



## Determination 2011/035

# The refusal to issue a code compliance certificate for a house and garage at 971 Whakamarama Road, Mount Maunganui

### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the current 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 the determination are:

- the building owner, Mr J Tretheway (“the applicant”) acting through an agent
- the Western Bay of Plenty District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.

1.3 This determination arises from the decision of the authority to refuse to issue a code compliance certificate for an 8-year old house and garage because the authority was of the opinion that reasonable progress had not been made in respect of the time taken to construct the building. Subsequent to a draft determination, the authority has also raised the issue of when the durability period for the building work should commence.

1.4 The matters to be determined<sup>2</sup> are whether:

- the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate
- the elements that make up the building work comply with Clause B2 Durability<sup>3</sup> of the Building Code (First Schedule, Building Regulations 1992, which was current at the time that the building consent was issued) taking into account the age of the building work.

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243.

<sup>2</sup> Under sections 177(1)(a), 177(1)(b), and 177 (2)(d) of the current Act

<sup>3</sup> 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.

- 1.5 In making my decision, I have considered the submissions of the parties, and the other evidence in this matter.

## **2. The building work and background**

- 2.1 The building work consists of two separate buildings. One building initially was a one-bedroom granny flat and the other building is a garage. Amended drawings were produced changing the flat into a three bedroom house with a lower living area . The garage is a single-storey timber-framed structure erected on a concrete floor slab. The house is constructed partly on a concrete slab and partly on a timber-framed floor. A large deck supported on poles is attached to the lounge of the house.
- 2.2 A building consent (No 66789) was issued by the authority for the building work on 12 April 2002 under the Building Act 1991 (“the former Act”). The original consent was for the granny flat and garage. Apparently, the plans submitted with the consent were replaced by amended plans showing the revised house configuration. I note that, while all the plans are referenced as consent No 66789, neither the plans nor the authority’s approval stamps are dated.
- 2.3 I take it that the authority issued a building consent in line with the amended drawings, although the issued building consent and the inspection documents all refer to “Granny Flat with Solid Fuel Heater & Garage”.
- 2.4 The authority carried out various inspections up to 2005, which included the foundations and ground floor slabs, the drainage and septic tank, and the pre-line plumbing inspection. All of which were passed.
- 2.5 The authority carried out a final inspection on 3 February 2010 (that failed), and a second final inspection on 7 March 2011 (that passed). A site notice dated 7 March 2011 stated:
- Owner has been informed that all the work associated with this Consent [No 66789] and amendments has been completed satisfactorily, but due to the age of this consent and the time taken to complete this work, a Code Compliance certificate cannot be issued.
- 2.6 In a letter to the applicant dated 7 March 2011, the authority stated that, as the final inspection was not requested until eight years after the building consent was issued, it could not issue a code compliance certificate. The authority said that:
- The building consent was issued in April 2002, but the final inspection was not requested until March 2011, over 8 years later.
- Section 436 of the ... Act is the transitional provision that refers back to building consents issued under the previous Act and the effect of this is to confirm that the “reasonable progress” provision applies.
- It is difficult to accept that reasonable progress has been made here given the time between inspections noted above.

[I note here that the reference to section 436 of the current Act should read section 433]

- 2.7 The authority confirmed that, as far as it could ascertain, the work carried out complied with the requirements of the Building Code that were in effect when the building consent was issued.
- 2.8 The Department received an application for determination on 17 March 2011.

### **3. The submissions**

- 3.1 Did not make a separate submission with the application but provided copies of:
- the building consent and related documents, the inspections carried out by the authority, including the plans and specifications
  - The authority's letter to the applicant dated 7 March 2011
  - a set of photographs of the completed building.
- 3.2 The authority acknowledged the application but made no submission in response and did not raise the matter of when the durability period for the building work should commence.

### **4. The draft determination**

- 4.1 Copies of a draft determination were forwarded to the parties for comment on 29 March 2011. The applicant accepted the determination subject to two non-contentious amendments.
- 4.2 In a letter to the Department dated 4 April 2011, the authority stated that as the wall framing and cladding had been installed by December 2005 the building consent should be amended to reflect a durability commencement at that date. The applicant responded to the authority in an email dated 8 April 2011 and accepted the proposed date.
- 4.3 I have amended the determination as I consider appropriate, including the commencement of the durability periods as a matter to be determined.

### **5. Discussion**

#### **The progress of the work**

- 5.1 Based on the final inspection carried out by the authority and the authority's letter to the applicant dated 7 March 2011, I consider the authority is satisfied on reasonable grounds that the completed building work complies with the Building Code
- 5.2 Under section 41(1)(b) of the former Act, the 'reasonable progress' provision concerns the failure to make reasonable progress on building work within 12 months after work commences, or within such further period as the territorial authority in its absolute discretion may allow. However these reasonable progress provisions are not relevant to any delay between the issue of a building consent and when the date a final inspection was requested.

5.3 This question of reasonable progress was considered by me in Determination 2010/057, and I consider that my opinions set out in that decision are applicable to the current situation. Accordingly, in my view, the provisions of section 41(1)(b) of the former Act are to be applied when reasonable progress is not being made, not at some point after this when the building work has been completed. Therefore, if an authority wishes to take action under the reasonable progress provisions, it would need to do so 12 months after the issue of a building consent. I note Determination 2010/057 involved the same authority.

5.4 Accordingly, I consider that the period of delay between the issue of a building consent and the request for a final inspection is not a ground under section 43(5) of the former Act for refusing to issue a code compliance certificate.

### **The matter of durability**

5.5 The authority has concerns regarding the durability, and hence the compliance with the Building Code, of certain elements of the house taking into consideration the age of the building work completed in 2005.

5.6 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).

5.7 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 2005 and the applicant’s request for a code compliance certificate has raised concerns that various elements of the building are now well through or beyond 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. I have not been provided with any evidence that the authority did not accept that those elements complied with Clause B2 at a date in 2005.

5.9 Both parties accept (refer to paragraph 4.2), and I am therefore satisfied, that all the building elements installed in the house complied with Clause B2 in December 2005.

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) the authority has the power to grant an appropriate modification of Clause B2 in respect of all the building elements if requested by the owner
- (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 code compliance certificate for the building work had been issued in 2005.

5.12 I strongly suggest that the authority record this determination and any modifications resulting from it, on the property file and also on any LIM issued concerning this property.

## **6. The decision**

6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that building work complies with the Building Code and that the authority incorrectly exercised its power in refusing to issue the code compliance certificate. Accordingly, I reverse the authority's decision to refuse to issue a code compliance certificate.

6.2 I also determine that:

- (a) all the building elements installed in the house complied with Clause B2 on 1 December 2005
- (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 December 2005 instead of from the time of issue of the code compliance certificate for all the building elements as described in Determination 2011/035.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 13 April 2011.

John Gardiner  
**Manager Determinations**