



Determination 2014/012

Regarding the exercise of an authority's powers in refusing to grant an extension of the period during which it must decide to issue a code compliance certificate for building work at 117 Aberdeen Road, 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 and Assurance, Ministry of Business, Innovation and Employment ("the Ministry"), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are

- the owners of the subject property, Mr & Mrs B Read ("the applicants"), acting through a legal adviser ("the legal adviser")
- Selwyn District Council ("the authority"), carrying out its duties and functions as a territorial authority or a building consent authority

1.3 This determination arises from a series of events, including damage caused by significant earthquake activity, which have delayed the applicants from applying for a code compliance certificate. The authority twice extended the period in which it would consider an application but refused a further extension under section 93(2)(ii).

1.4 The matter to be determined² therefore is the exercise of the authority's powers of decision in refusing to grant an extension under section 93(2)(ii)³.

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

1.6 The relevant sections of the Act are set out in Appendix A.

1.7 Matters outside this determination

1.7.1 The applicants have also raised their concerns with the authority in respect of building work they consider did not accord with the original approved plans and that though approved by way of an amendment to the consent this amendment was not

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

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

³ 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.

authorised by the applicants. There is a dispute between the applicants and the builder regarding work carried out under the amended consent. This determination considers only the exercise of the authority's powers of decision in respect of refusing the extension of time and does not consider the compliance of the building work.

2. The building work and background

- 2.1 The building work in question relates to a single storey detached house that is moderately complex in plan. The foundation is concrete slab, and the light timber frame external walls clad with Oamaru stone. The house was originally constructed with three chimneys; the chimneys and stonework veneer suffered earthquake related damage.
- 2.2 On 8 October 2009 the authority issued building consent number BC 090912 under the Act. I have not seen a copy of that consent.
- 2.3 The building work was largely completed at some time in 2011, and on 13 June 2011 the property experienced a significant earthquake event⁴ that caused damage to the chimneys and the stonework veneer.
- 2.4 In late June 2011 the builder requested a final inspection be carried out. In a letter to the authority dated 30 June 2011 (which refers to correspondence from the authority dated 20 June 2011 which I have not seen), the legal adviser confirmed an inspection booking and noted that there had been damage caused to the stonework veneer, and that the chimneys had also been damaged and would need to be either removed or stabilised. The letter outlined concerns the applicants had regarding the building work; those concerns included 'the unapproved design of the wooden window sills ... and the rubble drainage pits'. The legal adviser noted that a variation to the consent plans in respect of the drainage pits had been made by the builder without the applicants' knowledge or approval. The approval of the changes is a matter in dispute between the applicants and the builder and is not considered in this determination.
- 2.5 On 4 July 2011 the authority carried out an inspection of the building work. The inspection record noted 16 items that required attention and that another inspection would be required; one item was the reinstatement of all loose bricks.
- 2.6 On 7 September 2011, the legal adviser wrote to the authority in response to a letter from the authority to the applicant's architect in which the authority sought advice on when a code compliance certificate would be applied for. The legal adviser noted that an inspection had been carried out on 4 July 2011 and stated that some items identified in that inspection had been attended to but not all. It was also noted that the stonework veneer had been damaged as a result of earthquakes in June and that the remedial work was yet to be scoped by Fletcher Construction – Earthquake Recovery ("Fletcher EQR"), the Project Management Office established by the Earthquake Commission ("EQC"). The letter concluded by saying that if it was

⁴ The 13 June 2011 Christchurch earthquake was a shallow magnitude 6.3M_L earthquake that was centred at a depth of 6km and approximately 10km from Christchurch.

- necessary to formally extend the completion period that a date in about mid-2012 would appear appropriate.
- 2.7 In a letter to the applicants dated 9 September 2011, the authority granted an extension under section 93(2)(b)(ii) that allowed for an application for a code compliance certificate to be made by 7 April 2012.
- 2.8 On 28 September 2011 the authority carried out an inspection of the building work. The inspection record noted that an item from the 4 July inspection remained outstanding. In addition the inspection recorded the requirement for reinstatement of brick work related to earthquake damage and that ducting from an extractor in the kitchen was required.
- 2.9 On 5 July 2012, the legal adviser wrote to the authority requesting a further extension, referring to the damage caused in the June 2011 earthquake and noting that further damage had been caused in subsequent earthquakes. The legal adviser explained that the repairs process involving EQC and Fletcher EQR was taking longer than had been anticipated, in part caused by the shortage of skilled tradespeople due to their services being in high demand in the region.
- 2.10 On 10 September 2012, the legal adviser wrote to the authority to request an extension in respect of the time in which an application for a code compliance certificate could be made. The legal adviser noted that the applicants had recently returned to New Zealand and wished to have an inspection of the extension carried out.
- 2.11 In a letter to the applicants dated 18 December 2012 the authority granted an extension under section 93(2)(b)(ii) that allowed for an application for a code compliance certificate to be made by 5 July 2013.
- 2.12 The applicants engaged a building surveyor to carry out an independent assessment of earthquake damage to the cladding. The building surveyor carried out visual inspections on 27 November 2012 and 15 January 2013 and provided a report to the applicants dated 30 January 2013. The building surveyor concluded that the stonework veneer had suffered from 'significant earthquake related damage' and consequently did not comply with the Building Code. The building surveyor also considered that targeted repairs were not economic or practical and that the stonework should be completely removed and rebuilt.
- 2.13 On 12 July 2013, the legal adviser wrote to the authority noting that the previous extension was granted through to 5 July 2013 and requesting a further 12 month extension until 5 July 2014. The legal adviser explained that the required building work, including repairs to earthquake damage, was yet to be completed and that the applicants had experience delays in settling the issue of repairs with EQC and Fletcher EQR.
- 2.14 On 18 July 2013, EQC wrote to the applicants to acknowledge that inaccurate information had been sent in earlier correspondence regarding the 'reason for [the] current hold status' of the claim and confirming that the repairs were expected to be carried out during 2014.

2.15 In a letter dated 20 September 2013, the authority informed the applicants that it declined to grant further extensions on the statutory period in which the applicants could apply for a code compliance certificate. The authority stated its reason as being:

... based on the fact that numerous extensions had already been granted to the above mentioned consent.

[The authority] believes that the previous extensions provided enough time to allow for the completion of the project and that [the applicants'] reluctance to apply for the Code Compliance Certificate has more to do with contractual issues rather than compliance with the New Zealand Building Code & the Building Act 2004'

2.16 On 26 September 2013, EQC wrote to the applicants again confirmed that the repairs were expected to be carried out during 2014.

2.17 The Ministry received an application for a determination on 15 November 2013.

3. The submissions

3.1 In a covering letter with the application for determination, the applicants set out the background to the situation, stating that the major factor in the continuing delay is the requirement for repairs to be carried out to the stonework veneer that suffered earthquake related damage. The applicants submitted that many of the issues influencing when the remedial work will be carried out are beyond their control, and also that the extent of repairs required was greater than that first envisaged. The applicants also submitted that it may be necessary to apply again if the repair work has not been completed by the date currently set out by EQC.

3.2 The applicants also submitted that the authority was incorrect in the statements made in its letter of 20 September 2013 (refer 2.15); the applicants were not reluctant to apply for a code compliance certificate and would have preferred the matter resolved by now. The applicants submitted that the builder had made some significant departures from the approved plans without the applicants' approval and that there were also aspects of poor workmanship that the applicants sought to be corrected. Some remedial work was weather dependent, and in addition the applicants spend some time of the year out of the country; these factors were the cause of the initial delay in seeking a code compliance certificate.

3.3 In support of the application for determination, the applicant provided copies of

- plans dated 16 December 2009 (I note these are not copies stamped as approved by the authority)
- correspondence between the legal adviser and the authority
- an inspection notice dated 4 July 2011
- the earthquake damage report (refer paragraph 2.12)
- correspondence from EQC

- 3.4 The authority did not receive a copy of the application and supporting documents until 27 November 2013 and accordingly was unable to provide a submission before a draft of the determination was written.
- 3.5 A draft determination was issued to the parties for comment on 27 November 2013.
- 3.6 The applicants accepted the draft without further comment.
- 3.7 The authority did not accept the draft and in a letter dated 11 December 2013 provided some additional background details. The authority submitted that (in summary):
- if a building consent remains operative until a code compliance certificate is issued, the need to apply for an extension of time would be redundant and an unnecessary waste of time and money for the applicant
 - in reference to the applicants' view that aspects of the building work did not comply with the building consent (paragraph 4.2) – a final inspection carried out on 28 September 2011 recorded that only three items from the previous inspection were outstanding (refer paragraph 2.8)
 - the applicants have not advised the authority on progress toward the completion of outstanding items, other than references to the earthquake damaged brick work; this supports authority's view regarding the applicants' motivation for not applying for a code compliance certificate (refer paragraph 2.15).
- 3.8 The authority also raised the matter of compliance with Clause B2.3.1 of the Building Code considering that by the time the earthquake damage is repaired some elements of the building will be beyond the required five-year durability period. I note here that the authority is aware of the fact that 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 in respect of Clause B2.3.1 without a determination (refer also to the article titled 'Modification of durability periods' in Codewords Issue 39, August 2009⁵). As such I leave this issue to the parties to resolve in due course.
- 3.9 The authority also provided comment on the issue of the soak pits and the amendment to the consent, and requested that the scope of the determination be broadened to consider whether 'this work complies with the building consent'.
- 3.10 On 16 December 2013 I sought a response from the applicants as to whether they wished to broaden the matters considered in the determination to include the soak pits. The applicants' legal adviser responded on 11 February 2014 to advise that the applicants did not wish to include the soak pits.

⁵ Codewords articles are published by the Ministry and are available on the Ministry's website at www.dbh.govt.nz/codewords-index

4. Discussion

- 4.1 Section 92(2)(a) of the Act requires an owner to apply to a building consent authority for a code compliance certificate 'as soon as practicable' after all building work has been carried out under a building consent. The Act requires authorities to issue a code compliance certificate if they are satisfied on reasonable grounds that the building work complies with the consent⁶. The decision to issue or refuse a code compliance certificate 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.
- 4.2 It is my understanding from the applicants' submission that the building work was largely completed at the time the builder called for an inspection in June 2011 (refer paragraph 2.4) but that in addition to earthquake damage there were also aspects of the building work that the applicants considered did not comply with the building consent. That the inspection was sought and undertaken indicates that the applicants were in the process of seeking a code compliance certificate. The authority's inspection on 4 July 2011 identified a number of items requiring attention, and I am of the view that those matters would have delayed any application for a code compliance certificate.
- 4.3 Section 93(2)(b)(ii) provides for the authority to make its decision at the expiry of 'any further period that may be agreed between the owner and the building consent authority concerned'. The applicants sought and were granted two extensions to allow for remedial work to be carried out, some of which was earthquake related damage.
- 4.4 The applicants have received an indication from EQC that the remedial work to the stonework veneer is planned for 2014. In this respect I consider an extension under section 93(2)(b)(ii) would be appropriate.
- 4.5 It is hard to see how the authority could have refused the application for an extension when the owner had requested a final inspection, further work had been identified as necessary, and while the owner was endeavouring to have that work completed was facing a shortage of tradespeople to undertake the work, negotiations with EQC about the scope of the work continued, and there was on-going earthquake damage to the building.
- 4.6 I acknowledge that section 92 requires an owner to apply for a code compliance certificate after all building work has been carried out 'as soon as practicable after the work is completed' and that the authority is acting appropriately in monitoring and encouraging the sign-off of work by limiting the extensions that it grants for an owner to apply for a code compliance certificate. I also accept that it is important that repairs to earthquake damaged buildings are completed and signed off as soon as practicable so as to avoid the possibility of a legacy of buildings where the work has been carried out to the final stages but no code compliance certificate has been issued. However, the authority must be realistic about the pressures facing owners

⁶ Section 94

when it comes to the speed with which repairs of earthquake damaged buildings can be undertaken.

- 4.7 There is no doubt that previous extensions granted by the authority are a relevant factor when considering whether to grant a further extension but they are not a reason in themselves for refusing a further extension. The other reason cited by the authority concerns the owner's motivation for not applying for a code compliance certificate; however I do not consider that sufficient reason to refuse an extension of time particularly given the earthquake damage repairs that would still be required.
- 4.8 The authority submitted that if the building consent did not expire or terminate if an extension was refused the requirement that the applicant apply for an extension was a waste of time and money. I don't agree. The requirement that an owner seek an extension of time to complete building work provides an important record of the reasons why building work has not been completed and provides an authority with an appropriate regulatory mechanism for encouraging an owner to complete any outstanding building work as promptly as possible. If an owner is not aware of the disadvantages of not promptly obtaining a code compliance certificate then the extension process is an appropriate time for an authority to ensure that an owner is aware of the benefits of promptly obtaining a code compliance certificate.
- 4.9 The applicants have submitted they are seeking advice and plans are being prepared for remedial work to be carried out. I note that the applicants may need to seek a further amendment to the building consent.

5. The Decision

- 5.1 In accordance with section 188 of the Building Act 2004 I hereby determine that the authority incorrectly exercised its powers in refusing to grant an extension under section 93(2)(ii); accordingly I reverse the authority's decision thus requiring the authority reconsider the request for an extension and grant an extension that is appropriate to the length of time the owner considers will be required to complete the building work.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 21 February 2014.

John Gardiner
Manager Determinations and Assurance

Appendix A

A.1 The relevant sections of the Building Act 2004

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; ...