



Determination 2009/5

Determination regarding an authority's refusal to issue a code compliance certificate for an 11-year-old addition to a house at 29 Regent Street, Hamilton



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 building owners Mr A Hadfield and Mrs J Brown (“the applicants”), and the other party is the Hamilton City Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.2 The application arises from the decision of the authority to refuse to issue a code compliance certificate for an 11-year-old addition to a house.

¹ The Building Act 2004 and the Building Code are available from the Department's website at www.dbh.govt.nz.

1.3 I take the view that the matters for determination are:

Matter 1: The refusal to issue the compliance certificate

Whether the authority was correct in its decision to refuse to issue a code compliance certificate, in terms of section 177(b) of the Act.

Matter 2a: Compliance with the Building Code

Whether, following consideration of Matter 1, the building work complies with the Building Code in terms of section 177(a) of the Act.

Matter 2b: The durability considerations

Whether the building elements in the alterations comply with Building Code Clause B2 “Durability” taking into account the age of the building work.

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 work

2.1 The building work consists of an upper-story addition to an existing two-storey house 1987 built house. The addition is a dormer and deck on the first storey of the house. The existing attic trusses and super structure over the garage was extended with a small dormer and internal walls to create a study, a bedroom, and two storerooms. The ground floor of the original house remains unaltered.

2.2 The addition has painted fibre-cement weatherboard cladding, corrugated steel roofing, and aluminium joinery.

2.3 A small timber deck has been built as a separate structure. The deck has been bolted to the exterior structure and is supported by posts at the deck front.

3. Background

3.1 The authority issued a building consent for the addition on 11 October 1996.

3.2 The authority carried out pre-lining building and plumbing inspections on 12 May 1997.

3.3 The authority visited the address on 23 March 2000, but was unable to gain access to inspect the building work. The authority wrote to the applicants on the 12 May 2000, explaining that a final inspection was required. The authority noted that the applicants rang the authority on 26 May 2000 and stated that they would advise the authority when the work was completed, as it was not yet finished. It was recorded by the authority, on 16 January 2007 that:

Site visited 23/3/2000 – Unable to gain access. Letter sent 12/05/2000 requesting access. Owner phone 6/5/2000 and advised project still not completed. No more inspections called for and due to the age of the consent we have not issued a Code Compliance Certificate.

3.4 In their submission, the applicants explained that:

Most of the work was completed over 1996 and 1997... The delay was due in part to two relatively minor incomplete pieces of work: the two spouting runs on the dormer, and the insulation foil on the garage ceiling. In addition, the builder had concerns over the cantilevered balcony in the form it had been approved, and the decision was made that it should be a stand alone deck bolted to the dormer.

3.5 In January 2008, the applicants approached the authority to see that things were in order for their Land Information Memorandum (“LIM”), and discovered that a code compliance certificate had not been issued for the addition. The applicants have stated they were informed by the authority that the consent period “of 10 years had expired” and the Council “could not do anything”.

3.6 The applicants stated that on the advice of the authority, an independent building consultancy ("the consultants") was commissioned by the applicants to provide a report indicating the compliance of the addition with the Building Code. The building work was inspected on 11 February 2008, and a report was provided to the applicants. The report concluded:

It is the writer's opinion the dormer and associated deck has been constructed to meet the requirements of the building code.

3.7 The application for determination was received by the Department on 17 December 2008.

4. The submissions

4.1 In a letter to the Department dated 12 December 2008, the applicants stated that they had not requested a final inspection nor applied for a code compliance certificate at the time the building work was completed. As a consequence, the authority is now refusing to issue a code compliance certificate, due to the age of the building work.

4.2 The applicants forwarded copies of:

- plans of the original house
- the building consent, the consent drawings and some documentation
- the authority's inspection notes
- correspondence between the authority and the applicants
- invoices for the building work
- the site visit report from the consultants.

4.3 Copies of the submissions and other evidence were provided to the parties. Neither party made any further submissions in response to the information that was provided.

- 4.4 A draft determination was issued to the parties for comment on 27 January 2009. The draft was issued for comment and for the parties to agree a date when the building work complied with Clause B2 “Durability”.
- 4.5 In response to the draft determination all parties agreed that compliance with B2 was achieved on 31 July 1997.

Matter 1: The refusal to issue the compliance certificate

5. Discussion

- 5.1 The applicants have stated that they were informed by the territorial authority that its current policy is not to issue code compliance certificates for building work carried out under buildings consents older than ten years. I take this comment to refer to outstanding building consents issued under the Building Act 1991, which is the case in this instance.
- 5.2 This does not accord with my reading of the Act. Section 436 of the Act applies to building work carried out under a building consent granted under section 34 of the Building Act 1991, and therefore applies in this case. Section 436 requires that applications for code compliance certificates must be “considered and determined as if this Act had not been passed”. As Parliament included this provision in the Act in 2004, I conclude that it did not intend that applications for code compliance certificates could be refused solely because the building consent was granted under the Building Act 1991.
- 5.3 Further, from section 43 of the Building Act 1991, the authority must issue the code compliance certificate if it is satisfied on reasonable grounds that the building work specified complies with the building code.
- 5.4 It is not open to the authority to refuse to issue a code compliance certificate because of concerns about future legal liability.

Matter 2a: Compliance with the Building Code

6. Discussion

- 6.1 I note the building work is a relatively simple low-risk alteration with low risk features (weatherboard cladding with good eaves provided by the roof cladding). The alteration was completed for approximately 11 years ago with no matters of non-compliance raised by the owner, the consultant or the authority.
- 6.2 The report from the consultants specifically addresses Clauses B1, E1, E2, F4, and H1, and concludes:

It is the writer's opinion the dormer and associated deck has been constructed to meet the requirements of the building code.

6.3 The following table shows the relevant Building Code clauses and the means with which I have established code compliance.

Applicable Building Code Clause	Included in the consultant's report	My response
B1 Structure	No reported failures noted	Accepted as compliant and covered by pre-line inspection by the authority (see paragraph 6.4)
B2 Durability	Building elements well maintained and in good condition	Accepted as compliant (except relating to duration, see Section 7)
E1 Surface Water	Gutters and downpipes were installed appropriately	Accepted as compliant
E2 External Moisture	No reported failures after 11 years, claddings were properly installed and in good condition	Accepted as compliant
F4 Safety From Falling	The deck barrier complies with F4/AS1	Accepted as compliant
F7 Warning Systems	nil	Not a requirement when consent issued; I recommend smoke detectors be installed if not already
G4 Ventilation	nil	Accepted as compliant; vented skylight to the study, adequate opening windows to habitable spaces
G7 Natural Light	nil	Accepted as compliant; adequate areas of glazing to the habitable spaces providing an awareness of the outside
H1 Energy Efficiency	Pink batts insulation of walls and ceilings meets the required R values 1.8 for walls and 2.2 for ceilings	Accepted as compliant.

6.4 A pre-line inspection was completed by the authority in May 1997, and one item was raised to be remedied in the authority's pre-line inspection notes:

Extra floor joists required 450mm centres.

The report of the consultants addresses this issue:

A small timber deck has been bolted and attached as a separate structure to the dwelling. It is understood the consented Plan Drawings show the floor and deck joists as cantilevered which may not have been amended. All decking timbers meet the requirements of Chapter 7 Floor Joists of NZS3604:1999 and amendments.

- 6.5 In conclusion, I am of the view that the consultants' report plus the information submitted with the application provides sufficient grounds for me to be satisfied that the addition complies with the Building Code. I am also of the opinion that the authority had the means at its disposal to determine code compliance itself without referring the matter to the Department for determination.

Matter 2b: The durability considerations

7. Discussion

- 7.1 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 code compliance certificate" (Clause B2.3.1).

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.

- 7.2 In this case, the delay between the completion of the substantive building work in 1997 and the applicants' seeking a code compliance certificate in early 2008, has raised concerns with the authority that various elements of the building are now well through their required durability periods, and would consequently no longer comply with Clause B2 if a code compliance certificate were to be issued effective from today's date.

- 7.3 It is not disputed and I am therefore satisfied, that all the building elements complied with Clause B2 on 31 July 1997, refer paragraph 4.5.

- 7.4 In order to address these durability issues, when they were raised in previous determinations, I sought and received clarification of general legal advice about waivers and modifications. That clarification, and the legal framework and procedures based on the clarification, is described in previous determinations (for example, Determination 2006/85). I have used that advice to evaluate the durability matters raised in this determination.

7.5 I continue to hold the views expressed in the previous relevant determinations, and therefore conclude that:

- (a) the authority has the power to grant an appropriate modification of Clause B2 in respect of all of the building elements in the building that were constructed under the building consent.
- (b) it is reasonable to grant such a modification, with appropriate notification, because in practical terms the construction is no different from what it would have been if a code compliance certificate had been issued when the majority of the building work was substantially completed in 1997.

7.6 I strongly recommend that the authority record this determination, and any modification resulting from it, on the property file and also on any LIM issued concerning this property.

8. The Decision

8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the addition complies with the Building Code and I reverse the authority's decision to refuse to issue the code compliance certificate.

8.2 In addition, I determine that:

- (a) all the building elements installed in the building work complied with clause B2 on 31 July 1997
- (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 31 July 1997 instead of from the time of issue of the code compliance certificate for all of the building elements as described in Determination 2009/5.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 12 February 2009.

John Gardiner

Manager Determinations