



Determination 2012/021

Regarding the refusal of a code compliance certificate and the issue of a notice to fix for alterations to a house at 26 Benson Road, Remuera, Auckland



1. The matters 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 applicant is the owner of the house Benson Dempsey Ltd (“the applicant”) and the other party is the Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.2 This determination arises from the decision of the authority to refuse to issue a code compliance certificate and to issue a notice to fix for alterations to a house because it was not satisfied that the building work complied with certain clauses² of the Building Code (First Schedule, Building Regulations 1992). The authority concerns are limited to the weathertightness of the alterations.
- 1.3 The matter to be determined³ is therefore whether the authority was correct in its decision to refuse to issue a code compliance certificate and to issue a notice to fix for the alterations.

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

² 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.

³ Under sections 177(1)(b), 177(2)(d) and 177(2)(f) of the Act

1.4 In deciding this matter, I must consider whether the external claddings to the alterations (“the claddings”) comply with Clauses B2 Durability and E2 External Moisture of the Building Code. The claddings include the components of the systems (such as the wall cladding, the timber shutters, the roof membrane, and the flashings, as well as the way the components have been installed and work together, including at the junctions with adjacent components of the existing house.

1.5 The building consents

1.5.1 The two building consents referred to within the notice to fix are as follows:

- Consent No. AC/00/04670 issued on 12 July 2000 for a ‘new glazed roof over existing pergola’ (“the pergola roof”)
- Consent No. AC/02/01464 (“the 2002 consent”) issued on 8 March 2002 for ‘cover over existing pergola. New roof over portico and close in with shutters’ (“the 2002 alterations”).

1.5.2 I note that all work shown in the consent drawing for AC/00/04670 was subsequently allocated between two other building consents as follows:

- The pergola roof was included and installed as part of the 2002 consent.
- The remaining work was carried out under a separate building consent (No. AC/00/03525) issued on 30 May 2000, with a code compliance certificate issued on 19 September 2000. That remaining work included:
 - a new raised concrete deck to the east
 - new doors from the living area to the new east deck
 - new bi-fold doors from the living area to the existing north deck.

1.6 Matters outside this determination

1.6.1 As explained above, the building consent AC/00/04670 is redundant, as all building work was completed under other building consents. This determination is therefore limited to building work within the 2002 building consent only.

1.6.2 Extensive additions and alterations were carried out to the original house during the mid-1990’s (“the 1995 alterations”); and the building consents for these (No. AC/94/05831 and associated amendments), were issued with code compliance certificates on 2 September 1996. Those consents are not part of this determination.

1.6.3 The notice to fix incorrectly cited Clauses E1 Surface Water, F2 Hazardous Building Materials and H1 Energy efficiency of the Building Code, although there are no specific identified items relating to these clauses. The notice also cited Clause B1 Structure, which I take to relate to any structural implications associated with weathertightness. That clause is therefore considered as part of the compliance of the external envelope.

1.6.4 The notice also outlined requirements for durability of building elements and stated that the applicant may apply to the authority for a modification of the requirements to allow durability periods to commence from the date of substantial completion of the alterations in 2003. I therefore leave this matter to the parties to resolve once the claddings have been made code compliant.

1.7 In making my decision, I have considered the submissions of the parties, the report of the expert commissioned by the Department to advise on this dispute (“the expert”), the consultant’s report commissioned by the applicant and the other evidence in this matter.

1.8 The relevant legislation is set out in Appendix A.

2. The building work

2.1 The building work considered in this determination consists of minor alterations to a two-storey high detached house situated on a level site in a low wind zone for the purposes of NZS 3604⁴.

2.2 The existing house

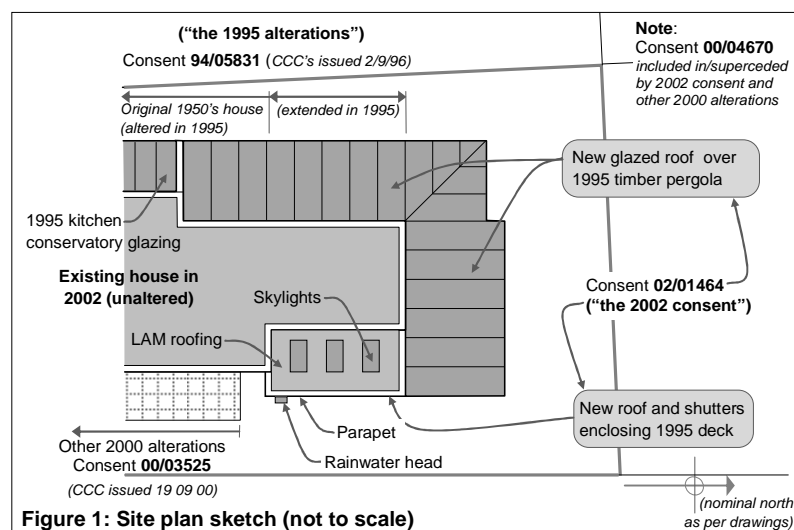
2.2.1 The original 1950’s state house was a simple two-storey stucco-clad building on pile and concrete foundations. A ground floor bedroom was added to the eastern end in 1955, with extensive additions and alterations carried out in the mid-1990’s⁵.

2.2.2 Construction is generally conventional light timber frame, with pile foundations, solid plaster (“stucco”) wall claddings and membrane roofing and prior to the 2002 alterations the house included the following:

- a timber pergola over a raised concrete terrace, extending around the northeast walls of the ground floor living area and supported on plastered columns
- a deck off the upper level master bedroom at the north east corner, with a tiled floor, plastered balustrades, and columns supporting a timber pergola.

2.3 The 2002 alterations

2.3.1 The subject alterations were carried out under the 2002 consent and incorporated the pergola glazing originally covered by AC/00/04670. The 2002 alterations are shown in the sketch in Figure 1:



⁴ New Zealand Standard NZS 3604:1999 Timber Framed Buildings

⁵ For clarity, components relating to the 1995 alterations are noted as “1995” (eg “the 1995 plaster”, “the 1995 pergola columns” etc).

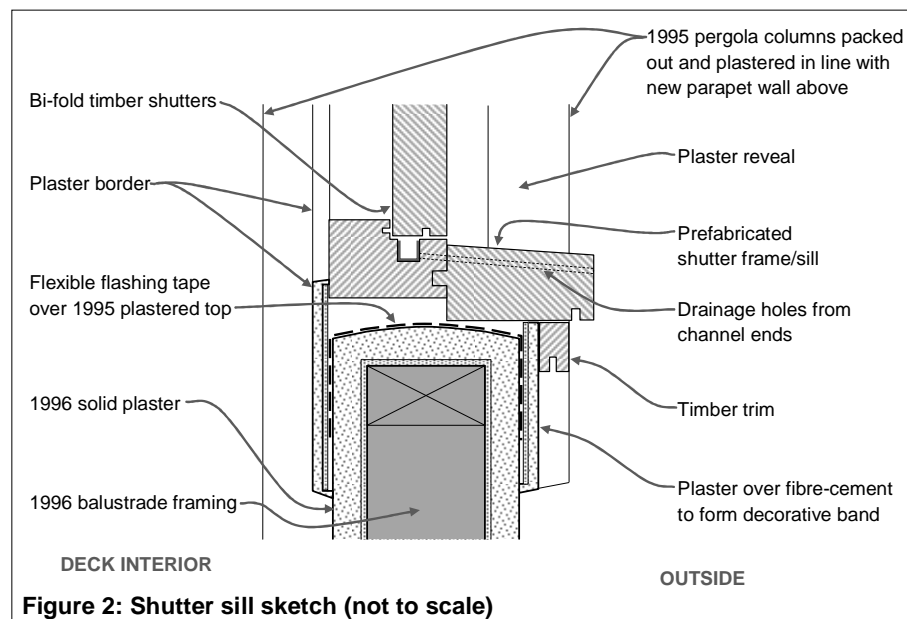
2.4 The 2002 alterations included:

- installation of the glazed roof over the existing ground floor pergola, including:
 - replacement of existing north pergola beam with new fitch beam
 - a glazed roof fixed onto the 1995 pergola rafters with aluminium clamp bars and gaskets supporting laminated glass panes
- additions to the 1995 deck to provide a semi-enclosed area, including:
 - new roof framing and skylights, with liquid-applied membrane over plywood substrate
 - new parapet framing, with plaster cladding to match existing
 - existing columns and balustrade tops packed out to accommodate new rain screen type timber shutters, with plaster and borders to match existing.

2.5 The deck enclosure

2.5.1 The deck enclosure provides a sheltered external area, with the 1995 walls and deck floor remaining part of the 1995 external building envelope. The new membrane roof includes three skylights and is bordered by a stucco-clad parapet wall at the top of the 1995 pergola columns. The 1995 plastered balustrades and pergola columns are packed out to provide openings for timber louver shutters.

2.5.2 The installation of the timber shutter sill is shown in the sketch in Figure 2:



2.5.3 The plaster cladding to the deck enclosure matches the 1995 plaster; and is a monolithic cladding system described as solid plaster over a rigid backing. In this instance it consists of 4.5mm fibre-cement sheets fixed through the building wrap directly to the framing timbers, and covered by a slip layer of building wrap, metal-reinforced 20mm thick solid plaster and a flexible paint coating.

- 2.5.4 The roof membrane system is a glass-fibre mat reinforced acrylic membrane applied to 18mm thick treated plywood substrate and impregnated with liquid resin. The manufacturer's product information states that the membrane thickness is expected to be from 1.2mm to 1.5mm 'depending on the number of glass cloth layers used.'
- 2.5.5 The expert was unable to inspect the framing timber. Taking account of the date of framing construction in 2002 and the ages of the other parts of the house, I consider that roof and wall framing within and adjacent to the subject alterations is likely to be a mix of native, treated, and untreated timbers.

3. Background

- 3.1 The applicant purchased the house in 1996 following completion of the 1995 alterations, and became aware of potential problems associated with stucco cladding and the need for careful maintenance practices. In considering alterations to the house, the applicant therefore aimed to avoid penetrating the existing exterior building envelope and, 'where feasible, to remove or reduce risks of water ingress in the future' by providing shelter above deck areas.
- 3.2 The applicant originally intended to install pergola glazing prior to the deck alterations and a building consent for the work (No. AC/00/04670) was issued for that work. However, the roof glazing was postponed to retain construction access to the deck and the remaining work in AC/00/04670 was carried out under AC/00/03525 while the pergola glazing was included in the 2002 consent (see paragraph 1.5.2).

3.3 The 2002 consent

- 3.3.1 The authority issued a building consent for the 2002 alterations (No. AC/02/01464) on 8 March 2002 under the Building Act 1991. I have not seen records of any inspections of the work.
- 3.3.2 According to the applicant, construction was carried out in two stages over an extended period, with the upper level deck completed in March 2003 and the pergola glazing in November 2003. A code compliance certificate was not sought until 2010.

3.4 The notice to fix

- 3.4.1 The authority visited the house on 23 March 2010 and issued a notice to fix with an attached 'photo file' on 12 May 2010. The notice identified a number of Building Code clauses that the building work was 'in breach of' and listed 'details of the contravention'.
- 3.4.2 The authority identified various areas of concern in regard to Clauses E2 and B2 (including in summary):
- the authority's lack of 'safe access to the roof' to confirm:
 - membrane installation, performance and slope
 - weathertightness of rainwater head
 - the adequacy of roof and parapet flashings

- the durability of the timber shutters
- lack of fall to timber shutter sills
- penetrations through the top of the original balustrades and possible moisture penetration into the 1995 framing
- lack of drip edges.

3.4.3 The notice to fix required the applicant to prepare a proposed scope of work by ‘a suitably qualified expert’ to address the areas of identified non-compliance, outlining ‘how each area of non-compliance is to be addressed and rectified’.

3.4.4 The notice also stated that the applicant may apply to the authority for a modification of the requirements to allow durability periods to commence from the date of substantial completion.

3.5 The consultant’s report

3.5.1 Despite maintaining there was ‘no legal or factual basis’ for the notice to fix, the applicant commissioned a property inspection company (“the consultant”) to assess the alterations, liaise with the authority as necessary and assist in gaining a code compliance certificate for the building work.

3.5.2 The consultant inspected the alterations on 16 July 2010 and reported on the items identified in the notice to fix, noting the following (in summary):

- although requiring cleaning, the roof membrane is installed to the manufacturer’s specifications and sheds water to the rainwater head
- the roof and deck falls have ‘the minimum 1:60 fall to the outlets as required’ and the membrane is dressed into and sealed to the rainwater head
- the deck roof flashings are satisfactory, but the north apron flashing to the pergola glazing is incorrectly installed
- a ‘barge type’ flashing is needed to protect the end pergola rafter penetration
- the shutter coating requires ongoing maintenance to protect the timber
- the timber shutter sill falls to the outside
- the former balustrade was not penetrated at any stage of shutter installation
- drip edges and drainage holes provided to the shutters and the roof glazing.

3.5.3 The consultant proposed several alterations to flashings and the continuation of the ‘ongoing maintenance programme’; but otherwise stated ‘no works required’ with regard to other identified items and concluded that ‘the exterior cladding to the dwelling had not been affected by the building works.’

3.6 The authority’s response

3.6.1 The consultant forwarded the report to the authority by email on 27 September 2010 and asked for a meeting to discuss the report. The authority responded on 27 October 2010, noting that it (in summary):

- is unable to confirm adequacy of membrane, which appears to be deteriorating
- requires confirmation that the roof membrane falls towards rainwater head
- requires further information on the parapet
- requires flashing details of areas identified in the report
- accepts that ongoing maintenance will protect the shutters
- accepts that the shutter sills fall to outside, but notes that drainage holes provided to guide track appear to be insufficient for expected water
- requires further investigation into penetrations into the 1995 balustrades
- notes lack of drip edge to bottom of cladding above shutters.

3.6.2 The authority concluded:

For the [authority] to be able to issue a Code of Compliance Certificate, [it] must be satisfied on reasonable grounds that the building work complies with the New Zealand Building Code. In this instance, further investigation is required.

3.7 Further correspondence followed between the applicant and the authority without resolution; with the authority maintaining its position that ‘the limited investigation and the lack of evidence’ did not provide it with reasonable grounds to be satisfied on compliance of the work. The authority stated:

To move this forward you need to have your Consultant undertake a full weathertightness building survey and then present [the authority] with a comprehensive report/‘scope of works’ outlining how you intend to rectify the areas of non compliance identified in Notice to Fix number 3390.

3.8 The Department received an application for a determination on 26 September 2011.

4. The submissions

4.1 The applicant’s submission

4.1.1 The applicant made a detailed submission which challenged the legal and factual basis for the issue of the notice to fix for work carried out under the Building Act 1991 (I address the legal basis of the notice to fix in paragraph 5).

4.1.2 The applicant set out the history of the house and the background to the 2002 alterations and to the current situation; noting that the consultant had concluded that the building work complied by the code requirements at the time of construction.

4.1.3 The applicant also maintained that the authority had improperly issued the notice to fix for various other reasons, including (in summary):

- Despite requests, the authority has not carried out ‘proper inspections’ to allow it to adequately assess whether the building work complies.
- The authority did not factually identify areas of actual non-compliance and instead made various unfounded assumptions leading to speculations that contraventions may have occurred.

- The authority did not specify details of alleged contraventions or non-compliance so as to fairly and fully inform the owners.
 - The authority had unreasonably refused to accept independent advice from the consultant or to meet on site to discuss the consultant's report.
- 4.1.4 The applicant provided copies of:
- the building consents and consent drawings
 - the notice to fix dated 12 May 2010
 - the consultant's report
 - some email correspondence with the authority
 - various other statements and information.
- 4.1.5 The authority forwarded a CD-Rom, entitled 'Property File', which contained some documents pertinent to this determination including:
- the building consents for other alterations on the house
 - various consent drawings for other alterations to the original house
 - some email correspondence with the consultant.
- 4.2 Copies of the submissions and other evidence were provided to each of the parties.
- 4.3 A draft determination was issued to the parties for comment on 8 December 2011.
- 4.4 The authority responded to the draft in submission to the Department dated 13 December 2011. The submission said the authority 'agree[s] with the outcome in principle' but it did not agree with paragraphs 4.1.3, 6.9.1 and 8.3, in that it's inspection staff did not carry extension ladders and that '[o]wners are to provide safe access for [authority] inspectors'.
- 4.5 The applicant responded to the draft determination and the authority's submission in a letter to the Department dated 13 February 2012. The applicant wished to make no submission in response to the draft, but in response to the authority's submission said:
- ... I cannot see how [the authority] could properly have performed its statutory functions without undertaking appropriate inspections, nor any legal basis for requiring the owner to provide access.
- The applicant acknowledged that further investigation and appropriate remedial work will need to be undertaken.

5. The basis for issuing the notice to fix

- 5.1 The 2002 consent was issued under Section 34 of the Building Act 1991 ("the former Act"). If a code compliance certificate had been applied for on completion of the alterations in 2003, the authority would have considered that application under Section 43(6) of the former Act and issued a notice to rectify if it did not consider that the building work complied with the Building Code.

- 5.2 When the applicant requested a code compliance certificate in 2010, the 2002 consent was still ‘open’ and as such the transitional provisions of the 1994 Act apply. Section 436 of the Act states that the application must be considered and determined as if the current Act had not been passed, which includes the requirement for the authority to issue a code compliance certificate only if it ‘is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted’.
- 5.3 The other relevant transitional provision of the Act is Section 433(1), which states that the open building consent must ‘be treated as if it were a consent issued under the current Act’ – and that includes the ability of the authority to issue a notice to fix (the equivalent of a notice to rectify under the former Act).
- 5.4 As the authority did not consider the application for a code compliance certificate until 2010, it considered that application based on the transitional provisions and was able to issue a notice to fix under Section 164 of the Act. I am therefore of the opinion that the authority had the power to issue a notice to fix for these alterations.
- 5.5 However, whether the contents of the notice to fix were appropriate for these alterations is a different question addressed in this determination as follows:
- the incorrect citing of other clauses in paragraph 1.6.3
 - the compliance with Clauses E2 and B2 in paragraph 7
 - the factual basis for items identified in the notice in paragraph 8.

6. The expert’s report

- 6.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me. The expert is a registered architect and a member of the New Zealand Institute of Architects. The expert inspected the house on 26 October 2011, providing a report dated 4 November 2011.

6.2 General

- 6.2.1 The expert noted that his inspection was limited to the subject alterations and did not include the original or 1995 plastered walls. However, he noted that adjoining existing and new construction can affect each others performance; with the existing elements incorporating various at-risk features and clear evidence of past repairs.
- 6.2.2 The expert noted that variations from the consent drawings included:
- the internal gutter behind the parapet wall omitted
 - chases not cut into the 1995 plaster.
- 6.2.3 The expert considered that the plaster surfaces appeared ‘reasonably straight and fair’, with no cracks apparent in the new plaster. Where visible, flashings appeared ‘reasonably straight and neatly applied’.

6.3 Moisture entry

6.3.1 The expert took non-invasive moisture readings in the deck soffit, noting that readings were 'low and uniform'. Four sample invasive readings were also taken at areas considered at-risk, with readings in the deck enclosure recorded as follows:

- 10% under the junction between the north parapet band and the 1995 wall
- 16% under shutter sill below the above location
- 19% under the shutter sill at the northeast corner
- 28% under the shutter sill below the east rainwater head.

6.3.2 The expert noted the wide variation in moisture readings and I note that the lowest reading of 10% is likely to represent the equilibrium moisture level. Moisture levels above 18%, or which vary significantly from equilibrium levels, indicate that external moisture is entering the structure and investigation is needed.

6.4 The timber shutters

6.4.1 The expert discussed the timber shutter installation with the builder and Figure 2 shows the likely sill details, based on the builder's recollections and on-site measurements (see paragraph 2.5.2). The shutters were installed as prefabricated units within prepared openings, with plaster applied at reveals and decorative bands.

6.4.2 The expert noted that the weatherproofing of the 1995 plastered balustrade framing is dependent on the flashing tape applied to the balustrades top. Although scupper defects are likely to have caused the highest moisture level of 28%, the expert considered that further investigation is needed to establish cause(s) of the elevated moisture levels under the shutter sills, as they may relate to other defects. (refer to paragraph 6.8.1)

6.5 The deck roof

6.5.1 The expert inspected the deck roof, noting that it sloped about 2.5° towards a scupper and rainwater head. The scupper was pre-formed and appeared retro-fitted, with flanges overlapping the membrane upstand and additional membrane applied over.

6.5.2 The expert noted that the fibreglass was visible in the membrane; indicating that the thickness was unlikely to accord with the manufacturer's instructions. At the junction with the 1995 wall, membrane was applied as an upstand of about 250mm that extended up to the underside of the 1995 cornice.

6.5.3 The expert noted that, while any failure of the membrane upstand could endanger the deck roof framing, the low moisture reading indicated satisfactory performance to date. However, he noted that the area will need regular inspections as part of normal maintenance on the house. (I also note that the projecting cornice above the upstand will tend to protect the upper edge).

6.6 The roof parapet

6.6.1 The builder informed the expert that parapet tops had been covered with the liquid-applied membrane. Metal cappings had since been retro-fitted and the applicant has

explained that metal cappings were installed to all roof parapets on the house about four years ago.

- 6.6.2 The expert noted that pre-formed metal saddle flashings had been installed at wall junctions, with the flanges over the 1995 plaster and membrane applied to overlap the flanges. As with the membrane upstand, regular inspection will be needed.

6.7 The pergola glazing

- 6.7.1 The expert described the glazing system and noted that membrane formed an apron flashing with a surface adhered upstand at the junction with the 1995 walls. As the junction was above external areas and did not affect the 1995 walls, the expert considered this detail adequate in the circumstances.
- 6.7.2 The expert also noted a retro-fitted end flashing (installed in response to the consultants report – see paragraph 3.5.3) at the east end of the apron flashing, which appeared to be satisfactory in the circumstances.
- 6.7.3 At the south end of the pergola, the glazed roof abuts a kitchen wall and a new flashing is installed over the top of the wall at the junction with the 1995 glazed roof. The expert noted that this flashing provides insufficient protection against driving rain. As it covers the junction between the pergola glazing and the 1995 kitchen wall, the expert considered that any flashing defects must be considered as part of the subject alteration work (see paragraph 6.10.2).

6.8 Weathertightness

- 6.8.1 Commenting specifically on the claddings, the expert noted that:
- the roof membrane is thinly applied, with glass fibres clearly visible (this indicates the membrane was not well installed and could be prone to leaks)
 - the scupper forms a lip at the opening and causes ponding, with the membrane deteriorating at the opening, high moisture levels, and stains on column plaster
 - there is no drip edge to the plastered reveal above the shutter heads
 - further investigation is needed into the cause(s) of elevated moisture levels under the sills (16% and 19% in comparison with the 10% at the head level), which may result from one or a combination of:
 - moisture penetrating at shutter jamb/plaster reveal junction
 - insufficient drainage provided from the shutter channel
 - moisture penetrating at the shutter sill/wall junctions
 - penetrations through underlying 1995 elements(I note here that investigation should include whether mechanical fixings to the new sill penetrate the existing plaster.)
 - the junction between the pergola glazing and the 1995 kitchen wall and conservatory glazing is not sufficiently weathertight and may allow rain to drive into the wall beneath.

6.9 Other comments on the notice to fix

6.9.1 The expert also commented on items identified in the notice to fix, and I have taken those comments into account in paragraph 8.1. In addition to comments included above, the expert noted:

- access to the high areas is easily gained with a standard extension ladder
- a new flashing has since been installed to the east end of the pergola glazing
- the slope to the shutter sill is more than 5° towards the outside
- painting of cedar shutters is part of normal maintenance.

6.9.2 The expert noted that some maintenance is due, including repainting and considered that regular inspections and maintenance will be required to ensure ongoing adequate performance of the building work.

6.10 The response to the expert's report

6.10.1 A copy of the expert's report was provided to the parties on 11 November 2011. The authority did not comment on the report.

6.10.2 The applicant responded on 28 November 2011, making various comments on the expert's report which I have taken in to account. Some comments repeated points made in the initial submission, with other comments including (in summary):

- The flashing at the pergola glazing/kitchen wall junction was installed as a result of a past leak into a wall not part of, or affected by, the pergola glazing.
- The main aim was to avoid adding penetrations through the existing cladding and the roof structures abut, but are not fixed to, existing plaster walls.
- Repairs to the existing plaster relate to hairline cracks repaired in the 1990's by a specialist company using fibreglass reinforced coating.
- The cappings on all roof parapets on house were replaced with metal cappings about four years ago, and it is likely that the area around the scupper was damaged and poorly repaired at that time.

6.10.3 I have taken the applicant's comments into account in the preparation of this determination, incorporating them as I consider appropriate.

7. Weathertightness

7.1 I note that alterations need to comply with the Building Code to the extent required by section 112(b) of the Act. The existing 1995 alterations adjacent to the subject alterations must therefore continue to comply with the code to 'at least the same extent as before the alteration.'

7.2 In assessing the compliance of the subject alterations to this house with the weathertightness provisions of the Building Code, I have taken into account:

- the complexity of some of the junctions and components
- the required level of compliance for the alteration work

- the minimal impact of the alterations on existing construction
- the lack of records of inspections carried out during construction
- the age of the subject alterations completed some nine years ago
- the consultant's report
- the expert's report.

7.3 While the claddings generally appear to have been installed in accordance with good trade practice and to manufacturers' instructions at the time of construction, there are some areas that require remedial work or further investigation. Taking account of the expert's report, I conclude that the areas identified in paragraph 6.8.1 require rectification and/or further investigation to establish cause(s) and remedies for the elevated moisture levels.

7.4 Weathertightness conclusion

7.4.1 I consider the expert's report establishes that the current performance of the claddings is not adequate because there is evidence of moisture penetration into some of the timber framing to the deck enclosure. Consequently, I am satisfied that the deck enclosure does not comply with Clause E2 of the Building Code.

7.4.2 In addition, the building envelope is also required to comply with the durability requirements of Clause B2 and that includes the requirement for the alterations to remain weathertight. Because the faults may allow the ingress of moisture in the future, the alterations do not comply with Clause B2.

7.4.3 Because the identified faults occur in discrete areas, I am able to conclude that satisfactory investigation and/or rectification of areas outlined in paragraph 6.8.1 will result in the alterations being brought into compliance with Clause B2 of the Building Code.

7.4.4 The expert has noted that maintenance is due. Effective maintenance is important to ensure ongoing compliance with the Building Code and is the responsibility of the building owner. The Department has previously described these maintenance requirements, including examples where the external wall framing of the building may not be treated to a level that will resist the onset of decay if it gets wet (for example, Determination 2007/60).

8. The notice to fix

8.1 Taking into account the consultant's report and the expert's comments, the following table summarises my conclusions on items listed in the notice to fix; referring also to relevant code clauses and related paragraphs within this determination:

Notice to fix		My conclusions	Code Clauses	Paragraph references
	Summarised requirements			
2.0	Issues relating to the cladding			
2.1	Not to manufacturer's specifications			
a)	Uncertainty on roof membrane	Remedial work required	E2, B2	6.8.1 and 6.9.1
b)	Uncertainty on roof fall	Adequate	E2, B2	6.5.1 and 6.9.1

Notice to fix		My conclusions	Code Clauses	Paragraph references
	Summarised requirements			
c)	Uncertainty on roof scupper/rainwater head	Remedial work required	E2, B2	6.8.1 and 6.9.1
d)	Uncertainty on roof flashings	Adequate in circumstances	E2, B2	6.5 to 6.7
e)	Uncertainty on protection of timber shutters	Maintenance required	B2	6.9
2.2 Not to accepted trade practice				
a)	Lack of fall to shutter sills Lack of fall to pergola glazing apron flashings East end of pergola apron flashing	Adequate Adequate in circumstances Adequate in circumstances	E2, B2	6.4.1 and 6.9 6.7.1 6.7.2
b)	Possible penetrations through 1995 components such as deck balustrades etc	Further investigation required	B1, E2, B2	6.8.1
c)	Lack of drip edges		E2, B2	6.8.1
2.3 Drainage and ventilation				
a)	Lack of cladding drainage & ventilation	Adequate in circumstances	E2, B2	9.1

- 8.2 I am satisfied that the alterations do not comply with the Clauses E2 and B2 of the Building Code and that the authority made an appropriate decision to issue a notice to fix. However, I am also of the view that some items identified in the notice are likely to be adequate and I have also identified additional items that need to be addressed, so the notice should be modified accordingly (refer to paragraph 9.2).
- 8.3 In its notice to fix dated 12 May 2010, the authority stated that it ‘was unable to gain safe access to the roof’. The expert advised that access is easily gained with a standard extension ladder.
- 8.4 I note that the authority’s code of practice for building inspections⁶ includes a ‘ladder’ as inspection equipment used ‘to access ceiling spaces and for checking items on the exterior of a building’. The Department’s publication ‘Building consent authority update’, issue October 2010, also includes a ladder as ‘typical equipment required to perform inspections’ for pre-line and final inspections. I consider the use of a modest-sized ladder would have enabled the authority to inspect the Level 2 roof via the flat roof over the garage. I therefore concur with the applicant’s opinion that the authority did not carry out appropriate inspections of the deck roof area, which would have provided it with visual evidence of non-compliance.

9. What is to be done now?

- 9.1 I note that the notice to fix required provision for adequate ventilation and drainage. Under the Act, a notice to fix can require the owner to bring the additions into compliance with the Building Code. The Building Industry Authority has found in a previous Determination (2000/1) that a notice to rectify (the equivalent to a notice to fix under the Building Act 2004) cannot specify how that compliance can be achieved. I concur with that view.
- 9.2 The notice to fix should be modified to take account the findings of this determination, referring to the items listed in paragraph 6.8.1 and referring to any further defects that might be discovered in the course of investigation and rectification, but not specifying how those defects are to be fixed. It is not for the

⁶ Auckland Council ‘A Code of Practice for Building Inspections’, reprinted June 2010

notice to fix to stipulate directly how the defects are to be remedied and the alterations brought to compliance with the Building Code. That is a matter for the owner to propose and for the authority to accept or reject. It is important to note that the Building Code allows for more than one means of achieving code compliance.

- 9.3 I suggest that the parties adopt the following process to meet the requirements of paragraph 9.2. Initially, the authority should revise and reissue the notice to fix. The applicant should then produce a response to this in the form of a detailed proposal for the alterations as a whole, produced in conjunction with a competent and suitably qualified person, as to the rectification or otherwise of the specified matters. That proposal should include a proposal for investigating the cause(s) of the elevated moisture levels and the condition of associated timber framing. Any outstanding items of disagreement can then be referred to the Chief Executive for a further binding determination.
- 9.4 As outlined in paragraph 1.5, the building consent AC/00/04670 is redundant, as all building work has been completed under other different building consents. I suggest that the authority resolve this matter by cancelling that consent, and I leave that matter to the parties to resolve.

10. The decision

- 10.1 In accordance with section 188 of the Act, I hereby determine that the external envelope does not comply with Building Code Clauses E2 and B2 and I accordingly confirm the authority's decision to refuse to issue a code compliance certificate.
- 10.2 I also determine that the authority is to modify the notice to fix, dated 26 July 2011, to take account of the findings of this determination.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 15 March 2011.

John Gardiner
Manager Determinations

Appendix A: The legislation

A.1 As the 2002 consent was issued under Section 34 of the former Act and the relevant transitional provisions in the Act are:

433 Transitional provision for building consents granted under former Act

- (1) A building consent that was granted under section 34 of the former Act before the commencement of this section must, on that commencement, be treated as if it were a building consent granted under section 49.

436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act

- (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—
 - (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...

A.2 The equivalent of a notice to fix in the former Act was a notice to rectify and the relevant section in the former Act was Section 43(6), which stated:

43(6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

A.3 The relevant section for a notice to fix in the current Act is Section 164:

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
 - (a) a specified person is contravening or failing to comply with this Act or the regulations...
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
 - (a) to remedy the contravention of, or to comply with, this Act or the regulations...