Determination 2006/102

Dispute about a code compliance certificate for a building with stone and monolithic cladding systems at 136 Teal Valley Road, Nelson

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004[1] ("the Act") made under due authorisation by me, John Gardiner, Determinations Manager, Department of Building and Housing("the Department"), for and on behalf of the Chief Executive of that Department. The applicant is the owner, Mr Clarke ("the applicant"), and the other party is the Nelson City Council ("the territorial authority").

1.2 The matter for determination is whether the territorial authority's decision is correct with regard to declining to issue a code compliance certificate for an 8-year-old house because it was not satisfied that:

[1] The Building Act 2004 is available from the Department's website at www.dbh.govt.nz.

- the monolithic and stone claddings complied with clauses B2 "Durability" and E2 "External Moisture" of the Building Code[2] (First Schedule, Building Regulations 1992), and

- other elements of the building comply with clause B2.

1.3 The questions to be determined are:

Issue 1: The cladding

Whether I am satisfied that the wall cladding as installed to the external walls of the building ("the cladding"), complies with the Building Code (see sections 177 and 188 of the Act). By "the wall cladding as installed" I mean the components of the system (such as the backing materials, the flashings, the joints and the coatings) as well as the way the components have been installed and work together.

Issue 2: The additional durability considerations

1.4 Whether the elements, other than those cladding items that have been rectified under Issue 1, that make up the whole of the building work, (which I refer to as "the listed elements" in the course of this determination) and which have 5 or 15-year, or the life of the building, being not less than 50 years, durability requirements, comply with clause B2 of the Building Code considering the time that has elapsed since the elements were constructed

1.5 In making my decision, I have considered the submissions of the parties, the report of the independent expert commissioned by the Department to advise on this dispute ("the expert"), and the other evidence in this matter. With regard to Issue 1, I have evaluated this information using a framework that I describe more fully in paragraph 6.1. I have not considered any other aspects of the Act or the Building Code.

2. The building

2.1 The building work consists of a large detached house with a detached single storey carport, which is situated on a flat site in a high wind zone in terms of NZS 3604[3]. The house is two storeys in part and is moderately complex with a number of complex features and intersections. Construction is conventional light timber frame, with concrete foundations, aluminium windows and a 40^{o} pitch pressed metal tile hipped roof. The upper level of the house is accommodated within the main roofline, with monolithic-clad dutch gables to the north and south and a dormer window to the west.

2.2 On the ground floor, two large bow-fronted bay windows extend to the north and south at the northeast corner. The house has stone veneer cladding to the ground floor north and east walls, with monolithic cladding to the other elevations. Eaves projections are generally greater than 600mm, and there are no verge projections to

[2] The Building Code is available from the Department's website at www.dbh.govt.nz.
[3] New Zealand Standard NZS 3604:1999 Timber Framed Buildings

the upper gables. A projecting window extends from the kitchen on the north elevation.

2.3 A small deck, with a membrane floor and monolithic-clad balustrades, is recessed into the roof slope on the north elevation.

2.4 The detached "carport" is a simple rectangular structure with vertical profiled metal wall cladding and a gable roof of the same material. The gable ends are clad in fibre cement sheet with uPVC jointers.

2.5 The specification calls for the wall framing to be Douglas fir or H1 Radiata pine. The expert has noted that the internal framing he was able to inspect was Douglas fir. I have received no other written evidence as to the treatment, if any, of the external wall framing timber. I therefore consider that the wall framing of this house is likely to be untreated Douglas fir, which will provide only limited resistance to fungal decay.

2.6 The cladding is a monolithic cladding system described as stucco over a solid backing. In this instance it consists of 4.5mm "Hardibacker" sheets fixed directly to the framing timbers, and covered by a slip layer of building wrap, metal-reinforced 20mm thick solid plaster and a flexible multi-coat paint coating.

2.7 I have seen no evidence of producer statements or warranties for the cladding.

3. Sequence of events

3.1 The territorial authority issued a building consent on 28 August 1997, based on a building certificate (dated 23 June 1997) issued by Mr Hislop ("the building certifier") for the purposes of gaining a building consent. The building certifier carried out all inspections during the course of construction, but I have received no evidence of pre-line, post-line or plaster inspections. It appears that the house was substantially complete by February 1998.

3.2 The building certifier carried out a final inspection on 25 September 2000, and the inspection record notes that the "building work is almost complete except for some minor work". The building certifier issued an interim code compliance certificate dated 26 September 2000, which noted:

> The ensuite bath skirting is to be completed, a handrail is required at the mid section of the stair, seismic restraint to the water cylinder and weep holes for the stonework. Insulation batts to be cut around the recess lights.

3.3 No further inspections were carried out, and the building certifier ceased operating in January 2003.

3.4 In a letter to the applicant dated 24 March 2005, the territorial authority noted that the building certifier had not issued a code compliance certificate for the house. The territorial authority suggested that advice be sought from the Department, and stated:

> As a March 31st 2005 a new Building Act will take effect. In this new Act there is no transitional provision for recognition of interim Code Compliance Certificates and therefore they will no longer have status.
>
> As your certifier has gone out of business he is unable to issue you a full Code Compliance Certificate and as Nelson City Council did not undertake any inspections on your building work we are also unable to issue you a full Code Compliance Certificate.

3.5 In a letter to the Department dated 5 April 2005, the applicant explained the background and the situation that he was now placed in, noting:

> In these circumstances, how am I to establish compliance? I am personally satisfied that the buildings were erected by a competent builder, and complied with the Building Code current at the time. Inspections were carried out satisfactorily at the required stages by a licensed private Certifier. The minor works required to satisfy the Certifier's Interim Code Compliance Certificate have been completed, but not yet inspected, because he has gone out of business and I presume is no longer a licensed Certifier.

3.6 In a letter to the applicant dated 26 April 2005, the Department provided information on the determination process and advice, saying that:

- while there is no provision for interim code compliance certificates to be issued under the Act, a certificate issued under the 1991 Act remains valid unless invalidated by a court or a determination
- the territorial authority cannot impose a policy not to issue code compliance certificates for building certifiers' work, and must consider each application on its circumstances and merits
- a possibility provided for in the Act is for the territorial authority to issue a certificate of acceptance, which would certify that (as far as could be ascertained) the work complied with the building code.

3.7 In a letter to the territorial authority dated 13 March 2006, the applicant attached the Department's letter of 26 April 2005, stating that the outstanding items listed in the interim code compliance certificate were complete and awaiting inspection.

3.8 In a letter to the applicant dated 27 March 2006, the territorial authority explained that it would not issue a code compliance certificate as the age of the house presented a problem with regard to the durability provisions of the building code, noting:

> As it is now approximately nine years since construction commenced, it would not be appropriate for this period to be added to the durability time frames identified in the New Zealand Building Code. Nelson City Council therefore cannot be satisfied on reasonable grounds that the work now meets all the requirements of the building code, especially B2 durability and E2 external moisture.

3.9 The territorial authority did not issue a notice to fix as required under section 164(2) of the Building Act 2004.

3.10 In a letter to the Department dated 13 April 2006, the applicant set out the history of the building work and the territorial authority's stance with regard to durability, asking for resolution of the matter by a determination (refer paragraph 4.1).

3.11 In a letter to the applicant dated 26 April 2006, the Department agreed with the territorial authority that a determination was the most appropriate way to proceed, and provided application information.

3.12 The Department received an application for a determination on 16 May 2006.

4. The submissions

4.1 The applicant noted within the application that "Interim C.C.Cert No 226 issued 26 Sept 2000 listed 5 small jobs to be completed. Now complete but not yet inspected". The applicant also made a submission in the form of a letter to the Department dated 13 April 2006 (refer paragraph 3.10), which noted:

> Nelson City Council has declined to act, owing to the time lapse since construction began. I am requesting, through the Determination process, a waiver or variation to the durability clauses of the Building Code.

4.2 The applicant forwarded copies of:

- the building plans and specification
- the consent documentation
- the building certifier's inspection records
- the interim code compliance certificate
- the correspondence with the territorial authority
- the correspondence with the Department
- various technical information, producer statements and other statements.

4.3 The territorial authority made no submission.

4.4 A copy of the applicant's submission was provided to the territorial authority, which made no submission in response.

Issue 1: The cladding

5. The expert's report

5.1 The expert inspected the claddings of the building on 11 July 2006, and furnished a report that was completed on 13 July 2006. The expert noted that the stone veneer had been installed directly over fibre cement backing sheets, without the cavity shown in the consent drawings. The expert noted that "generally the building appears to be sound and true and workmanship is generally of a good standard", but that some areas showed insufficient consideration of flashings and moisture

penetration. The expert noted that the roof and associated flashings appeared satisfactory (although requiring cleaning), penetrations were generally well sealed, cladding clearances to paved areas and roof cladding were adequate and metal head flashings to windows and doors appeared satisfactory. The expert noted that vertical control joints appeared to have been installed in line with window jambs, with some cracking to the plaster occurring in line with the control joints.

5.2 The expert scraped away a small section of the stucco plaster at the sill to jamb junction of a south window and noted that the windows in the monolithic cladding had been face-fixed with drainage gaps, no sill flashings and with the stucco at the jambs continuing behind the window flanges. The expert also noted a control joint beneath the jamb, with sealant installed within the scratch coat of the plaster. I accept that the location opened is typical of similar locations around the building.

5.3 The expert noted that the windows in the stone veneer walls had sloping slate sills, with drainage gaps at the sills, no sill flashings and with the mortar at the jambs continuing behind the window flanges. The expert removed some of the slate at the sill to observe the underlying fibre cement. I accept that the location opened is typical of similar locations around the building.

5.4 The expert took non-invasive moisture readings through interior linings of exterior walls throughout the house, and noted no elevated readings. The expert took 6 invasive moisture readings through the external wall claddings (under windows and in the dormer framing) and the highest reading was recorded at 15%.

5.5 The expert made the following specific comments on the cladding:

- While the mortar behind the jambs of the windows in the stone veneer appears to have provided adequate weatherproofing to date without jamb flashings, the windows have not been sealed at the jamb flanges.
- The windows in the stone veneer lack sill flashings, and the fibre cement exposed where the slates were removed at the window sill showed minor signs of fungal growth, indicating that moisture has penetrated the sill junction.
- While the plaster behind the jambs of the face-fixed windows in the stucco cladding appears to have provided adequate weatherproofing to date without jamb flashings, the windows have not been sealed at the jamb flanges.
- There are isolated cracks and hairline cracking in the stucco in some locations.
- The paint coating on the stucco has worn and repainting is needed.
- The fibre cement soffit under the “pop-out” kitchen window is unpainted.
- The penetration of the earth wire through the cladding is unsealed.
- While the metal capping to the deck balustrade appears to have been adequately back-flashed at the junction with the wall, the top of the capping is

flat with insufficient cover of the capping downturns over the balustrade stucco.

- There is no provision for overflow drainage provided to the deck.
- There is a downpipe missing from the roof of the dormer window, resulting in water splashing onto the lower cladding, which has lead to moss and lichen growth on the stucco.
- There is a loose downpipe on the south wall.
- There is a build-up of debris in the gutters.
- In the carport structure:
    - the door lacks a head flashing
    - there is a nail hole in the profiled metal wall cladding
    - the fibre cement to the south gable is unpainted, and part of a uPVC jointer is missing.

5.6 The expert also inspected the areas identified in the interim code compliance certificate, and noted that the hot water cylinder restraint had been fitted, the drainage holes in the stone veneer had been added, the batts had been cut around the recessed light fittings, but, the following items might require attention:

- The junction of the bath to the wall was adequately sealed, but the tiles to the bath front required fixing.
- A handrail had been installed at the mid-section of the staircase, but the handrail was not continuous.

5.7 The expert made the following additional comments:

- The window heads in the stone veneer lack head flashings, but butt against the soffit of the 600mm eaves which provide a traditional and satisfactory means of weather protection.
- The junctions between the stone and the stucco claddings appear to have been adequately weatherproofed, with the stucco plaster carried over the junction overlapping onto the stone.

5.8 Copies of the expert's report were provided to each of the parties.

5.9 The applicant responded to the expert's report in a letter to the Department dated 27 July 2006. The applicant commented on various aspects in the report, including the following points:

- The house was constructed in 1998, in accordance with the building code requirements at the time, and should therefore be issued with a code compliance certificate back-dated to that time.

- While the plans appear to have a cavity behind the stone, this was not practical due to the random sizes of the schist, was not commented on by the building certifier during inspections and has proved to be satisfactory.

- To install metal sill flashings would require destruction of the slate sills and is an over-reaction to minor staining on the Hardibacker sheet, which could be prevented by injecting sealant filler into the gap at the sill.

- The original issue with regard to the bath was related to the sealing behind the bath and not to the front tiles (which are awaiting matching tiles).

5.10 I have considered the applicant's comments in the preparation of this determination.

6. Evaluation for code compliance

6.1 Evaluation framework

6.1.1 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solution[4], in this case E2/AS1, which will assist in determining whether the features of this house are code compliant. However, in making this comparison, the following general observations are valid:

- Some Acceptable Solutions cover the worst case, so that they may be modified in less extreme cases and the resulting alternative solution will still comply with the Building Code.

- Usually, when there is non-compliance with one provision of an Acceptable Solution, it will be necessary to add some other provision to compensate for that in order to comply with the Building Code.

6.1.2 The approach in determining whether building work is weathertight and durable and is likely to remain so, is to apply the principles of weathertightness. This involves the examination of the design of the building, the surrounding environment, the design features that are intended to prevent the penetration of water, the cladding system, its installation, and the moisture tolerance of the external framing. The Department and its antecedent, the Building Industry Authority, have also described weathertightness risk factors in previous determinations (refer to Determination 2004/1 *et al*) relating to cladding and these factors are also used in the evaluation process.

6.1.3 The consequences of a building demonstrating a high weathertightness risk is that building solutions that comply with the Building Code will need to be more robust. Conversely, where there is a low weathertightness risk, the solutions may be less

[4] An Acceptable Solution is a prescriptive design solution approved by the Department that provides one way, but not the only way, of complying with the Building Code. The Acceptable Solutions are available from the Department's website at www.dbh.govt.nz.

robust. In any event, there is a need for both the design of the cladding system and its installation to be carefully carried out.

6.2 Weathertightness risk

6.2.1 In relation to these characteristics I find that the building:

- is built in a high wind zone
- is a maximum of two storeys high
- is moderately complex in plan and form, with two different wall claddings
- has an enclosed deck, with monolithic clad balustrades, recessed into the roof
- has monolithic and stone claddings which are fixed directly to the framing
- has eaves projections of more than 600mm above most walls
- has external wall framing that is likely to be untreated Douglas fir, so providing only limited resistance to the onset of decay if the framing absorbs and retains moisture.

6.2.2 When evaluated using the E2/AS1 risk matrix, these weathertight features show that three elevations of the building demonstrate a moderate weathertightness risk and one a high risk rating. The matrix is an assessment tool that is intended to be used at the time of application for consent, before the building work has begun and, consequently, before any assessment of the quality of the building work can be made. Poorly executed building work introduces a risk that cannot be taken into account in the consent stage but must be taken into account when the building as actually built is assessed for the purposes of issuing a code compliance certificate.

6.3 Weathertightness performance

6.3.1 Generally the cladding appears to have been installed in accordance with good trade practice, but some junctions, penetrations and edges are not well constructed. These areas are as described in paragraph 5.5 and in the expert's report as being the:

- lack of sealing at the jambs of the windows in the monolithic and the stone claddings
- lack of sill flashings to the windows in the stone veneer
- cracking to the stucco cladding and the poor condition of the paintwork
- unpainted fibre cement at the kitchen window soffit and the carport gable end
- unsealed penetration of the earth wire through the cladding

- lack of slope to the top of the balustrade capping, and the inadequate cover over the stucco balustrade cladding
- lack of overflow drainage to the deck
- missing downpipe from the dormer roof
- poorly fixed downpipe on the south wall
- debris in the gutters
- a nail hole in the carport cladding
- lack of head flashing to the carport door.

6.3.2 I note that the windows in the stucco and stone cladding have prevented moisture penetration for the 8 years since the house was completed. I also note that the stucco or mortar continues behind the window jamb flanges. I therefore consider that, in these circumstances, the addition of sealant at the window jamb flanges (without the need to remove the windows) will suffice to ensure that moisture does not penetrate the jambs and soak into the underlying plaster.

6.3.3 I note the applicant's comment in paragraph 5.9 with regard to the possibility of sealing the gaps under the sill, and consider that sealing the sill drainage gaps would create an added defect in the window sills, by preventing any moisture that penetrates behind the window flanges from safely draining to the outside. The provision of drainage gaps prevents moisture from being trapped within the cladding.

6.3.4 I note the expert's comments in paragraph 5.6 on the items listed as outstanding in the interim code compliance certificate. I also note the applicant's comments on these items in paragraph 5.9, and accept that the unfixed tiles to the bath front are not critical to the sealing of the bath. I also consider that the safety of the handrail is likely to be acceptable in the circumstances, and leave this matter to the territorial authority for its consideration.

6.3.5 I also note the expert's additional comments in paragraph 5.7, and consider that these features are adequate in the circumstances.

6.3.6 Notwithstanding the fact that the backing sheets behind the stucco are fixed directly to the timber framing, thus inhibiting drainage and ventilation behind the cladding, I have noted certain compensating factors that assist the performance of the cladding in this particular case:

- The cladding appears to have been installed to good trade practice.
- The house has eaves projections that provide good protection to most of the cladding areas below them.
- The cladding has been weathertight for the eight years since construction.

6.3.7 I consider that these factors help compensate for the lack of a ventilated cavity and can assist the building to comply with the weathertightness and durability provisions of the Building Code.

7. Conclusion

7.1 I am satisfied that investigations into this house have not revealed information that would lead me to conclude that the interim code compliance certificate was issued improperly by the building certifier. I therefore conclude that the interim code compliance certificate remains valid (refer paragraph 3.7), and consider that I am able to rely on the inspections carried out by the building certifier of the building.

7.2 I am satisfied that the current performance of the monolithic and stone claddings is adequate because it is preventing water penetration into the building at present. Consequently, I am satisfied that the cladding system as installed on the building complies with clause E2 of the Building Code.

7.3 In addition, the building is also required to comply with the durability requirements of clause B2. Clause B2 requires that a building continues to satisfy all the objectives of the Building Code throughout its effective life, and that includes the requirement for the house to remain weathertight. Because the cladding faults on the building are likely to allow the ingress of moisture in the future, the house does not comply with the durability requirements of clause B2.

7.4 Subject to further investigations that may identify other faults, I consider that, because the faults that have been identified with the cladding systems occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 6.3.1 should be expected to result in the building remaining weathertight and in compliance with clauses B2 and E2.

7.5 I note that the stucco cladding to some of the walls of this house is in need of maintenance. Effective maintenance of claddings (in particular of monolithic claddings) is important to ensure ongoing compliance with clauses B2 and E2 of the Building Code and is the responsibility of the building owner. Clause B2.3.1 of the Building Code requires that the cladding be subject to "normal maintenance", however that term is not defined in the Act.

7.6 I take the view that normal maintenance is that work generally recognised as necessary to achieve the expected durability for a given building element. With respect to the cladding, the extent and nature of the maintenance will depend on the material, or system, its geographical location and level of exposure. Following regular inspection, normal maintenance tasks should include but not be limited to:

- where applicable, following manufacturers' maintenance recommendations
- washing down surfaces, particularly those subject to wind-driven salt spray
- re-coating protective finishes

- replacing sealant, seals and gaskets in joints.

7.7 As the external wall framing of this building is likely to be untreated, periodic checking of its moisture content should also be carried out as part of normal maintenance.

7.8 It is emphasised that each determination is conducted on a case-by-case basis. Accordingly, the fact that a particular cladding system has been established as being code compliant in relation to a particular building does not necessarily mean that the same cladding system will be code compliant in another situation.

8. The decision

8.1 In accordance with section 188 of the Act, I hereby determine that the monolithic and stone cladding systems as installed comply with clause E2 of the Building Code. There are a number of items to be remedied to ensure that the house remains weathertight and thus meets the durability requirements of the code. Consequently, I find that the house does not comply with clause B2. Accordingly, I confirm the territorial authority's decision to refuse to issue a code compliance certificate.

8.2 I also find that rectification of the items outlined in paragraph 6.3.1 will consequently result in the house being weathertight and in compliance with clauses B2 and E2. Work to correct these items may expose additional associated defects that are not yet apparent. All rectification work is to be completed to the approval of the territorial authority.

8.3 I note that the territorial authority has not issued a notice to fix. A notice to fix should be issued based on the items outlined in paragraphs 6.3.1 and 6.3.2, which requires the owners to bring the house into compliance with the Building Code. The notice to fix may list the items to be rectified but it should not specify how compliance is to be achieved as that is for the owner to propose and for the territorial authority to accept or reject. It is important to note that the Building Code allows for more than one method of achieving compliance.

8.4 I would suggest that the parties adopt the following process to meet the requirements of paragraph 8.3. Initially, the territorial authority should issue a notice to fix, listing all the items that the territorial authority considers to be non-compliant. The owner should then produce a response to this in the form of a detailed proposal, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified issues. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.

Issue 2: The additional durability considerations

9. Discussion

9.1 As set out in paragraph 3.8, the territorial authority has concerns about the durability, and hence the compliance with the building code, of certain elements of the building, taking into consideration the completion date of the building in 1998.

9.2 Before addressing these issues I sought some clarification of general legal advice about waivers and modifications and the impact on them of the transitional provisions of the Act. I have now received that clarification, which has enabled me to make this determination.

9.3 It appears that the building was substantially completed sometime in 1998. The building certifier carried out a final inspection and issued an interim code compliance certificate on 26 September 2000. No further inspections were carried out by either the building certifier or the territorial authority.

9.4 The relevant provision of clause B2 of the Building Code recognises 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).

9.5 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.

9.6 The interim code compliance certificate was issued by the building certifier on 26 September 2000. I am therefore satisfied that the listed elements complied with clause B2 on that date.

9.7 Section 433 provides that a building consent granted under the Building Act 1991 must be treated as if it were a building consent granted under section 49 except that section 93 (which stipulates the time in which a building consent authority must decide to issue a code compliance certificate) does not apply.

9.8 Section 67 of the Act provides that a territorial authority "may grant an application for a building consent subject to a waiver or modification of the building code" subject to "any conditions that the territorial authority considers appropriate". I take

the view that a territorial authority may grant such a waiver or modification only when it is reasonable to do so in the circumstances. (Section 69 effectively excludes the provision of waivers or modifications to the Building Code for access and facilities for use by people with disabilities).

9.9 Section 45(5) provides that an application for an amendment to a building consent granted under section 49 must be made as if it were an application for a building consent and section 45 "applies with any necessary modifications".

9.10 I take the view that those sections are to be read as enabling a territorial authority to amend a building consent (whether granted under the Act or the former Act) by incorporating a waiver or modification of the Building Code.

9.11 Once the outstanding matters arising from Issue 1 are addressed to the territorial authority's satisfaction, the territorial authority may then issue a code compliance certificate against the amended consent.

10 Procedure

10.1 Should the territorial authority have concerns about procedure, I take the view that:

(a) Sections 92(1) and 94(1)(a) establish that a code compliance certificate must relate to all of the building work covered by the building consent to which that certificate relates. I take that to mean the building consent as amended (if at all) prior to the granting of the code compliance certificate. (See paragraph 10.5 below for a discussion of section 436).

(b) Section 92(1) also establishes that it is no longer possible to issue an interim code compliance certificate (as it was under section 43(4) of the former Act).

(c) An amendment to building consent under section 45(5) does not create a new building consent in the sense that it is possible to issue separate code compliance certificates for the original building consent and for the amendment. After all, if an amendment deletes particular work as specified in the original consent and substitutes different work as specified in the amendment, then the work covered by the original consent will never be completed and accordingly it will be impossible to grant a code compliance certificate in respect of that work as distinct from the work specified in the amended consent.

(d) Amendments to building consents are not confined to changing the building work covered by the building consent concerned but may also change the other matters covered by the building consent such as procedures for inspection and so on, including any waivers or modifications of the Building Code.

(e) Any waiver or modification the Building Code should be documented in the territorial authority's records of the property to ensure that potential purchasers and subsequent owners are aware of the waiver or modification. If the waiver or modification was made by way of a determination then that determination

should be identified on the Land Information Memorandum, with a copy of the determination on the property file for the building.

10.2 In coming to this view, I have had to consider section 436 of the Act, which sets out the transitional provision for issuing code compliance certificates for building work consented under the former Act.

10.3 Under section 43(3) of the former Act, a territorial authority was required to issue a code compliance certificate if it was satisfied that the building work complied with the Building Code subject to any previously approved waiver or modification.

10.4 The relevant parts of section 436 state:

> (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
>
> (3) For the purposes of subsection (2), section 43 of the former Act—
>
> (a) remains in force as if this Act had not been passed; but
>
> (b) must be read as if—
>
> (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and
>
> (ii) section 43(4) were omitted.

10.5 In Determination 2006/87, issued on 11 September 2006, I said

"4.2.12 There are two possible interpretations of section 436:

- a code compliance certificate may be issued only if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted; or
- a code compliance certificate may be issued if the territorial authority considers the building work complies with the Building Code in force at the time the building consent was granted, but allowing for any waivers and modifications to the Building Code incorporated in the building consent.

"4.2.13 The first interpretation is premised on section 436(3)(b)(i) replacing section 43(3) of the 1991 Act. It relies on the use of the word "only" in section 436(3)(b)(i) as excluding the possibility of the territorial authority considering anything other than compliance against the Building Code in force at the time the building consent was granted, meaning that a territorial

authority would not be able to consider any waivers or modifications to the Building Code that were incorporated in the building consent.

"4.2.14 In comparison, the second interpretation is that section 436(3)(b)(i) does not replace section 43 of the 1991 Act, but that it must be read alongside section 43(3) as much as possible. Under this interpretation, section 436(3)(b)(i) should be read as modifying section 43(3) only in respect of the new element it adds to the code compliance certificate test; it merely changes the version of the Building Code that compliance should be measured against, from the version in force at the time the application for a code compliance certificate was made, to the version in force at the time the building consent was granted.

"4.2.15 The effect of the first interpretation would be that owners who have been granted waivers or modifications to the Building Code (whether under the 1991 Act or through an amendment to a consent under the 2004 Act) would never be able to obtain a code compliance certificate. Essentially, these owners, who may have relied in good faith on waivers or modifications legitimately granted to them, would be left in perpetual limbo.

"4.2.16 This would be most undesirable. It would be the reverse of the usual situation under both the 1991and 2004 Acts and, in my view, does not fit with the purpose and scheme of the Building Act 2004. As far as possible, an owner should obtain a code compliance certificate for all work requiring a building consent and for which a consent was granted. A grant of a waiver or modification should not stop this.

"4.2.17 Furthermore, there is nothing in the transitional provisions of the 2004 Act that supports such a result; for cases where waivers or modifications have been granted, the Act does not provide for any outcome other than to obtain a code compliance certificate. In comparison, section 437(1)(b) provides for an owner to obtain a certificate of acceptance if they are unable to obtain a code compliance certificate because the building certifier no longer exists.

"4.2.18 For the reasons set out above, I prefer the second interpretation relating to section 436(3)(b)(i)".

10.6 I continue to hold that view, and therefore conclude that:

(a) The territorial authority has the power to grant an appropriate modification of clause B2 in respect of the listed elements if the applicant applies for such a modification.

(b) It is reasonable to grant such a modification, with appropriate notification, because in practical terms the building is no different from what it would have been if a code compliance certificate had been issued in 1998.

11 The decision

11.1 In accordance with section 186, I hereby:

(a) Determine that the listed elements complied with clause B2 on 26 September 2000.

(b) Modify the territorial authority's decision to issue the building consent to the effect that the building consent is amended as follows:

This amendment is subject to an amendment to the Building Code to the effect that, in respect of the listed building elements, together with those cladding elements that did not require rectification, performance B2.3.1 applies from 26 September 2000 and not from the time of issue of the code compliance certificate.

(c) Order the territorial authority, once the cladding issues set out in the first part of the determination (refer paragraph 8) have been rectified to its satisfaction, to issue a code compliance certificate in respect of the building consent as amended.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 26 October 2006.

John Gardiner
Determinations Manager