority, in an email dated 5 March 2008, saying:

[Section 93] says a decision whether to issue the CCC is to be made within a two year period, but that the two-year period may be extended by agreement. If the two year period has passed this should not be taken to mean that Council's ability to issue a CCC has somehow been removed.

4.3 In response the territorial authority said the informal opinion was not accepted and that:

In this case understanding that the decision . . . could still be made several months beyond the "drop dead" date set by the Act, makes an absolute nonsense of the change made between the 1991 & 2004 Acts, which has to have been made specifically to address the problem arising from the previously unlimited period.

4.4 In a letter to the Department dated 17 March 2008 the territorial authority submitted that:

Section 92 of the Building Act 2004 requires an owner to apply for a [CCC] as soon as practicable after the building work is completed.

If no application is made, Section 93 of this Act requires the building consent authority to decide within 2 years after the date on which the building consent for the building work was granted whether to issue the [CCC].

Section 93 allows for an extension to this 2-year period provided agreement is reached between the owner and the building consent authority. No such extension was requested by the owner, let alone agreed to and no provision exists to apply or agree to an extension retrospectively.

To issue a [CCC] 2 years and 9 months after the granting of the building consent would fail to meet the intended objective as articulated during the passage of the Building Bill and if not ultra vires is certainly contrary to the intent of the Building Act.

4.5 The draft determination was sent to the parties for comment on 14 April 2008. The applicants accepted the draft determination.

4.6 In a letter to the Department dated 5 April 2008, but received on 12 May 2008, territorial authority said it did not accept the draft determination setting out the reasons why. The letter also said the electrical certificate was signed by the electrician on 8 September 2005, which the territorial authority considers indicated that the shed '*must have been substantially completed at this time*'. The territorial authority submitted the following in reference to particular paragraphs of the draft determination:

The [territorial authority] made the decision not to issue a CCC within the two-year period. There was no requirement to justify this decision to the owner.

There is no requirement for a building consent authority to inspect the work completed to date in order to make a decision not to issue a CCC.

The territorial authority was unable to issue the CCC at [the expiry of the second anniversary of the granting of the building consent] as Sec 94 (3) states that failure by the owner to provide an energy certificate is sufficient reason for a territorial authority to refuse to issue a CCC. The final inspection was also carried out after the two-year period had elapsed.

[The territorial authority's letter dated 11 February 2008] was sent before the two-year period to help the territorial authority to make a decision. The decision not to issue was made after the two-year period and after no application was made. The territorial authority was still obliged to carry out the final inspection as it had been paid for by the building consent applicant and was a condition of the building consent.

The final inspection and receipt of the electrical certificate was after the period in which the decision had to be made.

[Under] the 1991 Act where there was no stated time limit in applying for a CCC but to do so under the 2004 Act is considered to be ultra vires.

- 4.7 The territorial authority also questioned why such a simple building had taken so long to complete. The applicant had earlier advised the delay was regretted and had arisen from the death of the original builder. The territorial authority submitted the work should have taken 2 weeks. However, there is no legal obligation for owners to do work within a certain time or even to complete work at all.
- 4.8 The territorial authority also submitted that some statements in the draft determination were contradictory.
- 4.9 I acknowledge that the applicants did not provide the territorial authority with the energy certificate until after the expiry of the second anniversary of the building consent (3 June 2007) and that the territorial authority would not have been able to issue the CCC had it made its assessment within 20 working days from that date.

5. The legislation

- 5.1 The relevant provision of the Act are as follows:

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) in the prescribed form; and
 - (c) either—
 - (i) to the building consent authority that granted the building consent for the building work; or
 - (ii) if section 91(2) applies, to the building consent authority that it is proposed will issue the code compliance certificate.
- (2A) If applicable, the owner must include with the application any memoranda provided by licensed building practitioners under section 88(1)(a).
- (3) If applicable, the owner must include with the application all certificates issued by licensed building practitioners under section 88 that state, when those certificates are considered together, that—
 - (a) in a case where a compliance schedule is required as a result of restricted building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or
 - (b) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being altered in, or added to, the building in the course of the restricted building work are capable of performing to the performance standards set out in the building consent.
- (4) If the building work comprises or includes energy work in respect of which a building consent has been granted, the owner must also include with the application any energy work certificate that relates to the energy work.

- 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.
 - (4) A building consent authority may, within the period specified in subsection (1), require further reasonable information in respect of the application for a code compliance certificate, and, if it does so, the period is suspended until it receives the information.
- 94 Matters for consideration by building consent authority in deciding issue of code compliance certificate
- (1) 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,—
 - (i) in a case where a compliance schedule is required as a result of the building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or
 - (ii) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being altered in, or added to, the building in the course of the building work are capable of performing to the performance standards set out in the building consent.
 - (2) In deciding whether to issue a code compliance certificate, a building consent authority must have regard to whether a building method or product to which a current warning or ban under section 26(2) relates has, or may have, been used or applied in the building work to which the certificate would relate.
 - (3) If the owner fails to provide to a building consent authority an energy work certificate in relation to energy work in respect of which a building consent has been granted, the failure is a sufficient reason for the building consent authority to refuse to issue a code compliance certificate in respect of the energy work.
 - (4) If a development contribution has been required to be paid or made under section 198 of the Local Government Act 2002, a building consent authority that is other than the territorial authority that made the requirement must refuse to

issue a code compliance certificate in respect of the relevant building work until the building consent authority has received—

- (a) evidence that the development contribution has been paid or made by the owner concerned to the territorial authority; or
 - (b) a copy of a written agreement between the owner and the territorial authority that the code compliance certificate may be issued.
- (5) Subsection (1) is subject to subsection (4).

6. Discussion

The issuing of code compliance certificates under the Act

- 6.1 Section 92(1) of the Act requires an owner to apply to a building consent authority for a CCC “as soon as practicable” after all building work has been carried out under a building consent.
- 6.2 Where an application for a CCC 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 CCC if it is satisfied, on reasonable grounds that the building work complies with the building consent.
- 6.3 However, if the owner fails to apply for the CCC within two years of the granting of the building consent, the Act requires the building consent authority to make the decision anyway.
- 6.4 The time in which a building consent authority is to decide whether to issue the CCC is set out in section 93. Under that section a building consent authority must decide whether to issue a CCC for building work either:
- (a) within 20 working days of receiving the application for a CCC 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).
- 6.5 Where an application for a CCC is not received within two years of the granting of the building consent, the building consent authority must then assess whether the building work complies with the building consent, and issue, or refuse to issue, the CCC. While there is no requirement in the Act to do so, in order to assess whether it is satisfied on reasonable grounds that the building work complies with the consent and make its decision, the building consent authority will usually need to inspect the work completed to date.
- 6.6 I note that the Building Amendment Act 2008 amended the Act to now require refusals of CCCs to be justified to an owner in writing. This provision does not take effect for applications made prior to 15 March 2008 provided the building consent authority makes its decision before 15 June 2008.

The application of the Act in this instance

- 6.7 The territorial authority passed the shed in the first inspection and it appears it would have passed the final inspection as complying with the consent had the electrical certificate been provided. The applicants sought the CCC after the final inspection in

- January 2008. The electrical certificate was provided to the territorial authority shortly after this.
- 6.8 The territorial authority sent a letter to the applicants in May 2007, advising, under section 93, of the two years period since the granting of the consent.
- 6.9 The territorial authority's decision, under section 93, should have been that it would either issue or refuse to issue the CCC (after it has made the appropriate assessment), or agree an extension with the applicant in which to do so.
- 6.10 An extension of the two-year period was not agreed with the applicant. Therefore, at the expiry of the two-year period, the territorial authority should have made an assessment of the building work, as required by section 94(1). In order to do so the territorial authority would usually conduct an inspection at the expiry of the two-year period to inform its decision whether or not the CCC should be issued.
- 6.11 As that inspection did not take place the territorial authority should have conducted its assessment under Section 94(1) within 20 working days after the CCC being sought by the applicant in January 2008.
- 6.12 The territorial authority did seek an application by the applicants for a CCC within two years from the date of the consent. However, the application was received outside of the two-year timeframe described in section 93 and the territorial authority made its decision to refuse the CCC on that basis that it considered the Act requires it to "issue a CCC within two years of the granting of the consent". Accordingly, because the CCC application was outside the two-year timeframe the territorial authority considered it was precluded from issuing a CCC.
- 6.13 It appears the territorial authority is confusing two requirements in the Act. Firstly, the time in which the territorial authority is to decide whether to issue a CCC for building work when the CCC has not been sought by the owner, and secondly, the matters it must consider when deciding to issue a CCC. The territorial authority made its decision to refuse to issue the CCC based on the first action. However, when deciding whether to issue, or refuse to issue a CCC, a territorial authority must consider certain matters including compliance with the Building Consent.
- 6.14 There is no statutory timeframe within which a CCC 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 CCCs. Even though the two year period has elapsed, this does not mean that a CCC cannot be issued.
- 6.15 While the territorial authority did not make the decision under section 94(1), it did complete a final inspection. The territorial authority has confirmed that the electrical certificate was obtained and it appears to have been satisfied all work complied with the building consent. If the territorial authority is satisfied that the building work complies with the building consent, then it should issue the CCC.

Liability with respect to the durability periods in the Building Code

- 6.16 The territorial authority has expressed concern about its ongoing liability and in particular with compliance with Clause B2 Durability. While I acknowledge these concerns, there are options available to the territorial authority to alleviate these concerns, such as modifying the date of the commencement of the durability periods. This means there is no unfair advantage to the late applicant for a CCC and nor is a

territorial authority unfairly rendered liable. However, I note that I would not consider a modification of the commencement of the durability periods for a building of this age because none of the durability periods described in Building Code, and which could reasonably be expected to commence after the building was effectively completed, have yet expired. I consider insufficient time would have passed to initiate the need for a modification of the durability period.

Conclusion

- 6.17 There is no requirement in the Act that CCCs must be issued within two years of the granting of the building consent. Likewise there is no restriction on a territorial authority from issuing a CCC after the two year anniversary of the granting of the consent.
- 6.18 The Act requires territorial authorities to issue a CCC if they are satisfied on reasonable grounds that the building work complies with the consent. The decision to issue or refuse a CCC 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.
- 6.19 In either case, the territorial authority is required to go through the same process in order to satisfy itself that the building work complies with the building consent. This will usually require the territorial authority to inspect the work.
- 6.20 Accordingly, I determine that the territorial authority is not prevented from issuing the CCC in accordance with section 93 of the Act and was therefore incorrect to refuse to issue the CCC because the consent was more than two years old.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I reverse the territorial authority's decision to refuse to issue the CCC. The territorial shall issue the CCC once it is satisfied on reasonable grounds that the building work complies with the building consent in accordance with section 94.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 May 2008.

John Gardiner
Manager Determinations