



Determination 2012/023

The exercise of the powers of an authority in refusing to grant an amendment to a building consent for remedial work to a house at 107 Realm Drive, Paraparaumu

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.

1.2 The parties to this determination are:

- the applicants, P and N Rust (“the applicants”) who are the owners of 107 Realm Drive, Paraparaumu; acting through a building surveyor
- Kapiti Coast District Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.3 This determination arises from the decision of the authority to refuse to grant an amendment to a building consent in relation to proposed remedial work to the external envelope of the house.

1.4 The matter for determination² is whether the authority correctly exercised its powers under sections 49 and 50 of the Act in refusing to grant the amended building consent. In making this decision I must consider whether the proposed remedial work would comply with the Building Code.

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

2. The existing house and proposed remedial work

2.1 This determination concerns proposed remedial work to a detached single-storey house. The house is light timber frame construction with a trussed roof and concrete foundations and slab-on-grade. The external wall cladding is EIFS³ with aluminium window and door joinery. The roof cladding is pressed metal tiles with a chip finish.

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 terms of sections 177(1)(b) and 177(2)(a) of the Act.

³ External Insulation and Finish System

- 2.2 There is a roof overhang to the front entrance on the north elevation and to the back porch on the east elevation. On the west and south elevation gables the external walls extend above the roof line to form parapets. There is no eaves protection on the remaining elevations.

The remedial consent

- 2.3 The scope of work in the remedial consent (refer paragraph 3.3) included the complete removal of the stucco cladding and the installation of timber weatherboards over a cavity, the installation of new exterior aluminium joinery, and the removal of the gable end parapets down to the roof level.

The proposed amendment to the remedial consent

- 2.4 The building work described in the proposed amendment limits remedial work to:

- Remediated (walls marked in red as below) and alterations to the adjacent roofs. Details provided of the junctions between the new and existing cladding.
- removal of a pergola and the existing parapets to the gable ends, with installation of new barge flashings and an extension to the eaves.
- existing spouting and downpipes to be removed and replaced.



Figure 1: proposed remediation extent

3. Background

- 3.1 The house was built under a building consent (“the original consent”) issued by the authority on 14 February 2000; the code compliance certificate was issued on 2 November 2000.
- 3.2 The applicants occupied the property in December 2000 and very soon after experienced problems with water ingress. In 2009 an application was made to the Department under section 14 of the Weathertight Homes Resolutions Services Act 2006 and a report was issued in February 2010. The report identified significant issues with moisture penetration. The report considered that one elevation (West)

should be reclad, and another elevation (adjacent the Garage) should be partially reclad. The report noted limited timber decay to the West elevation.

- 3.3 On 28 September 2011 the authority granted building consent (No. 110523) (“the remedial consent”) for ‘Weathertightness remediation incorporating re-cladding all elevations, and alterations to perimeter roofing’ under the Building Act 2004.
- 3.4 On 14 October 2011, the building surveyor, on the applicants’ behalf, applied for an amendment to the remedial consent which reduced the scope of works to a partial recladding of approximately 50% of the building (refer paragraph 2.4). The proposal was to remediate the high risk exterior walls, and high risk details such as roof parapets.
- 3.5 It appears that the authority sought further information in respect of the amendment; I have not seen correspondence outlining the information required, however, it appears that the information request related to the reduction in the scope of works.
- 3.6 In a letter dated 15 November 2011 the building surveyor responded to the authority stating that (in summary):
- the scope of work, although reduced, will address those areas that pose the greatest risk of failing to meet the requirements of Clause E2 External moisture⁴
 - the replacement of all of the cladding cannot be required
 - the applicants may choose to complete the re-cladding in stages
 - the amended building consent must be granted provided the plans and specifications demonstrate the proposed work will comply with the Building Code

The surveyor also acknowledged the authority’s concerns regarding the junction between the new and existing cladding, and provided detail of flashing at the junctions to ‘completely isolate wall framing to the area being re-clad from existing wall framing’ where existing claddings were not going to be replaced.

- 3.7 In a letter to the building surveyor dated 17 November 2011, the authority refused to grant the amended building consent; noting that the authority was of the view that a total re-clad was necessary and that the scope of work as approved by the grant of the remedial consent should not be reduced. The authority also noted that it ‘cannot be satisfied that the reduced scope of work will meet the building code’.
- 3.8 It appears from the submission of the building surveyor (refer paragraph 4.1) that building work has proceeded in accordance with the remedial consent, although only to those areas as described in the amendment application.
- 3.9 An application for a determination was received by the Department from on 8 December 2011.

⁴ In this determination, unless otherwise stated, references to ‘sections’ are to sections of the Building Act 2004, and references to ‘clauses’ are to clauses of the Building Code.

4. The submissions

- 4.1 In a covering letter to the Department, dated 6 December 2011, the building surveyor submitted that (in summary):
- the building work completed is ‘consistent in all respects’ with the remedial consent ‘with the exception of the reduced scope area’
 - appropriate detailing has been provided to ensure new works are isolated from the remaining existing cladding and framing
 - the building work, once completed in accordance with the amended consent, will meet the requirements of the Building Code
 - the authority does not have the ability to insist the remedial work must cover all of the elevations and areas at risk under a single building consent, or to deny the applicants from completing the overall works in stages under separate consents.
- 4.2 The authority made no submission in response to the application.
- 4.3 The draft determination was issued to the parties for comment on 7 February 2012. The building surveyor accepted the draft on behalf of the applicants on 8 February 2012.
- 4.4 The authority responded in an email to the Department dated 2 March 2012. The authority said that it ‘generally [agreed] with the findings and recommendations, especially under the auspices of Section 112 to the Act’. However, the authority also stated that ‘the building in its entirety no longer appeared to comply with E2 and therefore B2’, and the authority considered the determination was ‘unhelpful’.
- 4.5 The submission advised that the applicants had submitted ‘another amendment proposing to finish the entire re-clad’ which had been approved. The recladding work revealed ‘several areas of damage through leaking’ that were rectified and the authority had ‘a good deal of satisfaction that the building will now comply with B2 and E2 in its entirety’. The authority concluded by saying:
- the refusal of the amendment in the first place prompted a rethink and the appropriate decision was made by the applicant, regardless of the determination outcome.
- 4.6 In an email to the Department dated 16 March 2012 the building surveyor confirmed that the applicants had submitted a further amendment to the consent as advised by the authority. However, the building surveyor also advised that:
- the only area showing damage through water ingress and requiring removal and replacement of affected timber related to the bottom plate and trimmer studs to the garage door opening which had been previously identified. There has been no additional evidence of decay or water ingress which would have supported the [authority’s] insistence for a full cladding replacement ...
- 4.7 In response to the authority’s submission I note the following:
- The area of damage noted by the building surveyor was consistent with the findings of the WHRS report on which the proposed amendment was based.
 - While the authority has found the draft determination ‘unhelpful’, the determination does nothing more than describe the relevant provisions of the Act and how they are required to be applied by the authority.

- I refer the authority to paragraphs 5.1 and 5.9 in respect of the extent of the authority's powers under the Act in regards to building work for which a code compliance certificate has been issued.

5. Discussion

- 5.1 The house has a code compliance certificate issued under the Building Act 1991. The applicants are under no obligation under the current Act to take any action in respect of the remedial work to the house. The authority is has no power to take any action in respect of the house unless it considers it dangerous or insanity under section 124: the house falls well short of meeting that test.
- 5.2 In this instance the applicants applied for an amendment to the remedial consent to reduce the scope of works to that described in paragraph 2.4.
- 5.3 The authority refused to the grant the amended building consent on the basis that the original building consent approved a full re-clad of the house, and because the authority 'cannot be satisfied that the reduced scope of works will meet the building code'.
- 5.4 Applications for building consent (including amendments under section 45(4)(b)) are to be considered under section 49(1) which states:
- A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- 5.5 I note that the proposed work, though reduced in scope, has not changed in detail from that approved by the authority in the remedial consent, other than the detailing at the junction between the new and existing cladding. I consider that in this respect, and in the absence of a submission from the authority, it is reasonable to take the position that the authority's view as to the compliance of the building work itself has not changed from when the original building consent was granted.
- 5.6 In the authority's letter of refusal it reiterated its views that all elevations of the building should be re-clad: I note that the WHRS report did not deem this level of repair necessary (refer paragraph 3.2) and this has been corroborated by the evidence of the building surveyor (refer paragraph 4.6).
- 5.7 In deciding whether to grant or refuse the application for an amended building consent, under section 49 of the Act the authority should have confined itself to considering whether or not the work detailed in the amended remedial consent application met the requirements of the Building Code.
- 5.8 It is not for the authority to determine what other work may be required to the house. As noted in paragraph 5.1, the house has a code compliance certificate and the authority can, presently, take no regulatory action in respect of that work.
- 5.9 It is not correct for the authority to take the view that the proposed work, as an alteration, must bring the whole building into compliance with the Building Code. The authority can, under section 112(1)(b), only consider whether the building as a whole will 'continue to comply with the other provisions of the building code to at least the same extent as before the alteration'. In this respect the proposed works will not diminish the existing compliance of the building and as such the provisions of section 112(1)(b) cannot be used as a reason for refusing the application.

- 5.10 Irrespective of the proposed amendment, all new building work is required to comply fully with the requirements of the Building Code. Where the works are new or changed from the original building consent they must be further assessed. From the information provided to me (including the plans and specifications for the amended works and junction of the existing and new cladding) I am satisfied on reasonable grounds that should the work detailed in the amendment to the consent be completed in accordance with the plans and specifications provided, they will meet the provisions of the Building Code.
- 5.11 I conclude that the authority has not exercised its powers in accordance with the Act in refusing to grant the amendment to the original building consent based on the reasons provided to the applicants in its letter of 17 November 2011.

6. Decision

- 6.1 In accordance with section 188 of the Act, I hereby determine that the authority incorrectly exercised its powers and accordingly I reverse the authority's decision to refuse to grant amendment to building consent No. BC 110523.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 30 March 2012.

John Gardiner
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 include:

45 How to apply for building consent

- 4 An application for an amendment to a building consent must,—
- (a) in the case of a minor variation, be made in accordance with section 45A; and
 - (b) in all other cases, be made as if it were an application for a building consent, and this section, and sections 48 to 51 apply with any necessary modifications

49 Grant of building consent

- (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
- (2) However, a building consent authority is not required to grant a building consent until it receives—
 - (a) any charge fixed by it in relation to the consent; and
 - (b) any levy payable under section 53.

112 Alterations to existing buildings

- (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration, the building will—
 - (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—
 - (i) means of escape from fire; and
 - (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
 - (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.