

Determination 2007/105

Determination regarding refusal to issue a code compliance certificate for a house due to the territorial authority's decision not to rely on a building certifier's inspection reports at 359 Hot Springs Road, Katikati



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, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are the current owners, A Meads and N Tahua (“the applicants”) acting through Kelloways Lawyers, (the lawyers”) and the other party is the Western Bay of Plenty District Council (“the territorial authority”). The applicants have identified the former owner of the house, B Gray (“the former owner”) and N Henderson of Nero Construction Ltd (“the builder”) as interested parties to the matter.

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

1.2 The matter for determination is whether the territorial authority's decision to decline to issue a code compliance certificate for a 2-year-old house is correct. The refusal arose because:

- (a) The building work had been undertaken under the supervision of Bay Building Certifiers ("the building certifier"), which was duly registered as a building certifier under the former Building Act 1991 but which lost its approval as a building certifier before it had issued a code compliance certificate for the building work.
- (b) There was a significant amount of additional building work undertaken prior to the final inspection which had not been appropriately documented.

The territorial authority considers that the appropriate certificate to be issued is a certificate of acceptance under section 96, as it cannot be satisfied that the building as a whole complies with the Building Code² (First Schedule, Building Regulations 1992).

1.3 In order to determine that matter, I must address the following questions:

- a) Is it appropriate for the additional work to be included in the original building consent?
 - i) If yes, then the matter can be considered as part of question (b) below, can a code compliance certificate be issued?
 - ii) If no, then the matter needs to be considered as work without a consent and therefore can a certificate of acceptance be issued under section 96(1)(a) of the Act.
- b) Is there sufficient evidence to establish whether the house complies with the Building Code?
 - i) If yes, a code compliance certificate can be issued.
- c) If not, are there sufficient grounds to conclude that, once any outstanding items are repaired and inspected, a code compliance certificate can be issued?
 - i) If yes, a code compliance certificate can be issued in due course.
 - ii) If no, are there sufficient grounds for a certificate of acceptance to be issued?

I answer question a) in paragraph 1.4.5, question b) in paragraph 5, and question c) in paragraph 9.

1.4 The additional building work

1.4.1 I note that the extended lower decks and porch ("the additional building work") was not included in the original building consent. I therefore consider this work is un-consented.

² The Building Code is available from the Department's website at www.dbh.govt.nz.

- 1.4.2 The builder has stated that the additional building work was undertaken following the completion of the house. At that time, the builder and the former owner were under the impression that all matters pertaining to the building consent were satisfactorily completed and a code compliance certificate would be forthcoming. The builder maintains that the determination should be limited to the consented building work as inspected and passed by the building certifier in April 2005 (refer paragraphs 3.4 and 4.1).
- 1.4.3 The applicant maintains that this determination should be limited to the original consented building work (refer paragraph 4.3).
- 1.4.4 However, the former owner maintains that the additional building work was undertaken prior to completion of the house, and was therefore part of the building work passed during the building certifier's final inspection in April 2005 (refer paragraph 4.8).
- 1.4.5 The additional un-consented work could be dealt with either by an amendment to the original building consent or by the current owner seeking a certificate of acceptance. My view of this matter is dependent on the extent of the additional work, whether it is of a type generally consistent with the consented work, whether it was carried out at the same time as the consented work, and whether it was inspected during its construction.
- The additional work is significant and is at the point where an additional building consent might otherwise be required. However, I note that a large portion of the additional decking is exempted from the need for a building consent under Schedule 1(g) as the deck forms a platform "from which it is not possible for a person to fall more than 1 metre". None-the-less all the additional work is required to comply with the Building Code.
 - Most of the balance of the decking is an extension of the deck over the carport as shown on the consent drawings and is consistent with it.
 - According to the consent plans, the house is 5 metres to the closest boundary, and given the large size of the section, the additional work is very unlikely to adversely impact on bulk and location requirements arising from the District Plan for this locality.
 - If the work was completed prior to the completion of the house, it could be dealt with by way of an amendment to the original consent. If it was completed after the completion of the house, it could be regarded as un-consented work and be dealt with by way of a certificate of acceptance.
 - The evidence about the date when the additional building work was done is contradictory and I am unable to conclude on what date it was done. However, it appears the additional work was completed prior to the last inspection by the building certifier (refer paragraph 4.7). I am of the view that building certifier should have ensured the additional work was documented at the time and submitted to the territorial authority for an amendment to the original consent.

- I also note that the drawings for the additional work have already been provided to the territorial authority. However, the drawings for the additional work do not show the as-built ground levels as these are significantly different from the ground levels shown in the approved consent documents.

Accordingly I am inclined to the view that the additional work should be dealt with as an amendment to the original consent.

- 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. I have evaluated this information using a framework that I describe more fully in paragraph 7.1.
- 1.6 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.

2. The building

- 2.1 The building work consists of a detached house with a partial upper floor, situated on a sloping rural site, which is in a high wind zone for the purposes of NZS 3604³. The construction of the house is conventional light timber frame, with timber piles, timber framed floors, fibre-cement sheet cladding to the subfloor areas, plywood sheet wall cladding, and aluminium windows. The house is moderately complex in plan and form, and the 20° pitch profiled metal roofs have gables and hips with eaves projections of more than 600mm and verge projections of 300mm.
- 2.2 An upper deck, with membrane floor and clad balustrades, extends to the east from an upper bedroom. The deck returns around part of the south wall of the bedroom, and is recessed within the lower roof slope. The balustrades have plywood cladding on the inner face and horizontal corrugated steel cladding to the outer face, with a flat metal capping to the top.
- 2.3 The wall cladding is a “shadowclad” system consisting of stain-finished 12mm thick treated plywood sheets with rough-sawn faces, grooves at 150mm centres and shiplap edges with weathergrooves at the overlaps. The sheets are fixed through the building wrap to the framing, with 50mm x 20mm rough sawn battens fixed over the horizontal inter-storey joints and at corners.

3. Background

- 3.1 The territorial authority issued a building consent (No. 70537) in 2004. I have not seen a copy of the building consent. The building certifier issued a building certificate for consent purposes, dated 12 February 2004, which the territorial authority relied upon in issuing the building consent (I have not seen a copy of the building certificate).

³ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

- 3.2 The building certifier carried out various inspections during construction; and the inspection summary records a pre-line inspection on 28 June 2004 and final inspections on 14 December 2004, 25 January 2005 and 28 April 2005. The last inspection was recorded as a “pass” and included the note “OK to issue SOC [statement of compliance with Building Code]” (implying that the building work was considered code compliant at that date). I have received no evidence that the territorial authority received a copy of the inspection record or any recommendation from the building certifier at that time.
- 3.3 Additional building work was carried out, which included a small covered porch to the north elevation and the decks were extended to provide continuous decking around most of the ground floor level. The builder has stated he had no involvement in the design or construction as the work was undertaken as a separate arrangement between the former owner and the builder’s “sub-contract builder” (refer paragraph 4.9). It appears that the additional work was in place at the time of the final inspection by the building certifier (refer paragraph 4.8).
- 3.4 According to the builder, the territorial authority’s practice at that time was to issue the code compliance certificate directly to an owner without requiring a written application. The builder therefore assumed that the certificate had been issued to the former owner on receipt of the building certifier’s notification that the work had been satisfactorily completed.
- 3.5 The builder said he had been advised by the territorial authority that the building certifier was:
- no longer authorised to act on [the territorial authority’s] behalf and any unissued CCC’S would need to be reassessed and a “Certificate of Acceptance” would be issued not a “Code of Compliance”. The Certificate of Acceptance would only pertain to those parts of the building, which could be inspected.
- The territorial authority has confirmed that the building certifier did not act as an agent of council with respect to this house.
- 3.6 I note that Bay Building Certifiers is no longer approved as a building certifier (it lost its approval as a building certifier on 30 June 2005) but operates as Bay Inspections (“the contractor”), a contractor providing building regulatory services to the Tauranga City Council.
- 3.7 When the building certifier ceased operating, an agreement was made with the contractor to complete outstanding inspections on the building certifier’s projects and to make recommendations to the territorial authority regarding the issuing of code compliance certificates.
- 3.8 It appears that the applicants subsequently purchased the property from the former owner, with both parties apparently unaware of the lack of a code compliance certificate. It appears that the omission was discovered when the applicants recently decided to sell the house, and a code compliance certificate was sought.
- 3.9 On 30 August 2006 the territorial authority carried out an inspection of the house and, in a letter to the applicants, dated 19 September 2006, provided a list of 13 non-

complying matters. Seven of these items related to the lack of approval for and defects identified in the additional work. The remaining items related to the:

- unsealed ends of head flashings
- lack of anti-capillary gaps at the bottom of the wall and balustrade claddings
- inadequate clearance at the bottom of the balustrade cladding
- inadequate slope to the balustrade capping
- lack of safety marking on laundry door glass
- lack of proof of compliance of the fireplace installation.

3.10 The territorial authority also stated that on completion of the remedial work:

Council will not issue a Code Compliance Certificate for the building. That being the case, Section 91 of the [Act] requires that you apply for a Certificate of Acceptance...

If Council decides it is able to issue a Certificate of Acceptance it will only cover those elements of the building that can be readily inspected and compliance with the Building Code determined.

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

3.12 I am not aware of further correspondence between the parties. The Department received an application (“the initial application”) for a determination from the builder (on behalf of the former owner) on 7 March 2007. Following correspondence with regard to the ownership of the building, the Department received a revised application on 30 April 2007.

4. The submissions

4.1 In a statement accompanying the initial application, the builder outlined the history of the project, including the construction of the additional work following completion and inspection of the house as shown in the consent drawings. The builder explained that, until recently, he (together with the former owner, and the applicants) had been unaware of the lack of a code compliance certificate. He had assumed that the certificate had been issued to the former owner on receipt of the building certifier’s recommendation following the final inspection in April 2005 as:

At this point, the building was complete (as per the permitted plans) and [the building certifier] was satisfied that it met all the requirements of the Building Code and recommended the CCC be issued.

4.2 The builder maintained that a code compliance certificate should be issued for that part of the house completed, inspected and passed in April 2005. The builder stated:

Without the original CCC, this building will remain in a ‘void’ as ‘uncertified’.

The job history form is a clear record of the building meeting all the requirements of the Building Code and the permitted plans at that point in time.

Only by issuing the original CCC will any doubt or uncertainty be removed for all and any subsequent interested parties.

Once this is resolved, it then creates a starting point to remedy all of the subsequent construction additions. The intention then, is to apply for a separate consent for the unpermitted additions (plans have been redrafted) and have these certified independently to the original consent 70537.

4.3 In a submission dated 24 April 2007, which accompanied the revised application, the lawyers noted that the applicants intended to sell the property and were therefore anxious to resolve the issues. The lawyers explained that the additional building work was outside the original building consent, and should therefore be outside the matter to be determined.

4.4 The builder and the applicants forwarded copies of:

- the building consent drawings
- the drawings amended to show the additional building work
- the building certifier's inspection summary
- the letter from the territorial authority dated 19 September 2006
- various engineering calculations and other statements.

4.5 The territorial authority made no submission.

4.6 Copies of the submissions and other evidence were provided to each of the parties. Neither party made any further submissions in response to the submission of the other party.

4.7 A copy of the draft determination was sent to the parties for comment on 27 June 2007.

4.8 Anderson Law Office ("the former owner's lawyer") responded, on behalf of the former owner, to the draft determination in a facsimile to the Department dated 20 July 2007. The former owner's lawyer noted that their clients stated that all of the additional building work was completed prior to the building certifier's final inspection on 28 April 2005, with photographs taken in January 2005 showing the porch in place at that date. I have addressed the timing of the additional work in paragraphs 1.4.4 and 5.8.

4.9 In a letter received by the Department on 23 July 2007, the builder commented on the draft determination, noting that:

- The additional building work was carried out under a separate arrangement between the former owner and a sub-contractor, with no direct involvement by the builder in the design, the extent of the work or the decision to proceed without an amendment to the building consent.
- The grooves in the plywood cladding allow some drainage where the decking butts against the cladding, with further drainage provided by the gaps between the deck slats.

I have considered these comments and have amended the determination as I consider appropriate.

- 4.10 In an email to the Department, dated 25 July 2007, the territorial authority accepted the draft determination, saying that the additional work should remain part of the matter to be determined as it:

was work that should have been the subject of a building consent and was associated with building-consented work.

The territorial authority also said:

Council is unlikely to issue a CCC for this unconsented work and a [certificate of acceptance] is probably not of much value, even if Council felt able to issue one.

- 4.11 In an email to the Department dated 27 July 2007, the lawyer accepted the draft determination.

5. Grounds for the establishment of code compliance

- 5.1 In order for me to form a view as to code compliance I need to establish what evidence is available and what can be obtained, considering that the building is completed and some of the building elements are not able to be cost-effectively inspected.
- 5.2 In this case the evidence consists of the building certifier's inspection summary, the inspection report of the territorial authority, as well as the report of the expert I commissioned to provide additional evidence.
- 5.3 In this case, the territorial authority does not believe it can rely on the building certifier's reports and any decision it makes with respect to compliance is limited by what items it is able to inspect. I therefore need to decide if I can rely on the building certifier's inspection summary, particularly in regards to inaccessible building components.
- 5.4 In the absence of any evidence to the contrary, I take the view that I am entitled to rely on the inspections undertaken by the building certifier. However, before deciding whether or not to rely on the building certifier's inspection report, I consider it important to look for evidence that corroborates it.
- 5.5 In this particular case, corroboration comes from the visual inspection of the accessible components by the expert, which can be used to verify whether the building certifier's inspections were properly conducted.
- 5.6 I also note that the inspection summary indicates that the building certifier carried out all of the 9 required inspections, including the final inspection (which passed).
- 5.7 I accept that the additional building work has been constructed and inspected during the building certifier's final inspections on 25 January and 28 April 2005, in which case the defects relating to the lower decks and porch would have been inspected and should have been identified at that time. I also note that the building certifier's final inspection did not identify the remaining 6 items identified in the territorial

authority's final inspection on 30 August 2006 (refer paragraph 3.9). The expert's report provides me with evidence to allow assessment of these items.

5.8 In conclusion I find that the following documentation allows me to form a view as to the code compliance of the building work as a whole:

- The expert's inspection of the visible components of the house.
- The building certifier's inspection summary, which indicates satisfactory inspections of the inaccessible components and a satisfactory final inspection.
- The territorial authority's additional final inspection.

6. The expert's report

6.1 As mentioned in paragraph 1.4, I engaged an independent expert to provide an assessment of the condition of those building elements subject to the determination. The expert is a member of the New Zealand Institute of Building Surveyors.

6.2 The cladding

6.2.1 The expert visited the house on 30 May 2007, and furnished a report that was completed on 6 June 2007. The expert noted that the building work had generally "been executed in a tradesman like manner", with the cladding "generally well set out and fitted" and flashings "generally well detailed but more care could have been exercised when fitting". The expert also noted that cladding base overlaps were adequate (although lacking an anti-capillary gap at the base), penetrations were adequately sealed and junctions around the upper deck appeared satisfactory.

6.2.2 The expert noted the following items that did not accord with the consent drawings:

- the porch to the laundry door
- the extensions to the lower timber decks
- the carport deck changed from membrane and clad balustrades to timber slat with open timber balustrades
- the ground levels changed.

6.2.3 The expert inspected the window installation, and noted that the windows were face-fixed with metal head flashings and no sill or jamb flashings. The expert noted that sealant had been applied between the window jamb flanges and the plywood cladding, with additional sealant applied at the flange edge after the window was installed.

6.2.4 The expert inspected and took non-invasive moisture readings throughout the interior of the house and no evidence of moisture was noted. The expert took 12 invasive moisture readings through the plywood cladding into the framing at high risk areas, and all readings were recorded at below 14%.

6.2.5 Commenting specifically on the claddings, the expert noted that:

- garden soil is covering the bottom of the sub-floor cladding in some areas, and the fibre-cement is absorbing moisture
- the projections to some of the window head flashings are unsealed, and some have joints in the flashing that are unsealed
- at the proprietary “h” mould used for the horizontal inter-storey joint, the bottom edges of the upper plywood sheets have inadequate clearance to the mould to allow for expansion, which has caused some damage to the lower edge
- the battens over the external corner joints finish short of the soffit in some areas and are only 50mm wide, providing inadequate cover to the sheet edges
- at the upper deck, a small roof drains directly onto the membrane (without a downpipe), allowing water to splash against the bottom of the cladding
- the apron flashing to the small roof area adjacent to the upper deck lacks a kickout, and relies on sealant for weatherproofing
- the clearance of the wall and balustrade cladding above the upper deck membrane is inadequate, allowing debris to build up and moisture to soak into the plywood
- the metal capping to the upper deck balustrade lacks any fall to the top, and the corner mitres are poorly sealed
- the deck framing and timber slats to the lower decks butt against the plywood cladding, with limited allowance for moisture to drain.

6.2.6 The expert also noted that the bottom of the plywood cladding lacks an anti-capillary gap. (However I note that the overlap is adequate, and the plywood overlaps the sub-floor fibre-cement cladding fixed to framing that is open to the sub-floor area, allowing dissipation of any moisture that might penetrate the junction).

6.3 Other relevant code clauses

6.3.1 The expert also assessed compliance with other relevant building code clauses, and made the following comments:

6.3.2 B1 Structure

- the building certifier’s inspection summary indicates that footings and pre-line inspections were satisfactory.
- an internal and external visual inspection indicated no evidence of excessive movement or structural stress
- the sub-floor bracing of the “tana” piles appeared to accord with the consent drawings

6.3.2.1 The expert was not asked to comment on the structural adequacy of the additional building work (the porch and the lower decks) but he did not mention any obvious faults, nor did he comment on the concerns raised by the territorial authority about the impact of the additional work on the bracing to elevation 4 (South).

6.3.2.2 I accept that the as-built drawings provided by the applicant; represent what has been built, appear to comply with NZSS 3604, and that the work was inspected by the certifier. However, I am of the view that it would be prudent for the applicant to verify the adequacy of the bracing shown in the as-built drawings to the satisfaction of the territorial authority (refer paragraph 7.5.1).

- **E1 Surface Water**

Drainage and stormwater inspections were satisfactorily undertaken and the as-built plan provided to the territorial authority. No problems were observed.

- **F2 Hazardous Building Materials**

The glass in shower screens and the laundry door is not marked as safety glass, so cannot be confirmed as complying.

- **G1 Personal Hygiene**

Spaces and facilities are appropriate, with adequate provision for cleaning and protection against food contamination.

- **G4 Ventilation**

Mechanical ventilation is adequate, and opening windows and doors provide adequate natural ventilation.

- **G7 Natural Light**

The house has adequate provision of natural light to all habitable rooms.

- **G12 and G13 Water Supplies and Foul Water**

The building certifier's inspection summary indicates that satisfactory plumbing and drainage inspections were undertaken, and the as-built plan was supplied. All fixtures appear to be in good operating condition and the septic tank system is currently operating satisfactorily.

- **H1 Energy Efficiency**

The building certifier's inspection summary indicates that wall and ceiling insulation was inspected and passed. Ceiling insulation was observed.

6.4 A copy of the expert's report was forwarded to each of the parties on 18 June 2007.

7. Evaluation for code compliance

7.1 Evaluation framework

7.1.1 I have evaluated the code compliance of this house by considering the following two broad categories of the building work:

- The weathertightness of the external building envelope (clause E2) and durability (clause B2 in so far as it relates to clause E2).
- The remaining relevant code requirements.

In the case of this house, the weathertightness considerations merit particular attention and are therefore addressed first.

7.1.2 In evaluating the design of a building and its construction, it is useful to make some comparisons with the relevant Acceptable Solution, 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 are written conservatively to 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 one or more other provisions to compensate for that in order to comply with the Building Code.

7.2 Evaluation of external building envelope for E2 and B2 Compliance

7.2.1 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 determinations⁴ (for example, Determination 2004/1) relating to cladding and these factors are also used in the evaluation process.

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

7.3 Weathertightness risk

7.3.1 In relation to these characteristics I find that this house:

- is built in a high wind zone
- is a maximum of two storeys high
- is moderately complex in plan and form
- has plywood sheet cladding that is fixed directly to the framing
- has eaves projections greater than 600mm, and verge projections of 300mm
- has timber slat decks fixed to most of the lower walls
- has an upper deck, with clad balustrades and a membrane floor, that is partly situated over a living area below
- has external wall framing that may not be treated to a level that is effective in helping resist decay if it absorbs and retains moisture.

⁴ Copies of all determinations issued by the Department can be obtained from the Department's website.

7.3.2 The house has been evaluated using the E2/AS1 risk matrix. The risk matrix allows the summing of a range of design and location factors applying to a specific building design. The resulting level of risk can range from 'low' to 'very high'. The risk level is applied to determine what claddings can be used on a building in order to comply with E2/AS1. Higher levels of risk will require more rigorous weatherproof detailing; for example, a high risk level is likely to require a particular type of cladding to be installed over a drained cavity.

7.3.3 When evaluated using the E2/AS1 risk matrix, the weathertightness features outlined in paragraph 7.3.1 show that all elevations of this house demonstrate a moderate weathertightness risk rating. In this instance, E2/AS1 requires the cladding to be installed over a ventilated cavity.

7.4 Weathertightness performance: exterior cladding

7.4.1 Generally the cladding appears to have been installed in accordance with good trade practice. Taking account of the expert's report, I conclude that remedial work is necessary in respect of the following:

- garden soil over the bottom of the fibre-cement cladding to the sub-floor
- lack of sealing of joints in, and at the ends of, some window head flashings
- inadequate allowance for plywood expansion at the inter-storey joint mould
- inadequate battens (including gaps) over the external corners
- inadequate rainwater disposal at the small roof adjacent to the upper deck
- inadequate weatherproofing of the bottom of the apron flashing at the small roof adjacent to the upper deck
- inadequate clearance from the bottom of the plywood to the upper deck floor
- inadequate falls and joints in the balustrade capping to the upper deck floor
- the lack of provision for drainage at the junction of the lower timber decks with the walls.

7.4.2 I note the expert's comment in paragraph 6.2.6, but I consider that the lack of an anti-capillary gap is mitigated by the exposure of the sub-floor timber framing and I therefore accept that the junction is adequate in this particular instance.

7.4.3 Notwithstanding the fact that the cladding is fixed directly to the timber framing, thus limiting drainage and ventilation behind the cladding, I have noted certain compensating factors that assist or confirm the performance of the cladding in this particular case. These factors are that:

- apart from the noted exceptions, the cladding is installed to good trade practice
- there is no indication of moisture penetration into the building at present.

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

7.5 Evaluation of other code requirements

- 7.5.1 Based on the expert's comments as outlined in paragraph 6.3.2, I conclude that investigation and verification (and undertake remedial work if necessary) is needed in respect of the following:
- the structural performance of the additional building work as constructed, particularly the adequacy of the bracing to the deck along the South elevation.
 - the type of glass used in the shower screens and laundry door.
- 7.5.2 Based on the expert's comments as outlined in paragraph 6.3.2, there appears to be no evidence of any lack of compliance with other aspects of clauses B1 and F2, or with other relevant clauses of the Building Code.

8. Discussion

8.1 Weathertightness

- 8.1.1 I consider that the expert's report establishes there is no evidence of external moisture entering the building, and accordingly, that its cladding does comply with clause E2 at this time.
- 8.1.2 However, 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 building 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.
- 8.1.3 Because the faults identified with the cladding system occur in discrete areas, I am able to conclude that satisfactory rectification of the items outlined in paragraph 7.4.1 will result in the building remaining weathertight and in compliance with clause B2.
- 8.1.4 As I state in paragraph 7.4.2, other faults may become evident during the course of rectifying the faults outlined in paragraph 7.4.1. If the process described in paragraph 10.4 is followed, the territorial authority will be able to satisfy itself, by appropriate inspection, that faults identified in the course of rectification are themselves rectified. The territorial authority may of course decline to issue a code compliance certificate if any of the faults described in paragraph 7.4.1, or associated faults that are discovered in the course of rectification, are not rectified to its satisfaction.
- 8.1.5 I emphasise 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.

- 8.1.6 Effective maintenance of 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.
- 8.1.7 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.
- 8.1.8 As the external infill wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet, periodic checking of its moisture content should also be carried out as part of normal maintenance.

8.2 Other code clauses

- 8.2.1 I consider that the expert’s inspection and comments as outlined in paragraph 6.3.2 have established that the house may not comply with the requirements of clauses B1 and F2. However, I consider that satisfactory investigation and rectification (if necessary) of the items outlined in paragraph 7.5.1 will result in compliance with clauses B1 and F2.
- 8.2.2 I also consider that the expert’s inspection and comments as outlined in paragraph 6.3.2 have established that the house complies with all other relevant clauses of the building code. Based on the expert’s assessment of visible components of the building together with the inspection records and other documentation, I therefore consider, with the exception of the items outlined in paragraph 7.5.1, that the building is likely to comply with the provisions of the remaining relevant code clauses.
- 8.2.3 I consider that the expert’s report establishes there is no evidence of any lack of compliance with the other code clauses applicable to this house. I accordingly consider that the house complies with clauses E1, G1, G4, G7, G12 and H1 of the Building Code.

8.3 Amendment to the building consent

- 8.3.1 I also note the changes to the consented plans that require resolution (refer paragraph 6.2.2). I consider this matter also needs to be resolved to the satisfaction of the territorial authority. As discussed in paragraph 1.4.5, I am of the view that the additional work be dealt with by way of the owner seeking an amendment to the original building consent.

9. The appropriate certificate to be issued

- 9.1 Having found that the building can be brought into compliance with the Building Code, I must now determine whether the territorial authority should issue either a code compliance certificate or a certificate of acceptance.
- 9.2 Section 437 of the Act provides for the issue of a certificate of acceptance where a building certifier is unable or refuses to issue either a building certificate under section 56 of the former Act, or a code compliance certificate under section 95 of the current Act. In such a situation, a territorial authority may, on application, issue a certificate of acceptance or a code compliance certificate. In this instance, I note that the applicant has not sought a certificate of acceptance.
- 9.3 I am of the view that a code compliance certificate is the appropriate certificate to be issued in this situation, as I have reasonable grounds to conclude the building work can be brought into compliance with the Building Code.

10. The Decision

- 10.1 In accordance with section 188 of the Building Act 2004, I determine that the building work does not comply with clauses B1, B2 and F2 of the Building Code, and accordingly confirm the territorial authority's decision to refuse to issue a code compliance certificate.
- 10.2 I note that the territorial authority has not issued a notice to fix as required by section 164. A notice to fix should be issued that requires the applicant to bring the building work into compliance with the Building Code, identifying the defects listed in paragraphs 7.4.1 and 7.5.1 including any associated defects discovered during the course of that work. The notice to fix should require the owner to apply for an amendment to the current building consent for the additional work.
- 10.3 The notice to fix should not specify how those defects are to be fixed. That is a matter for the applicant 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.
- 10.4 I would suggest that the parties adopt the following process to meet the requirements of paragraph 10.2. Initially, the territorial authority should issue the 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 technically robust 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.
- 10.5 The territorial authority shall issue a code compliance certificate once the items listed in the notice to fix have been fixed its satisfaction.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing
on 12 September 2007.

John Gardiner
Manager Determinations