

Determination 2023/043

An authority's decision to grant a minor variation to a building consent for a change to external wall cladding

29c Nathan Avenue, Paraparaumu

Summary

This determination considers an authority's decision to grant a minor variation to a building consent regarding the substitution of external wall cladding products. The determination considers the criteria for granting a minor variation, whether the building consent is required to reflect the change in the external wall cladding, and if a new or amended certificate of design work is required.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The parties and matter to be determined

- 1.1. This is a determination made under due authorisation by me, Charlotte Gair, Manager Advisory, Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. Kapiti Nathan Development Limited, the owner of the property (“the owner”)
 - 1.2.2. R Glauser, the licensed building practitioner (“LBP”)² concerned with the relevant building work (“the builder”), and the director and a shareholder of the owner³
 - 1.2.3. P Rokos, the LBP who undertook the design associated with the building consent,⁴ and who applied for this determination (“the designer”)
 - 1.2.4. Kāpiti Coast District Council, carrying out its duties as a territorial authority or building consent authority (“the authority”).
- 1.3. This determination arises from the authority’s decision to grant a minor variation for a change to the external wall cladding of the owner’s dwelling. The designer considers a formal amendment to the building consent was required.

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² The LBP register (<https://www.lbp.govt.nz/>) was accessed on 13 December 2023. This confirmed the builder has a current carpentry licence.

³ In this case, I have specifically not referred to R Glauser as an owner-builder, as defined in section 90B. I have received no information from the parties to indicate if all the criteria in section 90B have been met for the purposes of confirming if R Glauser is an owner-builder. Further, I note the application (Form 2) for the building consent indicates it was not based on an owner-builder exemption.

⁴ Excluding the preparation of the plans by the builder, that were submitted to and granted by the authority as a minor variation, for the change in the external wall cladding.

- 1.4. The matter to be determined, under section 177(1)(b) and (2)(a), is the authority's decision to grant a minor variation to the building consent for a change to the external wall cladding.
- 1.5. In deciding this matter, I will consider whether the change in external wall cladding meets the criteria of a minor variation, and if so, whether the 'amended' building consent is required to reflect the change in the cladding, and if a new or amended certificate of design work⁵ is required.

Issues outside this determination

- 1.6. The authority's decision to grant a minor variation to the building consent included a change to the rigid air barrier, and associated bracing design, fixed behind the external wall cladding and cavity construction. This determination only considers the change in external wall cladding and does not consider the replacement rigid air barrier, which is only referred to below in setting out the background to the dispute.
- 1.7. I have not considered any other aspects of the Act, including:
 - 1.7.1. the Building Code compliance of the external wall cladding or any other building work detailed in the building consent
 - 1.7.2. the decision by the authority to grant the original building consent.
- 1.8. It is not clear from the information provided to me when decisions were made by the builder to change the rigid air barrier and external wall cladding products, or whether the installation of them preceded any decision by the authority to accept the amendment to the building consent as a minor variation.⁶ Therefore, I have not formed a view on whether an application for a certificate of acceptance⁷ was the appropriate means to record the changes made.
- 1.9. I have no jurisdiction under any other enactments, and the determination does not consider any contractual or financial issues between any of the parties.

⁵ Section 45(3) refers to a "certificate of work" to be provided by one or more LBPs to accompany plans and specifications containing design work that is restricted building work (section 45(2)). Form 2A of the Building (Forms) Regulations 2004, is titled 'Memorandum from licensed building practitioner (certificate of design work)', and it sets out the form and content of the certificate for the purposes of section 45. For the purposes of this determination, I have used the term 'certificate of design work'.

⁶ I note the requirements of section 44(1) and I am of the view this includes an amendment to a building consent as stated in section 45(4).

⁷ Sections 96 to 99.

2. The building work and background

- 2.1. On 26 August 2022, the authority granted a building consent (number BC220207) to the owner for the construction of a new two-storey detached dwelling on the property.
- 2.2. The building consent application documentation included a certificate of design work from the designer dated 10 March 2022. The certificate confirms the designer “carried out” the design for the “wall cladding or wall cladding system”, as it relates to the external moisture management system (clause 6 of the Building (Definition of Restricted Building Work) Order 2011).
- 2.3. The original building consent plans and specifications detailed the use of two types of 16mm thick fibre cement weatherboards to be installed across all four elevations of both storeys of the dwelling.⁸ The weatherboards were to be fixed horizontally over a 20mm cavity, flexible underlay, and rigid air barrier, onto structural timber framing. The specifications included installation instructions from the product manufacturer of the weatherboards.⁹
- 2.4. On 15 June 2023, during an inspection at the property, the authority observed a change had been made to the rigid air barrier that had been installed¹⁰, and noted this required an amendment to the building consent. The same outcome was recorded by the authority as a result of another inspection on 29 June 2023.
- 2.5. The sequence of events following the 15 June 2023 inspection is not clear; however, it appears the designer did draft amended plans to reflect the change to the rigid air barrier and bracing design on or about 16 June 2023.¹¹
- 2.6. On 22 June 2023, the builder contacted the designer by email to request a change in the specification of the external wall cladding (following the change to the rigid air barrier and associated bracing design).¹² The designer subsequently drafted amended plans.

⁸ The design also incorporated some external reinforced concrete masonry block walls coated in a proprietary plaster system.

⁹ Both types of weatherboards were produced by the same manufacturer.

¹⁰ It is not clear when the change was made by the builder to install a different type of rigid air barrier, or whether it had been done in consultation with the authority before the building work was undertaken to install the new product.

¹¹ The designer stated they provided the amended plans to the builder; however, it is not clear when this occurred or what subsequently happened to those plans. Regardless, I note a copy of the amended plans is not included in the building consent file provided to me by the authority.

¹² Included with the builder’s email dated 22 June 2023, was a copy of another email (undated) from the authority. The authority was of the view a change was necessary for the external wall cladding because the original product specified in the building consent had not been “tested and approved” with the new rigid air barrier product.

2.7. However, on or before 2 August 2023, the builder¹³ submitted to the authority a different set of amended plans¹⁴ and the manufacturer's construction details for the change in the external wall cladding. The new external wall cladding is two types of fibre cement weatherboards (12mm and 14mm thick) manufactured by the same company¹⁵. The cladding is fixed horizontally over a 20mm cavity, flexible underlay, and the new rigid air barrier, onto the structural timber framing.

2.8. An inspection record from the authority dated 24 August 2023 states:

Some documentation has been submitted for the minor variation, once reviewed these documents will be stamped as accepted and copies will be provided to the builder to hold on site.

2.9. On 1 September 2023, the authority stamped the amended plans and some of the manufacturer's construction details, that were provided by the builder, stating:

BC220207 Further Information Received Minor variation accepted 01/09/2023.

2.10. An inspection record from the authority dated 4 September 2023 states:

A proposal has been provided with other documentation required for the minor variation approval – The minor variation for the bracing alteration and cladding changes has been accepted ...

3. Submissions

The designer

3.1. The designer submits (in summary):

3.1.1. The amended plans and specifications they had drafted and provided to the builder were for the purpose of applying for and obtaining an amendment to the building consent¹⁶. The designer followed the Ministry's guidance on product substitution¹⁷ in the preparation of those plans and specifications to reflect the proposed changes.

¹³ Although I have referred to the builder in this instance, for the purpose of this determination, I have assumed they were acting in their capacity on behalf of the owner (refer to paragraph 1.2.1).

¹⁴ The amended plans were not those previously prepared by the designer. The builder has stated he marked up the two amended plans detailing each 'elevation' of the dwelling (reference numbers A301 and A302); the plans have been annotated with hand-written notes confirming the location of the two new types of fibre cement weatherboards.

¹⁵ The manufacturer of the two types of new weatherboards installed is not the same manufacturer of the weatherboards specified in the original building consent (refer to paragraph 2.3).

¹⁶ The designer referred to subsections 45(2) to (4).

¹⁷ *Product substitution guidance for designer and builders* (November 2021).

- 3.1.2. The authority's inspection record from 15 June 2023 referred to an amendment being required to the building consent for the change in the rigid air barrier and bracing system, and this should "include...the cladding system as well".
- 3.1.3. Both weatherboard claddings are fibre cement but "they are different systems" and the work is classified as restricted building work¹⁸.
- 3.1.4. Accountability for the consented plans and specifications rests with the LBP designer.
- 3.1.5. The building consent plans still show different cladding specifications, cross sections and construction details that don't align with the new cladding products that have been installed.¹⁹
- 3.1.6. The approved building consent documentation needs to be an "accurate reflection of what has been actually built" so that it can "be signed off as complete".
- 3.1.7. The authority has "significantly deviated from the original approve[d] building consent. The large number of resulting changes should be noted as revised plans to the original consented plans not [just the] elevations".
- 3.1.8. The certificate of design work included in the original building consent documentation should either be removed or amended (to no longer include reference to the cladding system).
- 3.1.9. The manufacturer's construction details provided to the authority by the builder, as part of the minor variation, do not include an internal corner junction between the two new types of fibre cement weatherboards.

The builder

- 3.2. The builder submits that both external wall claddings "that were proposed and eventually used are...more or less identical" with "only small differences in weight/density, finish, [and] fixing".

¹⁸ 'Restricted building work' is defined in section 7 to mean building work or design work of a kind declared by the Governor-General by Order in Council to be restricted building work. Clause 6 of the Building (Definition of Restricted Building Work) Order 2011 deems certain design work (including work relating to the external moisture-management system of a house) to be restricted building work. Section 84 provides that all restricted building work must be carried out or supervised by an LBP.

¹⁹ For example, specification sheets B and C, and plans A201, A202, A401, A403, A404 and A405.

The authority

- 3.3. The authority submits there was no formal amendment application²⁰. The owner had emailed the authority requesting the proposed changes were to be treated “as a [minor] variation”, which it did.
- 3.4. The authority stated its views on the matter in correspondence with the designer:
- 3.4.1. On 8 August 2023, the authority stated:

The cladding change is from a proprietary fibre cement [weatherboard] system to [another] proprietary fibre cement [weatherboard] system both appraised and required under those appraisals to be installed in accordance with the products current Technical Specification/Installation manual.

Your [certificate of design work] stands as it is for the works you proposed under the issued [building consent], the consent file will record [the authority] accepted a minor variation and the associated documentation and subsequently saved it to the building file hence your [certificate of design work] then does not need to be removed or revised.

- 3.4.2. On 9 August 2023, the authority stated, the designer’s certificate of design work:

...applies for the works associated with the issued [building consent], post that [the authority] can accept minor variations and must document them and add the details to the [building consent] file.

If those changes relate to [restricted building work] covered under the designers [certificate of design work], those aspects either in full or in part then fall on the [authority].

...these are proprietary cladding systems that unless you are proposing features or detailing outside the listed manufacturers design manuals should not be detailed in the application documentation, the elevations only need to indicate what product is intended on each...elevation, the builder should only be referencing the manual that forms part of the consented documentation.

4. Discussion

- 4.1. The matter to be determined is the authority’s decision to grant a minor variation to the building consent for a change to the external wall cladding.

²⁰ Section 45(4)(b).

The legislation

- 4.2. Sections 3 and 4 set out the purposes and principles of the Act respectively. I consider the relevant purposes and principles for this determination include section 3(b), and section 4(2)(q)(i) to (iii).
- 4.3. The responsibilities of the parties (ie the owner, designer, builder, and authority) as set out in sections 14B, 14D, 14E and 14F respectively, are also relevant.
- 4.4. Section 40 states that a person must not carry out any building work except in accordance with a building consent.²¹
- 4.5. Section 44 states when an owner must apply for a building consent, and the provisions of the Act relating to amendments to building consents (including minor variations) are in sections 45(4) and 45A. The appropriate method to amend a building consent depends on the nature of the building work involved.
- 4.6. Section 45(4) states:
 - (4) An application for an amendment to a building consent must,—
 - (a) in the case of a minor variation, be made in accordance with section 45A; and
 - (b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications.
- 4.7. Section 45A states:
 - (1) An application for a minor variation to a building consent—
 - (a) is not required to be made in the prescribed form; but
 - (b) must comply with all other applicable requirements of section 45.
 - (2) Sections 48 to 50 apply, with all necessary modifications, to an application for a minor variation.
 - (3) A building consent authority that grants a minor variation—
 - (a) must record the minor variation in writing; but
 - (b) is not required to issue an amended building consent.

²¹ This is notwithstanding other provisions stated in sections 41 and 42A.

4.8. 'Minor variation' is defined in section 7²², which leads to the Building (Minor Variations) Regulations 2009 ("the Regulations"). Clause 3 of those regulations defines a minor variation as follows:

- (1) A minor variation is a minor modification, addition, or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates.
- (2) The following are examples of minor variations and do not constitute an exhaustive list:
 - (a) substituting comparable products (for example, substituting one internal lining for a similar internal lining);
 - (b) minor wall bracing changes;
 - (c) a minor construction change (for example, changing the framing method used around a window);
 - (d) changing a room's layout (for example, changing the position of fixtures in a bathroom or kitchen).
- (3) The examples in subclause (2) are only illustrative of subclause (1) and do not limit it. If an example conflicts with subclause (1), subclause (1) prevails.
- (4) To avoid doubt, a minor variation does not include any building work in respect of which compliance with the building code is not required by the Building Act 2004.

4.9. The word "minor" is not defined in the Act or Building Code. The Oxford English Dictionary (OED) states "minor" means "More generally: relatively small or (now) esp, unimportant; not regarded as being among the most notable of a specified group or persons or things".²³

4.10. A minor variation generally does not affect the level of Building Code compliance, it simply achieves a compliant outcome but in a different way.

Whether the change in external wall cladding meets the criteria of a minor variation

4.11. Whether particular building work constitutes a minor variation is a question of fact, dependent on the circumstances of each case.

²² As meaning "a minor modification, addition, or variation to a building consent that is permitted by regulations made under section 402(1)(kd)". The Building (Minor Variations) Regulations 2009 have been made pursuant to section 402(1)(kd); that section provides for the making of regulations for the purpose of "defining the minor variations that may be made to a building consent for the purposes of section 45A".

²³ Oxford English Dictionary (online publication), accessed on 18 December 2023.

- 4.12. Clause 3(1) states a minor variation is one that “**does not deviate significantly** from the plans and specifications to which the building consent relate” [my emphasis].
- 4.13. Section 7 defines “plans and specifications” as, “(a) means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed; ... ”
- 4.14. Accordingly, I have considered the drawings, specifications and other documents that formed part of the original building consent to ascertain if the proposed replacement external wall cladding deviated significantly from these.
- 4.15. In my view, there are similarities between the two original external wall claddings specified in the building consent, and the two new cladding types that they were proposed to be replaced with as a result of the minor variation. In this case, I have considered several factors, including (but not limited to), both the original and new cladding types are:
- 4.15.1. lightweight fibre-cement weatherboards
 - 4.15.2. fixed horizontally over a 20mm deep cavity construction
 - 4.15.3. fixed over a flexible building underlay and rigid air barrier
 - 4.15.4. purpose made manufactured products²⁴ that include the manufacturers’ construction details and installation instructions (whilst also taking into consideration the responsibilities of the product manufacturer to comply with section 14G)
 - 4.15.5. relatively similar in profile, thickness, overlaps, use of flashings, and fixing arrangements.
- 4.16. In this case, the change to the external wall cladding involves substituting weatherboard products with others (which are required to perform the same function, and in the same place on each elevation of the dwelling).
- 4.17. The building work to construct the external wall cladding is required to comply with the Building Code (eg clauses B1, B2 and E2), and if installed in accordance with the manufacturer’s instructions, I am of the view compliance with the performance requirements of the relevant clauses should be met.

²⁴ Although not a deciding factor, I note each of the new weatherboard products in this case have been appraised in 2019 and 2021 by the Building Research Association of New Zealand (BRANZ), indicating compliance with Building Code clauses B1 *Structure*, B2 *Durability*, E3 *External Moisture* and F2 *Hazardous Building Materials* if designed, used, installed, and maintained in accordance with the statements and conditions of the relevant appraisals. Similar BRANZ appraisals have been issued for both of the weatherboard products specified in the original building consent.

- 4.18. Taking into account all of the factors identified above, I consider the change in external wall cladding is a minor modification or variation to the building consent that does not deviate significantly from the plans and specifications to which the building consent relates. Therefore, the proposed change does meet the criteria of a minor variation in accordance with sections 45(4)(a) and 45A, and clause 3(1) of the Regulations.
- 4.19. In reaching this view, I have also taken into consideration some of the Ministry's guidance that relate to minor variations, major alterations, product substitution, and schedule 1 of the Act²⁵, as well as a previous determination²⁶. While I have not detailed here all the aspects of the guidance I have considered, the relevant information has assisted me in forming a view on whether the change in the external wall cladding in this case has met the criteria of a minor variation.

Whether the 'amended' building consent is required to reflect the change in external wall cladding

- 4.20. Section 94(1)(a) states an authority must issue a code compliance certificate if it is satisfied, on reasonable grounds, that the building work complies with the building consent.
- 4.21. Changes to a design can occur as the building work progresses, and an amendment to a building consent must meet the requirements of section 45(4).
- 4.22. The Ministry's guidance on building consent amendments states "all changes need to be properly documented" and "what gets built needs to be accurately represented on the building consent".²⁷ I consider it would not be appropriate for an owner to apply for an amendment to a building consent (whether by way of a minor variation or a formal amendment), and the authority to grant the same, if the design information that is being relied on (to meet the requirements of section 94(1)(a)) is either incomplete or contradicts other information detailed in the building consent.
- 4.23. In this case, the application for a minor variation made by the builder, and granted by the authority, has been recorded on two plans showing the elevations of the dwelling²⁸ and included copies of some construction details prepared by the product manufacturer of the proposed new external wall cladding.

²⁵ The guidance was accessed on 13 December 2023.

²⁶ Determination 2017/004 *Regarding the issue of a notice to fix in respect of building work undertaken without building consent* (20 January 2017), at paragraph 5.3.5

²⁷ Information accessed from [Considering and amending the building consent | Building Performance](#) on 13 December 2023.

²⁸ Reference numbers A301 and A302.

- 4.24. However, the remaining plans in the building consent still show construction details for the originally specified cladding, and not the new cladding (for example, specification sheets B and C, and plans A201, A202, A401, A403, A404 and A405). This means the building consent plans include contradictory information and will not accurately represent the 'as-built' construction. Further, I note the manufacturer's construction details supplied to the authority by the builder, for the two new proposed cladding products, do not include an internal corner junction detail where the different weatherboards meet.
- 4.25. On these points, I agree with the designer (refer to paragraph 3.1). Steps need to be taken by the parties to ensure all the relevant building consent plans and specifications accurately reflect what is proposed to be constructed.

Whether a new or amended certificate of design work is required

- 4.26. An issue for the designer is the certificate of design work which was submitted with the original building consent application (refer to paragraphs 2.2 and 3.1). Although the certificate does not specifically state the type of external wall cladding that was proposed, the plans and specifications to which the certificate relates refer to the original fibre cement weatherboard cladding products, and not the proposed new weatherboards.
- 4.27. The question I must consider is whether the change to the external wall cladding, that was granted by the authority as a minor variation, should be accompanied by a new or amended certificate of design work.
- 4.28. In this case, although the designer had prepared amended plans and specifications for the change in the external wall cladding, these were not submitted to the authority. Instead, the builder provided to the authority handwritten marked-up copies of two plans (A301 and A302) along with copies of construction details from the product manufacturer; it was these that formed the basis of the minor variation granted by the authority. The designer is therefore concerned that the certificate of design work currently retained by the authority in the building consent file no longer represents their original design for the external wall cladding, or the minor variation (which they were not involved with).
- 4.29. Section 45A(1) states, "An application for a minor variation to a building consent....(b) must comply with all other applicable requirements of section 45".
- 4.30. Section 45(2) states:

If an application for a building consent is accompanied by plans and specifications that contain design work (relating to building work) that is restricted building work, that design work must be carried out or supervised by 1 or more licensed building practitioners who are licensed to carry out or supervise that work.

- 4.31. Section 45(3) states, “The plans and specifications that contain design work referred to in subsection (2) **must** be accompanied by a certificate of [design] work...” [my emphasis].
- 4.32. In my view, this means a certificate of design work should have been prepared by the LBP in accordance with section 45(3) and submitted along with the application for the minor variation to the building consent. In this case, the builder is an LBP with a current carpentry licence, but not a design licence, so is unable to provide a certificate of design work in relation to restricted building work.²⁹
- 4.33. The application to amend the building consent as a minor variation was required to comply with section 45. This means the builder and the authority should have considered the requirements of sections 45(2) and (3) and 45A(1)(b).
- 4.34. However, a new or amended certificate of design work from an LBP licensed to carry out or supervise that work was not provided with the application to amend the building consent as a minor variation.³⁰ Therefore, the requirement in section 45A(1)(b) was not met.

5. Decision

- 5.1. In accordance with section 188 of the Building Act 2004, I determine the authority could not grant a minor variation to the building consent for a change to the external wall cladding, because the application did not meet the requirements of sections 45 and 45A. Therefore, I reverse the authority’s decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 22 December 2023.

Charlotte Gair
Manager Advisory, Determinations

²⁹ Section 84 provides that all restricted building work must be carried out or supervised by an LBP who is licensed to carry out or supervise the work. Information regarding licence classes is available on the Ministry’s website: [LBP licence classes | Building Performance](#) accessed 13 December 2023.

³⁰ I have not considered if section 45(5) is relevant in this case based on the status of the builder (refer to paragraph 1.2.2).