



Determination 2010/038

The refusal of a code compliance certificate for a 9-year old house at 64 Bengal Drive, 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.

1.2 The parties to this determination are:

- the owner, the Bert Engelbrecht Family Trust (“the applicant”)
- the Christchurch City Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.

1.3 This determination relates to the refusal of the authority to issue a code compliance certificate for the original construction of a 9-year old house that requires remedial work.

1.4 The authority has suggested that the applicant apply for a new building consent to undertake the required remedial work. However, the authority has concerns regarding the age of the original building consent.

1.5 In order to determine² whether the decision of the authority to refuse to issue the code compliance certificate was correct, I must consider whether the original construction complies with Building Code Clause B2.

1.6 In making my decision, I have considered the submission of the applicant and other evidence in this matter.

2. The building work

2.1 The two-storey house is constructed on a concrete slab supported on blockwork retaining walls finished with plaster at both the ground and first floor levels. The rest

¹ The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at ww.dbh.govt.nz or by contacting the Department on 0800 242 243.

² In terms of section 177(b)(i)

of the construction is light timber frame clad with EIFS³. The roof is clad with a butyl rubber over plywood to the flat roofs, and concrete tiles to the pitched roofs. The joinery exterior is aluminium. There is a balcony at first floor level constructed of a tiled concrete slab supported on concrete columns.

3. The background

3.1 A building consent (No ABA 10005198) was issued by the authority on 21 August 2000 for the original construction of the house. A final inspection of the house was carried out by a building certifier in April 2001, and the house failed this inspection.

3.2 Following an initial report carried out on behalf of the Weathertight Homes Resolution Service (“the WHRS”) in 2003, some remedial work was carried out. A second WHRS report was completed on 16 February 2009. The report listed various items requiring remediation and the work required to rectify these items. The remedial work required appears to be in respect of the moisture ingress through the wall cladding and flat roofs, and damage to the timber framing.

3.3 The authority wrote to the applicant on 26 November 2009, following a meeting that was held at the property. The authority stated that:

The existing building consent #ABA 10005198 (as it stands), is unable to achieve the threshold required for the council to be satisfied on reasonable grounds to issue a code compliance certificate. The main reasons being

1. The age of the building
2. The WHRS Assessors report remedies
3. The impending remedial work that has been proposed.

3.4 The authority also issued a notice to fix dated 11 January 2010 and suggested that the applicant apply for a building consent for the remedial work. The authority recommended that the applicant apply to the Department for a determination as to whether the authority is to issue a code compliance certificate for the original building consent stating ‘the [Department] will determine [whether] the [authority] is to issue a code compliance certificate for the existing building consent.’

3.5 The application for a determination was received by the Department on 16 February 2010. Based on the application, I have taken the view that the applicant does not dispute the notice to fix and accepts that remedial work is required.

4. The submissions

4.1 Neither of the parties provided a detailed submission.

4.2 The applicant supplied copies of:

- the WHRS report of 16 February 2009
- the letter from the authority to the applicant dated 26 November 2009
- the notice to fix.

4.3 A draft determination was issued to the parties on 6 April 2010. The draft was issued for comment and for the parties to agree on a date when the building elements, with the exception of those items that are to be rectified under the building consent for the

³ External Insulated Finishing System

remedial work, complied with the Building Code Clause B2 Durability. Both parties accepted the draft without comment and agree that compliance with Clause B2 was achieved on 23 April 2001.

5. Discussion

General

- 5.1 It appears from the submission, that on the suggestion of the authority, a new building consent will be applied for to undertake the required remedial work. The authority have refused to issue a code compliance certificate for the original construction because of the age of the building consent, the remedial work identified in the WHRS reports, and the impending remedial work that has been proposed.
- 5.2 Given that the remedial work will be undertaken under a new building consent, the original building consent will need to be amended to exclude building elements for which remedial work is proposed and any other building elements found to require remedial work, which may be discovered in the course of remediation.
- 5.3 Based on the letter of the authority dated 26 November 2009 it appears that, with the exception of building elements that will be subject to remedial work, the authority does not have concerns about the compliance of the remainder of the original construction, other than in respect of its durability.
- 5.4 As discussed in Determination 2009/089, I do not accept that an authority does not have the power to grant modifications of the Building Code's requirements in respect of an existing consent. The authority could therefore have chosen to modify the requirements of Clause B2.3.1 itself without referring the matter to the Department.

The durability considerations

- 5.5 The authority has raised concerns about the durability of the building elements that will not be subject to remedial work, and hence the compliance of those elements with the Building Code, taking into consideration the age of the building work, which was completed in 2001.
- 5.6 The relevant provision of Clause B2 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).
- 5.7 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.

- 5.8 In this case, the delay between the completion of the building work in 2001 and the applicant's request for a code compliance certificate 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.
- 5.9 It is not disputed, and I am therefore satisfied, that all the building elements with the exception of those items that are to be rectified under the building consent for the remedial work, complied with Clause B2 on 23 April 2001. This date has been agreed between the parties, refer paragraph 4.3.
- 5.10 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 issues raised in this determination.
- 5.11 I continue to hold that view, and therefore conclude that:
- (a) following a request from an owner, the authority has the power to grant an appropriate modification of Clause B2
 - (b) it is reasonable to grant such a modification, with appropriate notification, as in practical terms the building is no different from what it would have been if a final code compliance certificate for the building work had been issued in 2001.
- 5.12 I strongly suggest that the authority record this determination, and any modifications of the Building Code resulting from it, on the property file and also on any LIM issued concerning this property.

6. What is to be done now

- 6.1 I leave it up to the authority to undertake the administrative process necessary to amend and modify the original building consent, and issue the code compliance certificate in respect of the amended consent.
- 6.2 The amendment of the original building consent must clearly exclude the building elements for which remedial work is proposed, and must exclude any other elements that are found to require remedial work that may be discovered in the course of remediation.
- 6.3 Therefore, I suggest that the applicant makes an application for a building consent to undertake the remedial work. When that work has been satisfactorily completed, the authority could, following an application for a code compliance certificate, issue a code compliance certificate in respect of the remedial work and exclude this now code compliant building work from the original consent by way of an amendment of the original consent.
- 6.4 Following the modification of the original building consent, as discussed in paragraph 5, the authority will then be able to issue a code compliance certificate in respect of the amended and modified original building consent.

7. The decision

7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that:

- (a) All the building elements, with the exception of those elements that are subject to rectification under the building consent for the remedial work, complied with Clause B2 on 23 April 2001.
- (b) The original building consent is to be amended to exclude the building elements to be remediated under building consent for the remedial work.
- (c) The original building consent shall be 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 23 April 2001 instead of from the issue of the code compliance certificate for all the building elements, with the exception of the elements that are to be remediated under the building consent for the remedial work [building consent number to be issued] as described in Determination 2010/038.
- (d) Following the modification and amendment described in (b) and (c) above, and once the authority is satisfied that the remedial work has been satisfactorily completed, the authority shall issue the code compliance certificate in respect of the original consent.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 7 May 2010.

John Gardiner
Manager Determinations