

Determination 2012/028

Regarding the exercise of powers in refusing to issue a code compliance certificate for a 12-year-old house and garage at 41A Cairns Crescent, Rototuna, 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, Tony Marshall, Manager Determinations (Acting), 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, E Walcroft (“the applicant”)
 - Hamilton City 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 a 12-year-old house. The authority’s concerns stem from the age of the building work (refer paragraph 2.8).
- 1.4 The matter to be determined² is whether the authority correctly exercised its powers when it decided to refuse to issue the code compliance certificate.
- 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 a single-storey house with enclosed garage constructed by a franchised building company. The house comprises concrete floor slab and foundation, and light timber framing; and is clad with fibre-cement sheet cladding

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

² Under sections 177(1)(b), and 177 (2)(d) of the Act

with a textured finish, aluminium window and door joinery, and profiled metal roofing with eaves on all elevations.

- 2.2 Building consent (No 2000/880) was issued by the authority for the building work at the beginning of 2000 under the Building Act 1991 (“the former Act”).
- 2.3 The building was completed in July of 2000 and granted an interim code compliance certificate on 20 July 2000. The interim certificate noted that the concrete level in front of the garage was too high, and that a ‘cage’ was required to the terminal vent. This work was completed and the applicant took possession of the building.
- 2.4 In 2006 the applicant received a letter from the authority explaining that the house did not have a code compliance certificate; noting that the last inspection was in 2000 and that the inspection had recorded items to be completed.
- 2.5 On 14 February 2006 the authority undertook a further inspection. I have not seen a copy of that inspection record and have received no information as to items of non-compliance. The authority subsequently requested a weathertightness report be provided by the applicant.
- 2.6 On 17 March 2006, a building consultant undertook an inspection of the house and prepared a weathertightness report dated 20 March 2006. The report concluded that the house complied with the ‘relevant New Zealand Documents for B2 Durability and E2 External Moisture’ and noted that the house was in need of a paint to help protect the exterior system. The authority received a copy of the report on 5 April 2006.
- 2.7 It appears that the applicant subsequently sought a code compliance certificate but the authority would not considering issuing it until the house was repainted. The house was repainted recently and the applicant again sought a code compliance certificate.
- 2.8 In an email to the applicant of 16 January 2012, the authority summarised the background history of the work, noting that it is the owner’s obligation to advise the authority on completion of the building work. The authority reiterated its refusal to issue a code compliance certificate, stating:
- [The authority] developed policy to deal with older buildings [where] construction occurred prior to Building Act 2004. This advises that for buildings constructed before the introduction of the Building Act 2004 (which was promulgated March 2005) “A Code Compliance Certificate ... will not be issued for this Building Consent because [the authority] is not satisfied on reasonable grounds that the following provisions of the Building Code have been complied with because of the age of the building. In particular:
1. B2 Durability
 2. E2 Weathertightness.”
- The email concluded that the applicant could either seek a determination on the matter or obtain a building report from an independent expert regarding the condition of the building which could be submitted to the authority.
- 2.9 The Department received an application for a determination on 9 February 2012.

3. The submissions

- 3.1 The applicant provided an outline of the background to the matter, the weathertightness report dated 20 March 2006, some drawings, and correspondence with the authority.
- 3.2 In a letter to the Department dated 20 February 2012 the authority made a submission in response to the application. The authority said
- The ongoing compliance of B1 and B2 is dependent on the maintenance and performance of the cladding system. On this basis [the authority] does not believe the dwelling complies with B2 insofar as it relates to E2 and has refused to issue a code compliance certificate under section 94 of the NZ Building Act.
- 3.3 The authority proposed that should a code compliance certificate be issued, it be subject to ‘a waiver of the building code clauses B2 and E2’. I note that the authority did not provide any evidence to me as to why it believes the building is not code-compliant.
- 3.4 A draft determination was issued to the parties for comment on 12 March 2012. Both parties accepted the draft without further comment.

4. The exercise by the authority of its powers

The application of section 95A

- 4.1 Section 95A of the Act states that if an authority refuses to issue a code compliance certificate, it:
- ... must give the applicant written notice of—
- (a) the refusal; and
 - (b) the reasons for the refusal.
- 4.2 In its email of 16 January 2012 to the applicant, the authority provided no explanation for its refusal to issue a code compliance certificate beyond its observation that the dwelling is over 10 years old. I do not accept that the age of the building work means that the authority cannot reach a decision about compliance with the Building Code. The authority appears to have applied a “blanket policy” to houses constructed prior to the Act rather than turn its mind to the compliance of this house and what, if any, further information it requires in order for it to form a view as to compliance.
- 4.3 The provisions of section 95A apply irrespective of individual circumstances. If an owner requests a code compliance certificate then an authority is obliged to follow the provisions of section 95A, which in the normal course of events is likely to include an inspection and a detailed assessment of the building work concerned.
- 4.4 In this instance I do not consider the authority met its obligation in respect of section 95A as it did not place itself in a position where it could make an informed contemporaneous decision about the compliance of the house with the Building Code.

The establishment of compliance

- 4.5 In regard to this house, the evidence as to compliance is able to be gathered from the authority's inspection records, the building consultant's report, the performance of the exterior envelope over the past twelve years, and a visual assessment of remaining building elements; which may or may not reveal that further evidence needs to be gathered to determine compliance.
- 4.6 This methodology has been used and articulated in a number of determinations such as 2011/116³. I consider the authority was able to apply a similar methodology in reaching a decision.
- 4.7 Had an inspection of the house been carried out the authority should have been able to identify any defects requiring attention, or identify any matter that it required the applicant to provide further evidence; without the applicant needing to apply for a determination.
- 4.8 The authority has not provided me or the owner with any evidence of why it considers the house is not code-compliant, and appears to have applied a policy position rather than make an assessment of this house. I do not consider the authority's perception of risk is an appropriate test under the Act. In my view the application of an overarching policy by the authority does not reduce its obligations under the Act in making a decision on a case-by-case basis based on reasonable grounds.
- 4.9 It is important that an owner be given clear reasons why compliance has not been achieved so the owner can either then act on those reasons, or apply for a determination if the reasons are disputed.

5. Waivers and Modifications of the Building Code

- 5.1 In response to the authority's position in paragraph 3.3, I note the following: waivers and modifications⁴ allow authorities to exercise judgement when dealing with unusual building compliance situations. Waivers and modifications relate to specific performance requirements of the Building Code that an authority has considered and agreed do not need to be met for a specific building project. That is, the authority agrees that compliance with a particular provision of the Building Code does not need to be achieved in a particular case.
- 5.2 Where an application for a waiver or modification is made, the applicant must justify the reasons why their proposal does not need to comply with the specific performance requirements of the Building Code. The authority must then assess the appropriateness of the proposed waiver or modification. I note here that the form 'Notification of Waiver or Modification of the Building Code'⁵ required under section 68 of the Act includes a clarification of the terms "Waiver" and "Modification" (refer Appendix A).

³ Determination 2011/116: Refusal to issue a code compliance certificate for a 7-year-old house completed under the supervision of a building certifier at 24 Tuapiro Road, Katikati

⁴ Under section 67 of the Act

⁵ <http://www.dbh.govt.nz/UserFiles/File/Publications/Building/Building-Act/notification-of-waiver-or-modification.pdf>

- 5.3 I consider that in this instance there are no grounds on which a waiver of Clause E2 or Clause B2 would be appropriate as there are no apparent reasons that the building work should not comply with those provisions of the Building Code.
- 5.4 However, I accept that the age of the building work raises 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. I note that I have issued a number of determinations, to which the authority has been a party, that have involved a modification of Clause B2.3.1.
- 5.5 I continue to hold the views expressed in previous relevant determinations; that an authority, following the appropriate application from the owner, has the power to grant a modification to the Building Code requirements of an existing building consent without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009⁶). As such I leave this matter to the parties to resolve in due course.

6. What is to be done now?

- 6.1 The authority should inspect the house for compliance with the Building Code, and if items of non-compliance are found, the authority should then issue a notice to fix that identifies those items and requires the applicant to bring the house into compliance with the Building Code. The notice should not specify how the defects are to be fixed. It is not for the notice to fix to specify how the defects are to be remedied and the building brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject.
- 6.2 Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

7. The decision

- 7.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority incorrectly exercised its powers in refusing to issue a code compliance certificate without providing adequate reasons for the refusal in accordance with section 95A of the Act.
- 7.2 Accordingly, I reverse the authority's decision to refuse to issue a code compliance certificate (thus requiring the authority to make a new decision under sections 94, 95, and 95A of the Act as described in this determination).

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 23 April 2012.

Tony Marshall
Manager Determinations (Acting)

⁶ Codewords articles are published by the Department and are available on the Department's website at www.dbh.govt.nz/codewords-index

Appendix A

Form: Notification of Waiver or Modification of the Building Code (under section 68 of the Building Act 2004)

Clarification of Terms

What is a Waiver?

A TA can waive the requirement for a particular application for a building consent, or part of an application, to comply with an aspect of the Building Code. In most cases waivers will relate to a particular performance requirement of a specific clause of the Building Code (eg C3.3.2 (d)). However, sometimes it may be appropriate to waive an entire Building Code clause.

What is a Modification?

In relation to an application for a building consent a TA can modify a performance requirement of the Building Code. This is usually done by modifying a performance requirement of the Building Code so that the functional requirement and objectives of the clause are still met. A common example is the modification of B2.3.1, which relates to the durability of a particular element and when the durability period applies from.